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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

FROM JULY TERM, 1879, TO JANUARY TERM, 1880,

AND

INCLUDING A PART OF THE JULY TERM, 1880.

C. B. BELLINGER,
REPORTER.

VOLUME 8.

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JUSTICES

OF

THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

JAMES K. KELLY, (Chief Justice)	Term expired July 4, 1880.
R. P. BOISE.....	Term expired July 4, 1880
P. P. PRIM.....	Term expired July 4, 1880.
WM. P. LORD (Chief Justice)	Term expires first Monday in July, 1882.
E. B. WATSON.....	Term expires first Monday in July, 1886.
JNO. B. WALDO.....	Term expires first Monday in July, 1884.

P. H. D'ARCY, Clerk up to July Term, 1880.
Succeeded by T. B. O'DNEAL.

JUSTICES

OF

THE SUPREME COURT

DURING THE TERM OF THE REPORTS.

[illegible] C. MITAL V. [illegible]

[illegible] ..... [illegible] expired [illegible] 4, 1[illegible].
[illegible] ..... [illegible] expired [illegible] 4, 1[illegible].
[illegible] ..... [illegible] expired [illegible] 4, 1[illegible].
[illegible] ..... Term expired [illegible] in July, 1[illegible].
[illegible] ..... Term expired [illegible] in July, 1[illegible].
[illegible] ..... Term expired [illegible] in July, 1[illegible].

P. H. DALY C. [illegible] in July Term, 1[illegible].
Succeeded by [illegible] B. [illegible].

ROLL OF ATTORNEYS

ADMITTED DURING THE TERM OF THESE REPORTS.

John H. Smith.
C. J. McDougall.
James A. Campbell.
T. S. Roadman.
James Gleason.
George Watkins.
T. H. Cann.
H. O. Hollenbeck.
J. H. Bird.
F. P. Mays.
W. S. Humphrey.
J. C. Leasure.
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A. S. Bennett.
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Harrison Kelley.
Burke Corbett.
R. N. Armstrong.
J. W. Wright.
David P. Kennedy.
W. T. Burney.
E. H. Autenrieth.
James H. White.
Charles B. Moores.

ADMITTED AT THE JULY TERM, 1880.

George W. Barnes,
J. R. Ewing,
George M. Miller,
O. F. Paxton,
T. J. Stites,
P. P. Prim,
George G. Bingham,
J. N. Duncan,
Henry W. Keesee,
Robert J. Slater,
J. W. Hays.

The decisions of the July Term, 1880, contained in this volume, include all that were rendered prior to August twenty-second of this year, and comprise about one-half of the decisions of the term, the remainder having been filed since this volume went to press.

CASES REPORTED.

JULY TERM, 1879.

JULY TERM, 1879.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JULY TERM, 1879.

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*THE SINGER MANUFACTURING COMPANY, RESPONDENTS, *v.* W. K. GRAHAM ET AL., APPELLANTS.

BILL OF EXCEPTIONS—JUDGE MUST SIGN.—A statement containing the testimony given and the rulings of the circuit court excepted to on the trial, although certified to be correct by the attorneys of both parties, does not become a bill of exceptions unless signed by the judge, and can not be considered as such on an appeal to the supreme court.

FOREIGN CORPORATION—APPOINTMENT OF ATTORNEYS—CORPORATIONS NOT NAMED IN TITLE OF ACT.—The act of the legislative assembly entitled, "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in the state," cannot, under section 20 of article 4 of the constitution, be construed to contain any provision in relation to any foreign corporation other than those expressly specified in the title of the act.

SALE, WHAT DOES NOT CONSTITUTE—MONTHLY PAYMENTS.—Where the owner of an article of personal property, under an agreement in writing, delivered the same to another person to be used by him at the stipulated price or hire of ten dollars per month, to be paid monthly until the sum of sixty-five dollars should be paid, when the title to the same was to become vested in the person paying the money, the agreement did not constitute a sale. Under such agreement the title did not pass to the party receiving the property, and a sale of it by him to a *bona fide* purchaser conveyed no title.

APPEAL from Linn County. The facts are stated in the opinion.

Weatherford & Blackburn, N. B. Humphrey, and W. G. Piper, for appellants.

Conley & Hewitt and Dolph, Bronaugh, Dolph & Simon, for respondents.

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*See 34 Am. Rep. 572.

By the Court, KELLY, C. J.:

This action was brought in a justice's court to recover the value of a sewing machine alleged to be the property of the respondent, and alleged to be wrongfully detained by the appellants and converted to their own use. Judgment was there rendered in favor of the respondent, from which an appeal was taken to the circuit court, and upon trial that court rendered a judgment also in favor of the respondent. The case comes here without any bill of exceptions signed by the judge who tried the cause. There is, it is true, a statement of the case certified to be correct by the attorneys of the respective parties, which would have been sufficient under section 526, page 211, of the civil code, as it existed prior to the amendment of that section by the act approved October 28, 1874. (Session laws of 1874, p. 96.) As amended, this statement is not a part of the judgment roll, and cannot therefore be included in the transcript of the cause required by section 531 of the civil code to be filed in this court. This statement is not properly a part of the record, as it was not signed by the judge of the court below, and consequently we cannot examine any of the alleged errors specified therein. We can only consider the objection raised by the demurrer to the complaint, that it does not state facts sufficient to constitute a cause of action.

The complaint is in substance as follows: That the said plaintiff is a corporation formed under the laws of New York and New Jersey, and doing business in this state as a corporation. That on or about the eleventh day of June, 1878, in the county clerk's office of the county of Multnomah, the said corporation filed a power of attorney appointing one Willis B. Fry, who is a citizen of the United States, and a citizen and resident of the state of Oregon, its legal attorney in fact, etc. That on or about the fifteenth day of July, 1878, said plaintiff was the owner and entitled to the possession of one Singer sewing machine valued at sixty-five dollars; that on said fifteenth day of July, 1878, the said plaintiff gave one of the said defendants, to wit, Frank Morgan, the possession of said sewing machine, upon the terms and

in accordance with the conditions and agreements expressed in a contract of which the following is a copy, to wit:

"HARRISBURG, Oregon, July 15, 1878.

"Received from the Singer Manufacturing Co., corner First and Yamhill streets, Portland, Oregon, one new No. 4 medium sewing machine, No. 1,937,680, value, sixty-five dollars ($65.00) U. S. coin, on hire at ten dollars ($10) U. S. coin, per month, payments to be made monthly in advance. I hereby agree not to remove the machine from my residence, situate in or near Harrisburg, Linn county, Oregon, without the consent of the Singer Manufacturing Company. And I also agree to pay the monthly installments punctually; or, failing in either of the above, I agree to relinquish all claims on the above machine, and to return it, or cause it to be returned, to the Singer Manufacturing Co., at my own expense; and if I sell, loan, or otherwise dispose of the above machine, I hold myself liable to the full penalty of the law.

(Signed name in full.)

"FRANK MORGAN.

"NOTE.—When $65 U. S. coin, the value of this machine, has been paid, the machine with this contract shall belong to Frank Morgan. For a valuable consideration, received from the Singer Manufacturing Co., I hereby guaranty the faithful performance of the within contract made this day by ———.

"Dated this 15th day of July, 1878.

"JNO. A. BROWN, Agent."

That said Morgan paid the company in all twenty-five dollars; that he has failed to perform the conditions of his contract; that said Frank Morgan, on or about the second day of January, 1879, for the purpose and with the intent to defraud this plaintiff, gave the possession of said machine to the said defendants, W. R. Graham and Richard Graham, and that said defendants, W. R. Graham and Richard Graham, well knew the conditions of said contract with the defendant Frank Morgan, and that they took the same for the

purpose of defrauding this plaintiff. That the said defendants have wrongfully and willfully converted said property to their own use, to the damage of this plaintiff in the sum of sixty-five dollars. That on or about the — day of January, 1879, the plaintiff demanded of said defendants that they return to him the possession of said sewing machine, but they refused, and still refuse, to give up the possession of said property.

Wherefore plaintiff demands judgment, etc.

To this complaint the respondent demurred, upon the following grounds:

1. The court has no jurisdiction of the persons of these defendants, or the subject matter of the action.

2. The plaintiff has no legal capacity to sue.

3. There is a defect of parties defendant.

4. The complaint does not state facts sufficient to constitute a cause of action against the defendants.

5. The contract set forth in the complaint is contrary to the policy of the law, and void as to these defendants.

The first and third causes of demurrer do not require any consideration. There is nothing in them. Under the second ground specified in the demurrer, it is claimed by the appellant that the respondent had no legal capacity to maintain this action, because it is a foreign corporation, and therefore could not lawfully transact any business in this state until it had executed a power of attorney and caused the same to be recorded, as required by sections seven and eight of chapter twenty-four of the miscellaneous laws of Oregon, page 617.

On the part of the respondent, it is claimed that the provisions of those sections do not apply to the Singer manufacturing company, because it is neither an insurance, banking, nor express and exchange corporation or association. Section twenty of article four of the constitution declares that, "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." On October 21, 1864, the legislative

assembly passed an act containing the two sections before referred to, entitled, "An act to regulate and tax foreign insurance, banking, express, and exchange corporations or associations doing business in the state." As was stated by this court in *Simpson v. Bailey*, 3 Or. 515, the constitutional provision above quoted was evidently "to prevent matters wholly foreign and disconnected from the subject expressed in the title from being inserted in the body of the act." In the ordinary course of legislation, it is impossible for every member of the legislative body to have the same information, or the same means of knowing what is contained in the bill, as the member who frames or the committee that considers it, and they have a right, therefore, to rely on the supposition that there is nothing contained in the body of the bill except what is expressed in the title, or such matters as are properly connected therewith. It was intended by the framers of the constitution to be a proper restraint upon inconsiderate or unsuitable legislation, that this provision was inserted in that instrument; and it should not be frittered away or disregarded either by the legislative or the judicial department of the government. And inasmuch as the title of the act referred to purports to regulate and tax "foreign *insurance*, *banking*, *express*, *and exchange* corporations or associations," the provisions of sections seven and eight of chapter twenty-fourth of the miscellaneous laws, p. 617, should be restricted to them alone, and should not be construed so as to include foreign corporations engaged in other enterprises within this state. The same construction was placed upon those sections by the United States circuit court for the district of Oregon in a well considered case. (*Oregon and Washington Trust Investment Co. v. Rathburn*, 5 Sawyer.)

As it does not appear from the pleadings in this case that the respondent was a foreign corporation doing business within the state as an *insurance*, *banking*, *express*, *or exchange* corporation or association, it does not come within the purview of the decision of this court in the case of *The Bank of British Columbia v. Page*, 6 Or. 431, and we hold that it had a right to bring and maintain this action. It is

also contended on the part of the appellant that there was a sale and delivery of the sewing machine to the defendant, Morgan, and that the title to it became vested in him, and he had a right to sell it to them discharged from any lien for the balance of the purchase-money due to respondent, and that it is against public policy for the vendor of a chattel to retain a secret lien for the purchase price of it. In this case we must take the contract to be as it is set forth in the complaint. The demurrer admits it to be correct and true.

By the terms of the agreement, the sewing machine was to continue to be the property of the respondent, and was merely hired to Morgan for ten dollars per month, payable monthly, with the right of respondent to have it returned in case of a failure to pay the monthly installments as they became due. It was further agreed that whenever the sum of sixty-five dollars should be paid in this way, the machine should then become the property of Morgan. There is no doubt it was the intention of both parties to the contract that the title to the sewing machine was to remain in the respondent until sixty-five dollars should be paid, and then, and not before, it was to become the property of Morgan. It was only a conditional sale, accompanied by the possession, which Morgan was permitted to retain until the condition was broken. Under these circumstances, he had no right to sell the property, and the appellants, although *bona fide* purchasers, acquired no better title than Morgan had. This is too well settled now to admit of any doubt. (*Ballard v. Bargett*, 40 N. Y. 314; 79 Penn. Stats. 488; 98 Mass. 149; *Kohler v. Hayes*, 41 Cal. 455; Benjamin on Sales, sec. 320, and note *d.*) The complaint contains a sufficient allegation that the respondent demanded the return of the property by appellants, and that they refused to return it, but converted it to their own use.

The judgment of the court below is affirmed.

CHARLES W. LOVE, APPELLANT, v. MARY A. J. LOVE, RESPONDENT.

DONATION ACT—FINAL PROOF—DOWER.—The widow of a donee holding under the fourth section of the donation act, when such donee dies before final proof is made, is entitled to dower in her husband's half of the claim.

IDEM—HUSBAND'S ESTATE, HOW DESCENDS.—When such donee dies after four years' residence and cultivation, but before final proof is made, his widow is entitled to an equal portion with the children or heirs of the deceased, in fee, and to dower in the remaining portion which descends to the children or heirs.

APPEAL from Lane County. The facts are stated in the opinion.

W. G. Piper and John Kelsay, for appellant:

A party can not be the owner in fee of land, and at the same time have dower in it. The dower will be merged in the fee. (2 Blackstone's Commentaries, 130.) "Dower is for the sustenance of the wife and the nurture and education of the children." (1 Wash. on Real Prop. 170.) One half of the donation is given to the widow in her own right; the other one half is disposed of by this act without dower attaching, especially when the husband dies before patent issues, and before final proof. Dower cannot attach to a donation claim until all the conditions have been complied with. (1 Deady, 113; 5 Or. 202.) Dower is a continuance of the husband's interest and estate. (1 Wash. on Real Prop. 179; 5 Or. 204; 1 Sawyer, 253; Id. 273; 4 Or. 155.) Where a donation claimant dies before patent issues, and before final proof, the land does not descend to his heirs as such, but to the person designated in the act. (1 Deady, 358; 13 Wall. 428.) Residence, cultivation, and final proof are absolutely necessary conditions to be complied with before a donation claim ceases to be an estate upon condition. If such be the law, then dower does not attach. (1 Deady, 113.)

Section 4 of the donation law reads as follows: "And if either shall have died before patent issues (speaking of husband and wife), the survivor and children or heirs of the

deceased shall be entitled to the share or interest of the deceased in equal portions." If they take an equal portion and not by descent from the deceased, but by purchase as the donees from the United States, then the widow or respondent in this case can take no dower, as that makes an inequality. (1 Deady, 382.) In 2 of Oregon, 32 and 33, the court held that dower did not attach to a donation claim until the conditions of the act had been complied with. Final proof is a condition. Dower will not attach to an equity. (2 Or. 34.)

In this case there can not be dower and fee in the respondent. Dower merges in fee. "A merger takes place when there is a union of the freehold or fee and the term in one person in the same right and at the same time. The greater estate merges and drowns the less, and other terms become extinct because they are inconsistent, and it would be absurd to allow a person to have two distinct estates immediately expectant on each other." (4 Kent Com. 99.) "As a general principle, dower is liable to be defeated by every subsisting claim or incumbrance in law or equity existing before the inception of the title." (4 Kent, 51, 52; 16 Ill. 122; Lambert on Dower 23; 15 Johns. 458.) Where a greater and less estate coincide and melt in one and the same person without any intermediate estate, the less is merged, that is, sunk. Hence we say that dower and an estate in fee cannot descend and vest in the respondent at the same time. That dower is merged and no longer exists is clear. (2 Black Com. 177; 1 Johns. Ch. 417; 3 Mass. 172; 10 Vt. 293; 8 Watts Penn. 146.)

The respondent does not ask for dower in her answer, and the court erred in granting such dower, there being no allegation to that effect. Title cannot be inferred; it must be alleged and proved from the pleadings. (Code, chap. 5, sec. 420, and sec. 5, subd. 3; 4 Or. 30.)

Thompson & Bean, for respondent:

The settlement, residence upon, and cultivation of said premises by said Hugh Love and respondent as required by the donation law, and the death of Hugh Love after the

compliance with the provisions of said law, and before patent or a certificate for a patent issued, is admitted by the pleadings and stipulations of this cause; therefore, respondent, the surviving widow of said Hugh Love, is entitled to a child's portion, or to share equally with the children or heirs of said deceased, in his half of said donation claim. (Donation act, sec. 4; *Dolph v. Barney*, 5 Or. 204; *Lamb v. Starr*, 1 Deady, 357). The widow of every deceased person should be entitled to dower, or the use during her natural life, of one third part of all lands whereof her husband was seised of an estate of inheritance, at any time during marriage, unless she is lawfully barred thereof. (Misc. Laws, chap. 17, sec. 1.) A settler, under the donation law, is seised of an estate of inheritance; therefore his widow is entitled to dower. (Civ. Code, sec. 329, p. 178; *Chapman v. School Dist. No.* 1, 1 Deady, 113; *Adams v. Burke*, 3 Saw. 416; *Lamb v. Davenport*, 1 Saw. 632; *Dolph v. Barney*, 5 Or. 201; *McKay v. Freeman*, 6 Or. 456.)

This court has decided that if a donation claimant, under the fourth section of the "donation law," complies with the conditions of the act so as to entitle him to a patent, and then dies before the issue of donation certificate or patent, his widow is entitled to dower in the tract. (*McKay v. Freeman*, 6 Or. 449.) The effect of a judgment or decree in partition is to be determined by the statute and met by the common law. (*Bybee v. Summers*, 4 Or. 356; *Morenhout v. Higuera*, 32 Cal. 289; *Kester v. Stark et al.*, 19 Ill. 328; 1 Washburne on Real Property, 580; *Waterman v. Lawrance*, 19 Cal. 210.)

The court, in a suit for partition, must determine the rights of the parties, plaintiff as well as defendant, from the facts presented, and make a decree accordingly. (Civ. Code, chap. 5, secs. 425, 426; Freeman on Judgment, sec. 304.) It is not essential that respondent's title be distinctly averred. It is sufficent if it may be fairly inferred from the facts stated. (*Webber v. Gage*, 39 N. H. 182; Story's Equity Pleadings, sec. 730; *Green v. Palmer*, 15 Cal. 414; *De Uprey v. De Uprey*, 27 Cal. 335.)

A prayer for general relief is sufficient, and will entitle

the respondent in this action on the final hearing to such a decree as her case may warrant. (Story Equity Pl. sec. 40; *Humphrey v. Foster*, 13 Gratt. Va. 653; *McGlothlin et al. v. Hemery et al.*, 44 Mo. 350; *Rollins v. Forbes and wife*, 10 Cal. 299; *Wilkins v. Wilkins*, 1 Johnson Ch. 110.)

By the Court; BOISE, J.:

It appears from the admitted facts in this case that the respondent was the wife of Hugh Love, who with her, in 1852, took a land claim in Lane county, in this state; that they resided on and cultivated the same until the death of Hugh Love, in 1861; that at the time of the death of Hugh Love, final proof had not been made so as to entitle said Hugh Love and wife to a patent from the government, although at that time the residence and cultivation required by section 4 of the act of the twenty-seventh of September, 1856 (called the donation law), had been completed. Afterwards Mary Love, the respondent, made the necessary proof, and in 1866 the patent was duly issued. At the time of his death Hugh Love left surviving him two children and his widow, Mary Love. Afterwards Mary Love purchased the interest of one of the children, Hannah Browning, and received a deed for her interest in said south half of said donation land claim, which south half was set off to the heirs of said Hugh Love.

This being a suit for a partition of this land, it is incumbent on the court first to determine who are the owners thereof. (Statutes, p. 199, sec. 425.) The first question to be determined is: Who, under the facts as set forth, are the owners of said south half? Section 4 of the donation law provides that "in all cases where married persons settling under the provisions of said section have complied with the provisions of the act so as to entitle them to the grant, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except in case of a will. Hugh Love and wife, at the time of his death, had completed the four years' residence required by the act. But in order to entitle them to a

patent it was necessary, as provided in section 6 of said act, that they should make proof of the fact of four years' residence and cultivation required by said act. This not being done, they were not entitled to a patent. Afterwards the widow made the proof and became entitled to one half of the claim, and of one third of the other half, as no patent had issued or could issue until the proof was made. We think the rule is that the land, on the death of a settler before he is entitled to a patent, by reason of not having fully performed the residence and cultivation and made the proofs, descends to the widow and children, as heirs, in equal proportions. For a patent will not relate back so as to bar the right of the widow to hold as survivor, any further than to the time when the patentees had performed all the conditions precedent, so as to entitle them to it, which conditions required proof of the facts of residence and cultivation in addition to the residence and cultivation themselves. The amendment to the land law of July 17, 1854, which repealed the proviso of said fourth section "that all future contracts by any person or persons entitled to the benefit of this act for the sale of the land to which he or she may be entitled under this act, before he or they have received a patent therefor, shall be void," we think so far modified the rights of parties holding under said section as to subject the land to the local laws of the territory, and cause them to descend under such laws where the parties had in all respects complied with the law so as to entitle them to a patent. That is, that a patent when issued relates back to the time when it should have issued; that is, to the time when full and satisfactory proof had been made; and that from that time the land would descend as provided by our statute of descent. In *Dolph v. Barney*, recently decided in the United States supreme court, it is held that the amendment of July 17, 1854, has modified the donation law in this behalf. In the case before us the final proof was not made until after the death of Hugh Love. Mary Love took by survivorship one third of said south half of said land. Then having purchased one third from Mrs. Browning, she would own the fee in two thirds of the land, and her right of

dower in that third would be merged as well as in the third coming by survivorship.

The only remaining question is whether Mary Love is entitled to dower in the remaining one third of the land claimed by the appellant, Charles Love. This must be determined by the construction of the statute. Page 584, section 1, provides, "That the widow of every deceased person shall be entitled to dower, or the use during her natural life of one third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." It has been held by this court, in the case of *Dolph v. Barney*, that a grant to a settler under the donation act is a grant *in praesenti* of an estate in fee, and this holding was affirmed in the same case by the supreme court of the United States. So the question is settled that one holding under the donation law became, from the time of filing his notification in the land office, seised of an estate of inheritance, which is an estate to which dower attaches, under the provisions of the statute. That this estate was subject to be defeated by the failure of the settler to comply with the conditions of the grant, did not prevent the right of dower from attaching to it, for until such failure it was subject to be possessed and enjoyed in the same manner as though there were no conditions to be performed. It has been decided in this court (*McKay v. Freeman*, 6 Or. 449) that where a donation claimant, under the fourth section of the act, died before making final proof, but after four years' residence and cultivation, his widow was entitled to dower in his half of the claim, and the decision in that case is decisive of this, as far as the question of dower is concerned.

The questions above discussed embrace all the points necessary to be considered in this case, and the decree of the circuit court will be affirmed with costs.

A. B. HALLOCK, RESPONDENT, v. THE CITY OF PORTLAND, APPELLANT.

FINDINGS ON TRIAL BY THE COURT, HOW REGARDED.—When a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed as a verdict, and may be set aside in the same manner and for the same reasons, as far as applicable, and a new trial granted.

IDEM—NEW TRIAL, WHEN A MATTER OF DISCRETION.—The refusal to grant a new trial on the ground that the evidence was insufficient to justify the finding of fact, is a matter resting in the sound discretion of the court below, and cannot be reviewed on appeal. The findings of fact by the court below must be accepted as correct until set aside in that court.

APPEAL from Multnomah County. The facts are stated in the opinion.

J. C. Moreland, City Attorney, for appellant.

Reed and Bingham, for respondent.

By the Court, PRIM, J.:

This action was brought by respondent to recover back money alleged to have been paid under a mistake, believing at the time that he was indebted to the appellant by reason of a judgment of the circuit court of the state of Oregon for the county of Multnomah, bearing date of October 14, 1874, claiming now that said judgment had been satisfied and paid by sale of respondent's property on execution. The answer denies that there was any mistake, or that the judgment was ever satisfied. And for further defense alleges that the said judgment, including interest, amounted to one hundred and thirteen dollars and sixty-five cents, and the execution referred to in the complaint was in a suit wherein Ladd & Tilton were plaintiffs, A. B. Hallock, defendant, and the Bank of British Columbia and the city of Portland were joined as subsequent lien-holders on said Hallock's property; that said execution was returned satisfied by the sheriff, but in truth and fact there was not enough money collected thereon to pay all of said liens, and that the return of the execution satisfied was a mistake. The replication alleges that sufficient money was realized out of the sale of

said property of the respondent by the sheriff to satisfy said judgment in full.

This case having been tried by the court without the intervention of a jury, the court thereupon made the following findings of fact and law:

On looking into the bill of exceptions we find that the only exception taken and the only error alleged, was the refusal of the court below to grant a new trial. When the trial of a case is had before the court without the intervention of a jury, "the findings of the court upon the facts shall be deemed as a verdict, and may be set aside in the same manner and for the same reasons as far as applicable, and a new trial granted." (Civ. Code, 149, sec. 217.)

As the motion for a new trial was based wholly upon the insufficiency of the evidence to justify the finding of fact, the granting of the motion was a matter resting wholly in the discretion of the court below, and can not be reviewed on appeal. (*State of Oregon v. Wilson*, 6 Or. 428; *State v. Fitzhugh*, 2 Or. 227; Hilliards on New Trials, 7.)

The evidence submitted on the trial is substantially reported in the bill of exceptions, but this court can not look into it in order to ascertain what the facts are. The finding of the court below is conclusive upon that matter here. It appears from the evidence as found by the court that the execution referred to in the pleadings was returned by the sheriff "satisfied in full." But it is claimed that there was evidence tending to show that the return of the sheriff was incorrect; but that matter can not be looked into here, as this court must accept the finding of the court below as correct on the issues of fact.

The judgment of the circuit court is affirmed.

THE STATE OF OREGON, RESPONDENT, v. AZELL ODELL, APPELLANT.

CRIME—ACCOMPLICE, TESTIMONY OF.—In a criminal case the testimony of an accomplice is not alone sufficient to warrant a conviction.

IDEM—CORROBORATING TESTIMONY.—Proof that the prisoner was in the same town about the time of the alleged commission of the crime

is not alone sufficient to corroborate the testimony of an accomplice and warrant a conviction, and it is the duty of the court to so instruct the jury when asked to do so by the defendant.

APPEAL from Yamhill county.

The appellant was jointly indicted with one Moran for the crime of larceny in a store. Moran not being in custody, the appellant was tried separately. Upon the trial the district attorney called only three witnesses on behalf of the state: William George, L. C. Forest, and James Fowler, and no testimony was introduced on the part of the defendant except as to the general reputation of the witness, George, for the purposes of impeachment.

William George testified, in substance, that about the time charged in the indictment, he (witness) and defendants Odell and Moran, were together in Fowler's saloon; and that the defendant Odell went out and directly returned and informed witness and Moran that he (Odell) had unlocked the store-room named in the indictment, and wanted them to go with him; that they went with him and found the store-room unlocked, and that Moran went in and carried out the property named in the indictment, while defendant Odell and witness watched on the outside to see if any one was watching them; in other words, witness and defendant Odell "stood guard," one on either side of the house, while Moran carried out the property; that he (witness) furnished Moran matches to light the store-room, and when the property was brought out they all put it in the wagon and carried it away, all going away together. The witness, George, swore to every material fact charged in the indictment, and that he was present aiding and abetting in the commission of the offense. L. C. Forest testified that he was a member of the firm of Hendrix and Forest, mentioned in the indictment; that said Hendrix and Forest were the owners of the property charged to have been stolen, and that near the time named in the indictment he had missed from their store-room a sack of flour, but nothing else. James Fowler testified that about the night named by witness, George, the defendants, Odell and Moran, and the witness, George, were

together in his saloon and were drinking freely; that they went away about ten o'clock, when he closed his saloon.

After the testimony was closed, the defendant's counsel submitted and asked the court to give the jury the following instructions, which were refused:

1. That a conviction of the defendant, Odell, can not be had upon the evidence of the accomplice, George, unless he be corroborated by other evidence tending to show the connection of defendant, Odell, with the commission of the crime charged in the indictment, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances of the commission.

2. The fact of the presence of the defendant, Odell, in the same town at the time of the commission of the offense, or immediately before or afterward, is not sufficient evidence to connect the defendant, Odell, with the commission of the crime charged in the indictment.

3. The fact that the injured persons (Forest and Hendrix) missed from their store-room about the time charged in the indictment, a part of the property charged in the indictment to have been stolen, is not alone sufficient evidence of the commission of the crime of larceny, or any crime, and is not any evidence to connect the defendant with the commission of the crime charged in this indictment.

The defendant was found guilty as charged, and from the judgment of conviction this appeal is taken.

McCain & Fenton, for appellant.

J. J. Whitney, District Attorney, and E. C. Bradshaw, for the state.

By the Court, BOISE, J.:

All the evidence in this case is set out in the bill of exceptions, and we think it appears from the testimony of the witness, William George, that he was an accomplice with Moran and Odell in the commission of the alleged crime. He says: "Moran went in and carried out the property named in the indictment, while he (the witness) and defendant Odell watched on the outside to see if any one was

watching them." Such a participation in the commission of the crime would make him an accomplice. (1 Bouvier Law Dictionary, 52.) The term in its fullness includes in its meaning all persons who have been concerned in the commission of a crime, all *particeps criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (1 Russell on Crimes; 4 Blackstone's Commentaries, 331; 1 Phillips' Ev., 28.) It is sufficient that this should appear from the testimony of the accomplice himself, in order to enable the prisoner on trial to make the application of the rule that no conviction can be had on the evidence of an accomplice without corroborating testimony. The testimony of the other witnesses only tended to show that Odell was in the town about the time of the commission of the alleged crime, and that a sack of flour was missed from the place where the larceny was alleged to have been committed. Such evidence did not tend to connect the appellant with the commission of the crime. Such corroboration as tends to connect the accused with the commission of the crime is required by the statute (page 362, sec. 172) to render the testimony of an accomplice sufficient to warrant a conviction.

The circuit court should have given the instruction asked by the defendant's counsel, as follows: "A conviction of the defendant, Odell, can not be had upon the evidence of the accomplice, George, unless he be corroborated by other evidence tending to show the connection of defendant, Odell, with the commission of the crime alleged in the indictment, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances of the commission." The refusal of the circuit court to give this instruction as asked would have been error had not the court given the same in substance by reading the statute, which is of the same import, and we therefore think that the instruction was substantially given, and the refusal to give the instruction as asked did not injure the defendant.

Counsel for the prisoner also asked the court to give the

following instruction: "The fact of the presence of the defendant Odell in the same town at the time of the commission of the offense, or immediately before or afterwards, is not sufficient evidence to connect the defendant Odell with the commission of the crime charged in the indictment." This instruction the court refused to give, and stated to the jury that it would be error for the court to give it, and said: "I am not permitted to state the evidence. You have heard it all, and of its effect and the credibility of witnesses you are the exclusive judges." The remark made to the jury by the learned judge announces a sound rule of the law. But does this instruction ask the court to state the evidence to the jury, the evidence adduced, or its effect? To illustrate: Had the counsel asked the court to instruct the jury that if they believed from the evidence that the prisoner was in the same town at the time of the commission of the crime, or immediately before or after, that fact alone would not be a sufficient corroboration of the evidence of the accomplice, George, to warrant a conviction. We think such an instruction was pertinent, and should have been given.

The instruction asked, taken in connection with the first instruction (which was given in substance), and the evidence reported in the bill of exceptions, which shows that the witness, James Fowler, testified that the prisoner was in the town about the time of the commission of the alleged crime, simply asked the court to declare that if such a fact was established, it alone would not be sufficient to connect the prisoner with the commission of the crime. We think the instruction should have been given, for it simply asked the court to say to the jury that as a matter of law, if there was no other evidence before the jury than the fact that Odell was in the vicinity, such evidence would not be sufficient to convict. While the court has not the right to tell the jury what facts have been proven, or declare to them the weight of the evidence adduced, so far as the credibility of the witnesses is concerned, still, when the statute has declared, as in section 172, that there shall be some other evidence of the commission of the crime and of the connection of the prisoner with it than the testimony of an accom-

plice, it was the duty of the court to say to the jury that the proof of the fact alone that the accused was in the town was not sufficient. The refusal of the court to give this instruction was error which must have injured the prisoner, for there was no other evidence to corroborate the testimony of George.

The judgment will be reversed, and the case remanded to the circuit court for a new trial.

WILLIAM JOHNSON, RESPONDENT, v. THE OREGON STEAM NAVIGATION COMPANY, APPELLANT.

PLEADING—ALLEGATION OF OWNERSHIP IN ACTION FOR CONVERSION.—In an action for the wrongful conversion of personal property when the complaint contains no allegation that it was either the property of plaintiff or property in which he was interested, nor any allegation that it was wrongfully taken from his possession, it is not sufficient to sustain a judgment after verdict.

APPEAL from Clatsop County. The facts are stated in the opinion.

Wm. Strong & Sons, for appellant.

J. W. Robb and C. W. Fulton, for respondent.

By the Court, PRIM, J.:

This was an action to recover damages for an alleged wrongful carrying away of certain personal property described in the complaint. The action was originally commenced before a justice of the peace and appealed to the circuit court, where it was tried, and a judgment having been rendered against the appellant, an appeal has been taken to this court. The assignments of error are as follows:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in the admission of testimony.

The material parts of the complaint are as follows: "That said defendant, on or about the nineteenth day of July, 1878, by its agents and servants wrongfully carried away

upon one of its steamboats from Fisherton, W. T., to Astoria, Oregon, one chest of the value of five dollars, and the articles contained in said chest. The description and value of said articles are as follows, to wit: Gold and currency one hundred and ten dollars, one overshirt of the value of three dollars, one red undershirt of the value of two dollars and fifty cents, one pair of flannel drawers of the value of two dollars and fifty cents, one pocket knife of the value of two dollars and fifty cents, amounting to the sum of one hundred and twenty-five dollars. That said plaintiff has demanded from said defendant said money and property, but said defendant has neglected and refused to deliver the same to plaintiff. That said plaintiff has been at great trouble and expense in tracing and searching for his said property, to wit, the sum of twenty-five dollars, and at the expense of employing attorneys to bring and prosecute this action, to wit, in the sum of twenty-five dollars."

The first assignment of error is well taken. The first cause of action is for wrongfully carrying away certain personal property from Fisherton to Astoria, but there is no allegation that it was either the property of the plaintiff or property in which he was in any way interested. Nor is there any allegation that it was wrongfully taken from the plaintiff. Possession will not be presumed to be unlawful until it is shown to be so. In fact, the possession of personal property is *prima facie* evidence of ownership in said property, either special or general. The latter part of the complaint contains this expression, "That said plaintiff has been at great trouble and expense in tracing and searching for *his said property*." This allegation has reference to property which had already been described, and the words "his said property" could not enlarge those allegations. It is also a well settled rule of pleading, that a pleading must be construed most strongly against the pleader. There being no cause of action stated in the complaint, it was not a defect which was waived by answering or cured by verdict.

The judgment is reversed and the cause remanded to the court below for further proceedings.

LUCIEN REMILLARD ET AL., APPELLANTS, v. C. H. PRESCOTT ET AL., RESPONDENTS.

MISTAKE IN DEED—GRANTOR.—In order to show a mistake in a deed, it must be shown that the grantor was a party to the mistake.

IDEM—DEGREE OF PROOF.—In order to establish a mistake in a deed, it is necessary that the mistake be shown by clear and convincing proof, since the evidence must overcome the strong presumption existing in favor of written instruments, which should not be annulled by uncertain and contradictory testimony.

ESTOPPEL—PLEADING.—An estoppel, to be relied upon, must be pleaded where there is an opportunity to plead it.

APPEAL from Union County.

This is a suit in equity, originally brought by the appellants, Lucien and Edward Remillard, who claim to be the legal owners of an undivided half and equitable owners of the other half of lot No. 4, of block No. 1, in the town of Union, to compel the respondent Prescott to convey to them the undivided half of said lot 4. Prescott having subsequently begun an action to eject the appellants from lots 4 and 5, in said block, and the appellants having filed a cross-bill to enjoin said action, claiming an equitable defense as to lot 4 in both appellants, and as to lot 5 in the appellant Lucien Remillard, the two suits were, by order of the court, consolidated.

The facts alleged are in effect: That in the month of March, 1865, one A. C. Craig purchased of J. A. J. Chapman, respondent, lots 4 and 5, in block No. 1, in the town of Union, Union county, and went into the possession thereof; that thereafter, on March 3, 1865, no deed having been made by Chapman to Craig therefor, and Craig being absent from home, Prescott, acting for and in behalf of Craig, on his own motion, procured of Chapman a deed for said lots in fulfillment of said contract of purchase, but that by mistake, inadvertence, or at the solicitation of Prescott, said deed of conveyance was executed by Chapman to Prescott and Craig, when it should have been to Craig alone; that on ——, 1872, Craig conveyed, for a valuable consideration. lot 4 to respondent E. Remillard,

and E. Remillard conveyed the same to respondent L. Remillard, on ——, 1874, and on May, 1877, L. Remillard reconveyed an undivided half thereof to said E. Remillard, and that they are now the owners thereof; that Craig, for a valuable consideration, conveyed lot 5 to E. S. McComas, and McComas conveyed to L. Remillard, who is now owner of the same; that appellants and their grantors have at all times since March 3, 1865, had full and undisturbed possession of said lots Nos. 4 and 5, and claimed title and had the exclusive use and occupation thereof, Prescott having full knowledge and information thereof; that Prescott advised and procured appellants and their grantors to purchase said lots from Craig, and acquiesced in the purchase and possession thereof, with full knowledge, and acquiesced in, and received large sums of money from appellants and their grantors for buildings and improvements put upon said lots with knowledge that appellants and their grantors claimed to be sole owners thereof; that appellants and grantors have paid all taxes thereon since 1865; that lot 4 is worth one thousand dollars, and lot 5 is worth two hundred dollars; that neither appellants nor their grantors had any knowledge that Prescott claimed any interest therein, or had any title thereto; that Prescott had knowledge of each of said conveyances at the time they were made, and made no objection thereto, and has been living in and near said town of Union ever since 1865 most of the time; that he has been advised of said mistake or misdescription in said deed, and requested to rectify it, but refuses to do so; that Prescott, on March, 1878, procured a deed from one Frederick Nodine and wife to said lots 4 and 5.

Prescott, by his separate answer, denies all the material allegations of the complaint, and sets up as a further defense that in 1863 Prescott and Craig purchased lots 4 and 5, and thereafter erected buildings thereon, and occupied the same as a saloon; that defendant Prescott paid to Craig four hundred and fifty dollars towards erecting said building, and that Chapman properly executed said deed of March 3, 1865, to Craig and Prescott, and that the said

deed was duly recorded in the county records; and for a further defense that Chapman was on March 1, 1865, largely indebted to Blaumer & Rosenblat, and that said Blaumer & Rosenblat sued Chapman, and attached said lots 4 and 5 on that day; that on the sixth day of March, 1865, Chapman gave a delivery bond for the property, and Nodine and Bennington were two of the sureties thereon; that Chapman, in consideration therefor, and of the release of said property from attachment, conveyed to them, Nodine and Bennington, said lots 4 and 5, with other property; that said Bennington deeded his interest to said Nodine, and said Nodine and wife to Prescott, in January, 1878, which deeds were duly recorded.

It is also alleged as master of estoppel against the appellants that Nodine, in the fall of 1867, published a notice calling on all persons to come forward on a day mentioned, and claim any right or title they might have in any of said lots, that he was going to have them sold at public sale; but that Craig did not make any claim to them, and that the same were sold to Nodine, and that Prescott claims title to the whole of said lots 4 and 5. The appellants filed a demurrer to the separate defense in the answer, setting up title in Prescott from Chapman through Nodine and Bennington, and setting up matter in estoppel. The demurrer was sustained as to the estoppel and overruled as to the other defense. Thereupon the appellants filed their reply, denying all the material allegations in the answer. Upon the trial the court found that there was no equity in the bill, and it was therefore dismissed. From that order this appeal is taken.

Baker & Eakin, for appellant:

Where a person undertakes to act for another and takes a conveyance in his own name which he undertook to obtain for another, equity will consider it a trust for his principal. (6 Paige's Ch. 355; Hill on Trustees, 144.) If A. purchase an estate with his own money, and the deed is taken in the name of B., a trust results to A., and may be proved by parol. (1 Johns. Ch. 582; 6 Paige's Ch. 355; 2 Johns. Ch.

405; Lomax Digest, 200; 4 Kent's Com. 306; 2 Story's Eq. Jur. 1201, note 2; 5 Barb. 51; 21 Ohio, 547; 16 Barb. 376; 6 Or. 204.)

Where the owner of real estate suffers another to purchase the estate from a third person, and erect valuable improvements thereon under the erroneous belief that he has a good title, and intentionally conceals his title from the purchaser, he is estopped from thereafter setting up his legal title. (3 Paige's Ch. 546; 1 Johns. Ch. 354; Bigelow on Estoppel, 508.) Even though his deed is recorded. (Bigelow on Estoppel, 466, 533; 46 Texas, 371; 12 Met. 494.) A sheriff acquires no possession or title to real estate by attachment. The attachment becomes only a lien; and if released before execution issues, it leaves the title unaffected. (5 Or., 46.)

Sterns & Balleray, and F. M. Ish, for respondents:

To establish a resulting trust in a case like this, it is necessary to show mistake on the part of the common grantor, and *mala fides* on the part of the person procuring the deed to himself. (Lewin on Trusts, 201; *Brown v. Kennedy*, 33 Beav. 133; *Phillipson v. Kerry*, 32 Beav. 544; Kerr on Fraud and Mistake, 429.) Or a mutual mistake of the parties. (1 Perry on Trusts, sec. 186, 217; *Andrews v. Essex Ins. Co.*, 3 Mason, 10; *Bradford v. Romney*, 30 Beav. 431.) The mistake, if any, must also be clearly proved and put beyond cavil, as it operates to vary a written instrument. (*Holmes v. Constance*, 12 Ver. 279; *Gillespie v. Moon*, 2 Johns. Ch. 596; *Atty. General v. Sitwell*, 1 Young & Collyer, 583; *Tucker v. Madden*, 44 Maine, 206; *Hillman v. Wright*, 9 Ind. 126; *Linn v. Balkey*, 7 Ind. 69; *Ruffner v. McConnell*, 17 Ill. 212.)

Or there must have been fraud and circumvention of the common grantor Chapman by Prescott in obtaining the deed. If a resulting trust is to be established on account of fraud, the fraud must be alleged, and clearly, plainly, and specifically made out. Facts constituting fraud must be alleged. (*Harding v. Handy*, 11 Wheat. 103; *Conway v. Ellison*, 14 Ark. 360; *Pendleton v. Galloway*, 9 Ohio, 178; *Bell*

v. Henderson, 6 How. Miss. 311; *Forey v. Clark*, 3 Wend. 637; Kerr on Fraud and Mistake, 365.) Fraud must be clearly and distinctly proved as alleged. (*Robson v. Earl of Devon*, 4 Jour. U. S. 248; *Jennings v. Broughton*, 17 Beav. 239; Kerr on Fraud and Mistake, p. 382-3; *Luff v. Lord*, 11 Jour., N. S. 50; *Parr v. Jewell*, 1 Kay and Johnson, 671; Hill on Trustees, 4 Am. ed. 264 and 265; *Miller v. Cotton*, 5 Ga. 346.)

Respondent insists that he is not estopped to assert his rights as against the appellants, for the reason that appellants had all the notice of respondents' title which the law requires to be given by the record of the deed, recorded March 4, 1865. (3 Washb. on Real Prop. 3 ed. 72 and 292; *Flynt v. Anold*, 2 Met. 619, 625; *Hill v. Epley*, 31 Penn. St. 331; *Fisher's Ex'rs v. Mossman*, 11 Ohio St. 42; *Ferris v. Coover et al.*, 10 Cal. 589; *Davis v. Davis*, 26 Cal. 23.) A party to be estopped by a statement, must have misled the party claiming the estoppel, and such party must also have acted on the faith of it. (Bigelow on Estoppel, 492, note 4; *Garlinghouse v. Whitehouse*, 51 Barb. 208; Kerr on Fraud and Mistake, 132; *Dann v. Spurrier*, 7 Ver. 230; 4 E. D. Smith, N. Y. 296; 3 Wash. R. 75.) And the statements claimed as working on estoppel must have been exclusively acted on, and the party must have been justifiable in so exclusively acting on them. (Bigelow on Estoppel, 493; *McMaster v. Ins. Co. of N. A.*, 55 N. Y. 222.)

Matter out of which an estoppel arises must be clearly proved. (*Prebel v. Conyer*, 66 Ill. 370; *Davis v. Davis*, 26 Cal. 23.) An estoppel, also, when relied on and there is an opportunity to plead it, must be pleaded. (*Brinkerhoof v. Lansing*, 4 Johns. Ch. 70; *Arguello v. Edinger*, 10 Cal. 150; *Downer v. Smith*, 24 Cal. 114; *Blum v. Robertson*, 24 Cal. 127; *Clark v. Huber*, 25 Cal. 593; *Flandreau v. Downey*, 23 Cal. 354.)

By the Court, BOISE, J.:

The appellants claim that their demurrer to that part of the answer of the respondent Prescott which sets up a conveyance of the property from Chapman to Nodine and

Bennington, and from them through mesne conveyances to Prescott, should be sustained. As this conveyance from Chapman to Nodine and Bennington was made after the deed from Chapman to Craig and Prescott, we think there is no question but what this part of the answer constitutes no defense, and that the demurrer is well taken, so that Prescott has by the pleadings no further interest in the property in dispute than that which he holds under the deed from Chapman to Craig and himself, which is an undivided half interest.

We will now consider Prescott's interest under this last named deed. The appellants allege that in March, 1865, A. C. Craig purchased these lots of J. A. J. Chapman; that thereafter, no deed having been made by Chapman to Craig therefor, and Craig being absent from home, "defendant Prescott, acting for and in behalf of Craig," on his own motion, procured of respondent Chapman a deed for said lots in fulfillment of said contract of purchase. But "by mistake, inadvertence, or at the solicitation of defendant Prescott, said deed of conveyance was executed by said Chapman to said Prescott and Craig when it should have been to Craig alone." These allegations are denied and the determination of the case must rest on the discussion of these issues of fact.

It is alleged that the name of Prescott was inserted in the deed by mistake. Craig, who is a witness for the appellant, testified in relation to his purchase of the lots from Chapman that he was to have the lots for improving them. This improvement commenced in February, 1864. He then put up a building in the spring of 1864, twenty by twenty-six feet. There was no particular understanding what the improvements were to be. He then put up an addition, making the building forty feet in length, with a small kitchen attached. He states also that he paid the taxes on the property until he sold it, and collected the rents, and that he was in sole possession. He is corroborated as to the possession and receiving the rents by the appellants, and other witnesses of the appellants. Prescott testifies that the lots were deeded to himself and Craig by Chapman in

consideration of their improvement, Chapman, who was the proprietor of the town of Union, being desirous to have these improvements made to build up the town, and thereby enhance the value of his adjoining property; that no consideration was paid for them except one or two dollars, which he paid; that he helped Craig to put the improvements on the lots; that he negotiated with Chapman for lot five, and had an understanding with Craig that they were to improve and own the lots in common; and that fearing that Chapman's property would be attached, he procured the deed and had it recorded. Craig and Chapman are the only witnesses who have personal knowledge as to their understanding of the ownership of the property when the deed was executed. Prescott is the only witness who knows whether or not there was a mistake made by Chapman in executing the deed to Craig and Prescott instead of to Prescott alone, and he testifies that the deed was executed by Chapman to himself and Craig according to Chapman's, Craig's, and his understanding at the time; and that they, Prescott and Craig, were to have the lots in common for improving them.

We think from this evidence that it is not proven that the grantor, Chapman, made a mistake as alleged when he executed the deed. In order to show a mistake, it should be shown that Chapman, the grantor, was a party to it. (Lewin on Trusts, 201; 33 Beav. 133; Kerr on Fraud and Mistake, 429; 1 Perry on Trusts, 217.) In order to establish a mistake in a deed it is necessary to show it by clear and convincing proof, as the evidence must overcome the strong presumption which exists in favor of written instruments, which should not be annulled by uncertain and contradictory testimony. (*Gillespie v. Moon*, 2 Johnson's Ch. 279; *Hillman v. Wright*, 9 Ind. 126.)

The next question is, did Prescott obtain this deed by fraud? On this subject the testimony is conflicting; Craig and Prescott being the only witnesses who have any personal knowledge, and they disagree. There is some evidence of the acts and declarations of Prescott which tend to corroborate the testimony of Craig, that he alone was to have the

deed. He seems to have had the control of the property after the deed was made, except while he and Prescott occupied it as a saloon. There is on the other hand the fact that Craig, knowing that the deed was made to Prescott and himself, made no effort to get the whole title, and when he sold the property made a quitclaim deed to it, granting simply his right in the premises. He and Prescott were also, at the time the deed was made, partners in business, and in circumstances where they would be likely to embark together in such an enterprise. And there is also the fact that Prescott was at the pains to obtain the deed and paid the nominal consideration therefor.

From the whole evidence we think the fact of fraud in obtaining the deed is not clearly established, and that we would not be warranted in finding that the deed was obtained from Chapman by fraud, and that to do so on the evidence before us would be going beyond the rules established in any of the numerous cases cited by counsel.

The only remaining question is as to the estoppel. The appellants claim title by estoppel, and if they intended to rely on such title, they should have pleaded it in the complaint, as they had an opportunity to do so. They made their case in the complaint, wherein they relied on the fact that Craig had purchased the property from Chapman and that by mistake on the procurement of Prescott the deed was made to Prescott and Craig. We think, therefore, that the matter of estoppel as sustaining the claim of the appellant as prayed for can not be considered in the case.

There were some other questions which were discussed to some extent in the argument which are not pertinent to the issues as made by the pleadings, and it is not necessary to consider them here.

We do not find any error in the findings or determination of the circuit court, and its decree will be affirmed by this court with costs.

JOHN PAGE ET AL., RESPONDENTS, v. HENRY FINLEY ET AL., APPELLANTS.

IMPEACHING WITNESS—GENERAL REPUTATION.—The regular mode of examining into the general reputation is to inquire of the witness first whether he knew the *general* reputation of the person in question among his neighbors, and if his answer is in the affirmative, then he may be asked what that reputation is.

INSTRUCTION—MATTERS NOT PERTINENT.—The mere omission to instruct upon matters pertinent to the case is not error, without the attention of the court is called to the matter.

APPEAL from Polk County. The facts are stated in the opinion.

Knight & Lord, for appellants.

Ben. Hayden, and Wm. H. Holmes, for respondents

By the Court, PRIM, J.:

This is an appeal from a judgment in an action for damages, for the malicious utterance of defamatory words. The complaint in brief alleges that on the sixth and seventh days of June, 1878, in the county of Polk and state of Oregon, the appellant, Elizabeth Finley, maliciously and falsely accused the respondent, Eva Page, of the crime of adultery, committed with one W. R. Ross and one Sel Finley. The answer denies the allegations of the complaint; and in their separate answer the appellants justify by alleging that the appellant, Elizabeth Finley, in June, 1878, in the county of Polk and state of Oregon, caught the said Eva Page and the said Ross in the act of adultery; and in mitigation of damages allege the lewd acts and unchaste conduct of the said Eva Page at different times with the said Sel Finley and other persons; and further allege that the words were spoken in their own house, and nowhere else, in a conversation addressed to the said Elizabeth Finley by the said John Page and the said Ross, concerning the chastity of the said Eva Page, in the presence and hearing only of the parties to this action and the said Ross, and were spoken with no intention to injure or defame the said Eva Page.

The allegations of the separate answer were put in issue by stipulation of the parties without replication.

The bill of exceptions shows that at the trial the defendants introduced the testimony of several witnesses tending to prove that the plaintiff, Eva Page, was a lewd and unchaste woman. After the defendants had rested their case, the plaintiffs then called the following witnesses for the purpose of proving that the general reputation of the plaintiff, Eva Page, for chastity, was good.

Mr. Stevens, who testified that he knew the plaintiff, Eva Page, intimately, and had so known her since 1875, but that she had not lived in his immediate neighborhood since that year. The counsel for the plaintiffs then asked the witness the following question: "What is her reputation for chastity in your neighborhood?" To that question the counsel for the defendants objected, for the reason it had not been shown by the previous testimony of the witness that he knew what her *general* reputation for chastity was, and was therefore incompetent to testify on that subject. The court overruled the objection, and the defendants, by their counsel, duly excepted, and the exception was allowed by the court.

The same interrogatory was put to several other witnesses, to which they replied to the same effect. Exceptions were then and there duly taken and allowed by the court. The admission of the testimony of these witnesses is assigned as error, for the reason that they had not been asked, nor had they testified that they *knew* what the *general* reputation of the person in question, for chastity, was. This assignment we think is well taken. While it has been held in some cases that the preliminary questions as to the knowledge of the reputation need not be put, we think the point has been settled the other way by the later and better authorities. Mr. Greenleaf says: "The regular mode of examining into the general reputation is to inquire of the witness whether he *knows* the *general* reputation of the person in question among his neighbors, and what that reputation is." (1 Greenleaf on Evidence, sec. 461.) Thus it will be seen that the question excepted to is objectionable in two particulars:

1. The witnesses were asked what the reputation of the party, for chastity, was, without first being asked whether they knew what that reputation was. 2. They were asked as to her reputation instead of her *general* reputation among her neighbors.

The next alleged error is as to the ninth instruction upon the question of damages. It is claimed that the court erred in failing to give to the jury any definite rule as to the measure of damages. If appellants desired special instructions upon that subject, they should have presented such instructions as they desired with a request that they be submitted to the consideration of the jury. Then a refusal to instruct as requested could have been assigned as error. This assignment we think is not well taken.

The next assignment of error complained of is as to the instructions given at the request of the respondents, as follows: "The character of evidence to prove the justification must be such as would warrant them (the jury) in convicting of the crime charged." This instruction refers to the quality and not to the quantity or degree of evidence necessary to prove the justification, and is therefore not objecttionable. It would have been better perhaps to have used language more definite in its meaning.

The court having erred in admitting the witnesses to testify as to reputation as alleged in the first assignment, the judgment should be reversed, and the case remanded to the court below for a new trial.

JOSEPH E. BENTLEY ET AL., APPELLANTS, v. REBECCA F. JONES ET AL., RESPONDENTS.

APPEAL—EXECUTION—MAY BE RECALLED, WHEN.—When an appeal has been taken from a judgment and undertaking given for a stay of proceedings, an execution issued thereon may be recalled and set aside by the circuit court on motion.

IDEM—EVIDENCE NOT PRODUCED IN LOWER COURT.—No paper or other evidence not produced at the hearing of the motion in the circuit court can be considered by the appellate court.

APPEAL from Linn County. The facts are stated in the opinion.

S. A. Johns and T. B. Hackleman, for appellants.

J. K. Weatherford and N. B. Humphreys, for respondents.

By the Court, PRIM, J.:

This is a motion by respondents before Judge Harding, at chambers, to set aside an execution issued on a judgment in favor of appellants and against respondents for one dollar damages, and for two hundred and thirteen dollars and eighty cents, costs and disbursements, for the reason that an appeal had been taken to the supreme court by respondents, whereby proceedings were stayed as provided by law. The motion was heard in term time, and allowed, and an order made setting aside the execution, and for costs and disbursements. From this order and judgment an appeal has been taken to this court.

On looking into the transcript it will be seen that the motion was based upon the affidavit of John C. Elder, one of the respondents. The order setting aside the execution, it appears, was based upon that affidavit, as the record fails to show that any other paper was produced by either side. Appellants having failed, on the hearing of the motion, to controvert the facts stated in the motion and affidavit upon which it was based, they were and should have been treated as true. The material provisions of the undertaking on appeal, as set out in said affidavit, were sufficient, if true, to sustain the motion. If not properly set out therein, they should have been controverted by the other side, by counter affidavits or by producing a certified copy of the original undertaking on file. Respondents having failed to avail themselves of this privilege at the hearing of the motion, the court very properly held that the execution had been improperly issued and should be recalled.

But it appears that the original undertaking filed on the appeal has been sent up with the transcript to this court, and upon inspection it will be seen that its provisions were insufficient to operate as a stay of execution. It is claimed, however, that this paper is improperly here and should not be considered by this court. This position we are of opin-

ion is correct. This paper properly belongs to the files in the original case, and has no connection whatever with the transcript in this proceeding unless produced in evidence at the hearing, and if produced in evidence, a certified copy should have been used instead of the original. But there being no bill of exceptions nor anything in the record indicating that it was used in the court below, it can not be used here.

The judgment of the court below is affirmed with costs.

BRIDGET NINE, APPELLANT, v. LEWIS M. STARR, RESPONDENT.

BASTARD CHILD—AGREEMENT FOR SUPPORT—CONSIDERATION FOR.—Where the putative father of a bastard child agrees with the mother that he will pay her for boarding and clothing such child, such contract is without consideration, and cannot be legally enforced. The mother of such child is its guardian and bound to maintain it.

IDEM.—A moral obligation unsupported by any pre-existing legal obligation is not a sufficient consideration to support an express contract that can be enforced at law.

APPEAL from Multnomah County.

This is an action to recover upon an express contract for the maintenance of the infant illegitimate son of the parties. The appellant alleges that in August, 1867, she gave birth to an illegitimate child, of which the respondent is the natural father; that at that time and prior thereto the appellant and respondent cohabited together, but were not married, and that they so continued until July, 1868, when she informed the respondent of her determination to withdraw from the unlawful association with him, which she then did; that thereupon he requested her to keep, support, clothe, and educate the child, and provide medical attention for it when necessary, and to continue such support and care for nine or ten months, or until the respondent could make arrangements to take it for himself and send it to his sister in California, where he intended to have it kept and raised; that he promised to pay therefor so much as the ser-

vices were reasonably worth, and all expenses necessarily incurred by the appellant in caring for the child; that in consideration of these promises she kept and cared for the child, and paid out for medical treatment and medicines for it six hundred dollars; and that her services and other necessary expenditures for the child are reasonably worth seven thousand dollars.

To this complaint a demurrer was filed, which was sustained by the court, and the respondent had judgment for his costs and disbursements. From this judgment this appeal is taken.

Yocum & Clarno, for appellant.

Dolph, Bronaugh, Dolph & Simon, for respondent.

By the Court, BOISE, J.:

The first question arising on the demurrer in this action is as to the sufficiency of the allegations of the complaint to constitute a cause of action. The contract relied on is an agreement made by the alleged father of a bastard child with the mother, whereby he agreed to pay her for its maintenance. It is claimed by the respondent that this alleged agreement is without consideration and void, for the reason that the putative father of a bastard child is not legally bound to support it, but that this obligation legally devolves on the mother. We think that whatever the moral obligation of a putative father may be to support such a child, no legal obligation attaches to him in that behalf, and that this legal obligation is upon the mother. Tyler on Infancy and Coverture (p. 285), lays down the rule that the mother is the natural guardian of such a child, and is bound to maintain it, and we think such is the law. When one agrees to pay another for a service which that other is legally bound to perform, the contract is without consideration, and can not be enforced. (Parsons on Contracts, 424.)

It may be truly said that the respondent was under a moral obligation to contribute to the support of this illegitimate child, and it is insisted that this is a sufficient consideration to support this promise. But to constitute a moral

obligation the consideration of an express contract which may be enforced by an action at law, there must have been some pre-existing legal obligation. This legal obligation may have ceased to have force by reason of the statute of limitations, or the like; but there having been a legal obligation, the moral obligation is sufficient to revive the liability by means of an express promise. (*Mills v. Wyman*, 3 Pick. 207; *Dodge v. Adams*, 19 Pick. 429; *Cook v. Brady*, 7 Conn. 57.)

We think, therefore, that the alleged promise of Starr to pay the appellant for the maintenance of this child can not be enforced at law, and that the judgment of the circuit court must be sustained.

The other points in the demurrer are therefore immaterial.

THE GRANGE UNION, APPELLANT, v. H. D. BURKHART.

FINAL SETTLEMENT OF ESTATE—REJECTED CLAIM.—Where one having a claim against the estate of a deceased person presented it to the administrator for allowance, and it was rejected by him, and no action was afterwards commenced by the claimant against the administrator to establish its validity, the holder thereof can not after the final settlement of the administration accounts maintain a suit in equity to recover the claim from the next of kin of the deceased person out of any distributive share which he may have received.

APPEAL from Linn County. The facts are stated in the opinion.

Powell & Flynn, and R. S. Strahan, for appellant.

J. K. Weatherford and D. R. N. Blackburn, for respondent.

By the Court, KELLY, C. J.:

The respondent is a corporation duly incorporated under the laws of Oregon, on the sixth day of February, 1875, with a capital stock of twenty thousand dollars, divided into eight hundred shares of twenty-five dollars each. In April of that year subscriptions were made to the capital stock,

and among others, one by L. C. Burkhart, for four shares, amounting to one hundred dollars. The whole amount was levied and ordered to be paid on or before October 30, 1875. The assessments of L. C. Burkhart became due and payable but were not paid by him. On the fifth day of November, 1875, he died intestate, leaving H. D. Burkhart, the appellant, and six others, his heirs at law. In November, 1875, the appellant was appointed administrator of the estate of his father, and as such administrator he settled up the estate on the eleventh of March, 1878. The appellant received out of the personal estate of L. C. Burkhart, deceased, four hundred and thirty-five dollars and seventy-six cents as his distributive share of the estate as one of the heirs and next of kin.

The respondent made out a claim against the estate of the decedent for one hundred dollars and interest, the amount of the assessments before referred to, duly verified, and presented the same to the administrator for allowance about six months before the settlement of the estate. The administrator neither allowed nor disallowed the claim by indorsement thereon at the time it was presented, but two or three months before the final settlement of the estate, the administrator personally notified the respondent, through its secretary, that he would not pay said claim. The secretary, who had charge of the matter, informed the administrator that he would appear before the probate court and object to the final settlement of the estate unless the claim was paid. The administrator stated that he was ready to pay it if the court would so direct. The respondent, however, failed to appear, and made no objections whatever to the final settlement. After the discharge of the appellant as administrator, this suit was brought against him as next of kin of L. C. Burkhart, deceased, to enforce the payment of the claim of one hundred dollars and interest, before referred to. It is brought under section 469, page 206, of the code, which is as follows: "The next of kin of a deceased person are liable to a suit in equity by a creditor of the estate to recover the distributive shares received out of such estate, or to so much thereof as may be necessary to

satisfy his debt. The suit may be against all of the next of kin jointly, or against any one or more of them severally."

The claim, for the recovery for which this suit was brought was presented by the respondent to the administrator of L. C. Burkhart, deceased, for his allowance or rejection, and afterwards disallowed by him, of which fact he afterwards personally notified the secretary of the respondent. When the claim was rejected, we think the respondent ought to have proceeded to establish its validity by an action against the administrator, so that any judgment which might have been obtained could have been satisfied in the due course of administration. The respondent had a plain and adequate remedy at law to collect its demands, and having discontinued the proceedings already commenced to establish the claim, the administrator was justified in coming to the conclusion that it had been abandoned. Under these circumstances, after the final settlement of the administration accounts, we think the respondent ought no' to maintain a suit in equity to establish its claim against the appellant as the next of kin to the decedent, L. C. Burkhart.

The decree of the circuit court is reversed, and it is ordered and decreed that the appellant recover of the respondent his costs of suit.

JAMES ABRAHAM, APPELLANT, v. GEORGE ABBOTT, RESPONDENT.

CONVEYANCE—RESERVATION IN A DEED.—Where a person owning a tract of land sells a portion thereof which is surrounded by his other lands, and describes the lands conveyed by metes and bounds, and then excepts a strip included in these bounds off of three sides of the land so described, for a road; held, that the fee passes by the deed subject to the right of way for a road.

APPEAL from Multnomah County.

This is an action in ejectment. The appellant heretofore conveyed to the respondent a tract of land by the following instrument:

"I have this day bargained and sold unto the said Annette Abbott the following described real estate, to wit: Commencing at the northeast corner of the Seldon Murray Donation Land Claim, running thence twenty chains west to a stake; thence twelve chains south to a stake, to the initial point of this description to a stake; thence west five chains to a stake; thence south eight chains to a stake; thence east five chains to a stake; thence north eight chains to the said initial point of this description, except a strip off of the north and west sides thereof thirty feet wide, and a strip off of the east side thereof twenty feet wide, reserved for a road. Said tract so sold containing four acres, less said reserved strips, being, lying, situated," etc.

The appellant contends that the strips described in the instrument are excepted from the grant, and this is the question to be determined in the case. The land by which the tract described in the instrument is surrounded belongs to the appellant, and has been by him laid off in two acre tracts with streets—the strips in question being a part of these streets. The court below held that the strips passed by the conveyance to the respondent with a reservation of the right to use them for a road, and the respondent had judgment accordingly, from which this appeal is taken.

Wm. Strong & Sons, and M. C. George, for appellant.

Thayer & Williams, for respondent.

By the Court, BOISE, J.:

The question to be decided in this case arises on the construction of the deed set out in the statement of the case. The grantor in this deed being the owner of the land surrounding the tract described in the deed, if he did not intend to grant any interest in these strips will not be presumed to have included them in the deed for the mere purpose of reserving them, if any other reasonable construction can be given to the language of the instrument. Reservations usually impose some burden or easement on the land conveyed, as a right of way or the like. In this case we think the manifest intention of the grantor was to convey

to the grantee the entire tract of land described in the deed with the reservation of the right for a road over these strips.

The language "except a strip off of the north and west sides thereof thirty feet wide, and a strip off of the east side thereof twenty feet wide, reserved for a road," we think was used by the parties for the purpose of reserving these strips for a road alone; and such is the natural meaning of the words. Such a construction will give effect to the grant over all the property described, and afford a reason for including these strips in the deed, otherwise we can see no reason why the grantor should have included these strips in the description of the land. The circumstances surrounding the transaction show a reason for such a construction. For as the grantee was buying land surrounded by other lands of the grantor, it would be for his interest to secure land for roads on all sides of him, and especially as this land was near the city of Portland and might soon be needed for suburban lots. And the same would be true of the grantor, for he also might want streets on these strips. The width of the strips would indicate that it was the intention of the parties that this land sold should extend to the center of the contemplated streets, subject to this right for a road, and if the road was the usual width—sixty feet—each adjoining proprietor would own to the center. If we were to give the deed the construction contended for by the appellant, we could give no meaning to the words "for a road." We think the other is the more reasonable construction and the one which the parties intended at the time the deed was made.

The decree of the circuit court dismissing the plaintiff's bill will be affirmed with costs.

LOUIS NICOLAI, RESPONDENT, v. S. M. LYON, APPELLANT.

COMPOSITION AGREEMENT—EFFECT OF, AS TO LIABILITY OF THIRD PERSONS.—L., a broker, undertook to loan money for N. for compensation, upon first-mortgage security; but through negligence loaned the money on second-mortgage security, and thereby became liable to N. to make good the security. Before the loan became due N. signed a composition agreement with other creditors of the borrower, releasing such borrower from personal liability beyond the lien of the mortgage. *Held,* that the release of the borrower by it had the effect to release L., the broker, from his contingent liability to N.

PLEADING—AN ALLEGATION OF FRAUD, to be sufficient, must state facts which show that the party complaining was misled and injured by the matter complained of.

COMPOSITION AGREEMENT—NOTICE PRESUMED AS TO CONDITION OF PROPERTY ASSIGNED.—Where a composition agreement was signed in which it was stipulated that the creditors did not waive any lien either of them had upon the property assigned by the agreement, it was *held,* that the creditors were presumed to have inquired as to the condition of the property and the liens to which it was subject, and that to avoid such agreement it must appear that active fraud was practiced upon such creditors.

APPEAL from Multnomah County.

It is alleged on behalf of the respondent that in March, 1873, the appellant undertook with the respondent for compensation to loan two thousand dollars for the respondent upon adequate first-mortgage security; that he negligently loaned the money to J. B. and C. B. Upton, upon the security of a second mortgage on certain real estate in East Portland; that there was a prior unpaid mortgage of record upon the property taken; that the property so mortgaged was sold, upon foreclosure of the first mortgage, for no more than enough to satisfy such first mortgage; that the Uptons have been insolvent ever since the respondent's debt became due; that no part of the two thousand dollars has been paid. Among other defenses it is alleged that the respondent and other creditors, without the appellant's knowledge, entered into composition agreement with the Uptons in August, 1873, by which it was agreed that in consideration of the assignment to G. A. Steel, for the creditor's benefit, of certain property by the Uptons, the creditors

would release the Uptons from all personal liability on account of their indebtedness to such creditors; that it was stipulated in the agreement that the creditors did not waive any liens either of them had upon any of the property assigned. The respondent seeks to avoid the effect of the signing of this composition agreement upon the ground that the Uptons did not assign to the assignee of the creditors a promissory note which they held against A. C. Gibbs, and which was included in the composition agreement; that at the time the agreement was signed this note was deposited with the First National Bank of Portland, as security for a debt due from the Uptons to the bank, of which fact the Uptons did not inform the respondent. The bank signed the composition agreement with the other creditors. Upon the trial in the court below, the court, among other instructions, gave the following:

"If the plaintiff was induced to sign the composition agreement by fraudulent representations or fraudulent concealments, upon the part of the Uptons, then it was void as between the Uptons and plaintiff."

"If it was void as between plaintiff and the Uptons, then the signing of the composition deed by plaintiff, constituted no defense to the defendant in this action."

"The composition deed is a representation that the Uptons were the owners of the Gibbs note, and had a right to make a good and sufficient transfer of the same to the assignee, for the use and benefit of the creditors; and if untrue at the time, and known to be untrue by the Uptons, was a fraud upon every creditor who signed the composition deed without knowledge of the truth, and rendered it void as to them."

The appellant's counsel asked the following instruction, which was refused:

"If the jury find from the evidence that at the time of the signing of the composition agreement by Nicolai, the Uptons were the owners of the Gibbs note mentioned in the pleadings, but that said note was pledged to the bank as collateral security for a debt due from the Uptons to the bank, and that the bank also signed said composition agree-

ment, and that thereafter, and within the time specified in said agreement, the Uptons assigned to G. A. Steel all their interest in said note by proper conveyance, then the Uptons fulfilled their part of said composition agreement so far as said note is concerned."

The respondent had judgment on a verdict of the jury for two thousand dollars, the amount prayed for. From this judgment this appeal is taken.

Dolph, Bronaugh, Dolph & Simon, for appellant.

Catlin & Killen, and Wm. Strong, for respondent.

By the Court, BOISE, J.:

This case has been before this court on a former appeal by the appellants, and in that appeal some of the questions now presented were heard and considered by the court. (6 Or. 457.) On that appeal it was held by this court that the fact that Lyon signed the composition deed would not operate to relieve the Uptons from any contingent liability they might be under to Lyon, provided Nicolai shall recover against him on the contract named in the complaint, arising out of his failure to loan the two thousand dollars on a first mortgage; and that the signing of the composition agreement by Nicolai released Lyon from his liability to Nicolai. The decision of the court in that appeal would be binding on us as authority in determining this appeal, were it not that it is now claimed that the composition agreement was not binding on Nicolai, for the reason that it was fraudulent; that, as alleged in the replication, "said composition agreement was never valid or binding on respondent, because at the time of its execution said Uptons were not the owners of said Gibbs' note, and did not inform plaintiff of that fact, of which he was ignorant." We do not think this is a sufficient allegation of fraud. (*Horrell v. Manning*, 6 Or. 416; *Rolf v. Russell*, 5 Id. 400; *Dubois v. Hermance*, 56 N. Y. 673; *Liffen v. Field*, 52 Id. 621.) Moreover, to avoid the agreement on this ground, it should appear that the respondent was misled by this fact, and thereby induced to execute the agreement.

The evidence also tends to show that at the time that Nicolai signed the agreement the Gibbs note was pledged at the First National Bank, to secure notes of the Uptons, and that the Uptons were the owners of it. If such was the fact, then the note was the property of the Uptons, subject to the lien, and was one of the portions of the property of the Uptons, named in the composition agreement, which was reserved to the lienholder by the express terms of the agreement—as much so as the property subject to the mortgage held by Nicolai; for it appears from the agreement itself that the parties thereto stipulate and say in relation to these liens, "not hereby waiving any lien that any of or either of us have upon said property or any part thereof." The First National Bank was a party to the agreement as well as Nicolai. Nicolai should have then inquired as to the liens which are referred to, and will be presumed to have done so, unless some active fraud is shown to have been practiced on him by which the condition of this note was concealed from him. On this subject the counsel for the appellant asked the court to instruct the jury that: "If the jury believe from the evidence that at the time of the signing of the composition agreement by Nicolai the Uptons were the owners of the Gibbs note mentioned in the pleadings, but that said note was pledged to the bank as collateral security for a debt due from the Uptons to the bank, and that the bank also signed the composition agreement, and that thereafter and within the time specified in said agreement the Uptons assigned to G. A. Steel all their interest in said note by proper conveyance, then the Uptons fulfilled their part of the composition agreement so far as said note is concerned."

We think, for the reasons before stated, that this instruction should have been given, and that the refusal of the court to give it was error, for which the judgment of the circuit court should be reversed and a new trial ordered.

*E. C. DICE, RESPONDENT, v. WILLAMETTE TRANSPORTATION AND LOCKS COMPANY, APPELLANT.

NEGLIGENCE—PASSENGER MAY LAND AT INTERMEDIATE POINTS.—A passenger for hire, traveling upon a steamboat, has a right to go ashore at any point where such boat may land, before arriving at his destination, without forfeiting his rights as a passenger to safe ingress and egress.

APPEAL from Marion County. The facts are stated in the opinion.

Hill, Durham & Thompson, for appellant.

Ben Hayden, Knight & Lord, for respondent.

By the Court, PRIM, J.:

This action was brought to recover damages for injuries sustained, as is alleged, through the negligence of the agents and servants of the appellant. The appellant was a corporation and the owner and proprietor of a steamboat named the "Occident," which was employed by the appellant in conveying passengers and merchandise on the Willamette river, from Portland to Independence, Oregon, for hire; and was also the owner and proprietor of a wharf at the foot of Trade street, in the city of Salem, Oregon. The appellant received the respondent into its said boat for the purpose of carrying him safely therein as a passenger from Portland to Independence, Oregon, for the usual fare. That before reaching Independence the appellant stopped its said boat at its wharf in the city of Salem, on the night of the seventh day of December, for the purpose of discharging its freight and passengers. That while it was so stopped and employed in landing its passengers, the respondent, having occasion to go ashore on business, in passing from said boat to the wharf stepped off the boat and fell, breaking his right arm and sustaining other injuries. That the night was dark and rainy, and there were no lights on the boat and wharf, or none sufficient to enable the respondent to see plainly his way ashore. The respondent was without blame, unless going ashore at that place with-

*See 34 Am. Rep. 575.

out permission of the appellant shall be considered such. A judgment was recovered against the appellant in the court below, from which an appeal is taken to this court.

The theory of the appellant is that respondent having employed the company to carry him safely from Portland to Independence, should have remained on the boat without going ashore at any intermediate point until the boat reached his place of destination. That when its boat stopped at its wharf at Salem for the purpose of discharging its freight and passengers, it was not obliged to furnish the respondent a safe means of egress from its boat to its wharf, although he may have had business ashore at that point; that his attempt to go ashore there was at his own risk, and that the appellant was not responsible for any injury that may have resulted to him in consequence of the accident.

At the trial of the case the court was requested by the appellant to instruct the jury as follows: "If you find that the plaintiff took passage on the defendant's boat at Portland for the town of Independence, and that he attempted to land at a way port without the permission of the defendant, then in so doing he was not a passenger, but took upon himself the risk of receiving injury in landing from and returning to the boat, and he can not recover in this action unless you find such negligence on the part of the defendant as would render it liable to a person not a passenger." The refusal of this instruction is the principal ground of error complained of by the appellant.

To sustain this proposition the appellant cites the case of *State v. Grand Trunk Railway Company of Canada*, 58 Maine, 176. While the syllabus of that case sustains the proposition, the facts of the case are not at all analogous to the one under consideration. That was a criminal case, and the indictment charged the company with negligently and carelessly running their locomotive against one Pullen, by means whereof he was killed. He had purchased a ticket at Auburn for Portland. The train turned out on the side track at an intermediate point to await the express train from Portland, which was behind time. The deceased got

off the car while it was standing there, crossed the main track and went behind the water tank for a necessary purpose. While there the express train signaled its approach and the conductor of the waiting train gave the usual notice for passengers to resume their seats, which the deceased did not hear, but did hear the double whistle, and thereupon rushed from behind the water tank, but not seeing the approaching train on account of the intervening water tank, undertook to recross the main track, when he was struck by the engine of the express train and so injured that he died in a few hours. Thus it will be seen that the train had not stopped at a depot for the purpose of discharging its passengers, nor was the deceased injured on account of the means of egress and ingress to the car being in any way defective and unsafe, nor does it appear that there was any negligence on the part of the agents and servants of the company. If the respondent in the case had been injured by another boat running against him after he had safely reached the wharf it would have been an analogous case.

A case is cited on the other side in 51 Georgia, which appears to be in point. (*The Montgomery and West Point Railroad Company v. Jesse Baring*, 51 Ga. 582.) One Baring took passage on the road of said company at Columbus, Georgia, to be carried to West Point, Georgia, for the usual fare. The train was stopped on the track at an intermediate point from half an hour to an hour in the night time, to await the arrival of another train of the company, to convey its passengers to its destination. The train stopped over an open ditch six or eight feet deep, at the bottom of which there were rocks and timbers, which ditch was known to the conductor but unknown to the passengers. There were no stationary lights by which it could be seen by him. While the train was standing there the passenger stepped out of the car, and was precipitated into the ditch and had his leg broken and was crippled for life. In that case, it was held by the court that he had the right under the circumstances to step out of the car, and that the company was liable for damages for the injuries resulting to him, on the ground of negligence.

Under the facts and circumstances of the case under consideration we are of opinion that the respondent had the right to go ashore at Salem, and that appellant was obliged, through its agents and servants, to provide him a safe means of egress from the boat to its wharf. It follows from this conclusion that it was not error to refuse the instruction requested.

The judgment is affirmed, with costs.

COLIN McRAE, Appellant, v. V. S. DAVINER et al., Respondents.

A Purchase at an Execution Sale by a sheriff depends upon the judgment, the levy, and deed. All other questions are between the parties to the judgment and the sheriff.

Sheriff's Sale—Order of Confirmation Conclusive of Regularity of Sale.—By sec. 293, subd 4. of the code, an order confirming a sheriff's sale is a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit, or proceeding whatever.

Appeal from Union County. The facts are stated in the opinion.

M. Baker and R. Eakin, for appellant.

L. O. Sterns, John J. Balleray and F. M. Ish, for respondents.

By the Court, Prim, J.:

This suit was commenced in equity to set aside a sheriff's sale of real estate, made under and by virtue of an execution, and is based upon the following facts: On October 21, 1876, V. S. Daviner, one of the respondents, recovered a judgment against the appellant, in the circuit court of the state of Oregon for the county of Union, for the sum of two thousand and fifty-five dollars and thirty-five cents, and costs of suit. On October 23, 1876, execution was duly issued thereon and levied upon the real estate described in the complaint; and thereafter, on December 11, 1876, such real estate was sold to Joseph Oliver, one of the respondents in this suit. On May 8, 1877, at a regular term of the

circuit court of said county, the said Davinar presented the proofs of sale, to wit, the affidavit of J. H. Stevens, Jr., the certificate of S. O. Swackhamer, the sheriff, and his return on the execution; and there being no objections interposed thereto by said appellant, the sale was duly confirmed by said court. In July, 1877, the time for redemption having expired, and appellant having failed to redeem, the sheriff duly made and executed a deed of said premises to Joseph Oliver. On October, 1878, two years after the rendition of the judgment, this suit was commenced, to set aside the sale on the ground that said sale, order of confirmation, and deed were void. This assumption is based upon the allegation that the time, place, and manner of said sale by the sheriff of said real estate were not advertised according to law in this: 1. That the notice thereof was not published for four weeks in a newspaper in the county; 2. That it does not appear that the notice was posted in three public places in the county where the property was to be sold, for four weeks; 3. It does not appear that the sale was on the day and hour mentioned in the notice; 4. It does not appear that there was no personal property of defendant in execution subject to levy.

Exhibit "A," annexed to the complaint, shows that the notice of sale was signed officially by the sheriff of said county, bearing date November 9, 1876, and, after reciting in substance the execution, is to the effect that he has levied on all the right, title, and interest of McRae in and to the following real property (describing it), and that on December 11, A. D. 1876, at two o'clock P. M., at the court-house door of said Union county, he will sell it to the highest bidder for cash. To this is also attached the affidavit of J. H. Stevens, Jr., to the effect that he was foreman of the Mountain Sentinel, a weekly newspaper published at Union, Union county, state of Oregon, and that the foregoing notice of sale was published in said paper once a week for four consecutive weeks, beginning with the issue of November 11, 1876, and ending with the issue of December 1, 1876.

Exhibit "B" is the return of said sheriff on said execution, which recites, among other things, that there being no

personal property found, he levied upon the said real property and advertised the same for sale at the court house in the said county of Union, state of Oregon, on the eleventh day of December, 1876, by posting up three notices of said sale in three public places in said county, one of which was posted on the court-house door of said county, and by publishing the same in the Mountain Sentinel, the proof of which was thereto attached. And that in pursuance of said notice the same was sold at public auction at said time and place to Joseph Oliver, he being the highest bidder therefor, subject to redemption. Thus it will be seen that the proof and recitals contained in these exhibits show a substantial compliance with the requirements of the statute in the several particulars complained of by appellant. But it appears that there was a valid judgment, levy, and deed. These were all that a *bona fide* purchaser was required to look to. (Rorer on Judicial Sales, secs. 588, 589; *Wheaton v. Sexton*, 4 Wheaton, 503.)

The matters complained of were mere irregularities which did not render the sale void, but were such as were cured by the order of confirmation.

The code provides that such order is "a conclusive determination of the regularity of the proceedings concerning such sale as to all persons, in any other action, suit, or proceeding whatever." (Civil Code, sec. 298, subd. 4; *Dolph v. Barney*, 5 Or. 192; *Matthews v. Eddy*, 4 Id. 225.) Appellant had three remedies: the right to appear and file objections to the order of confirmation of the sale, the right of appeal, and the right of redemption, all of which he has neglected and failed to avail himself of; nor has he made such a statement of facts as would excuse such laches in a court of equity.

We are of the opinion that the decree of the court below should be affirmed with costs.

L. J. SHERMAN, APPELLANT, v. J. D. OSBORN, RESPONDENT.

PLEADING—DENIAL ON INFORMATION AND BELIEF.—Where the plaintiff in his reply used these words: "But whether the defendant was at the time a non-resident of this state, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies the said allegation: *Held*, that this was a sufficient denial of the allegation of non-residence.

APPEAL from Baker county. The facts are stated in the opinion.

L. O. Sterns and John J. Balleray, for appellant.

A. J. Lawrence and L. B. Ison, for respondent.

By the Court, KELLY, C. J.:

This is an action brought upon a promissory note made and delivered by the respondent in the state of Nevada. As a defense to the action, he pleads the statute of limitations of that state in the following words: "That said promissory note was made and became due in Elko county, state of Nevada. That at the time said cause of action arose on said promissory note, the said Rhinehart Brothers, the payees, and this defendant were non-residents of the State of Oregon, and that by the laws of the state of Nevada, in relation to contracts made prior to March 2, 1877, an action could only be commenced upon a promissory note in writing within four years from the time when the same became payable."

Although the respondent's defense under the statute of limitations of Nevada might have been set forth with more precision, we nevertheless think it is sufficient to present the defense relied on by the respondent under section twenty-six of the civil code, which provides that "when a cause of action has arisen in another state between non-residents of this state, and by the laws of the state where the cause of action arose an action can not be maintained thereon, by reason of the lapse of time, no action shall be maintained in this state." We think the court did not err in overruling

the demurrer to the answer. The demurrer to the answer having been overruled, the appellant filed a reply in these words: "But whether the defendant, J. D. Osborne, was at that time, viz., the time when the cause of action arose on said promissory note, a non-resident of the state of Oregon, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies said allegation."

The court held that this was not a sufficient denial of knowledge or information to comply with the statute, and on motion, gave judgment upon the pleadings against the appellant. In this, we hold there was error. It was held by this court in the case of *Robbins v. Baker*, 2 Or. 52, upon a similar denial, and under a statute quite like the one now in force, that it was sufficient.

The judgment is reversed, and this case remanded for trial in the circuit court.

J. A. STROWBRIDGE, APPELLANT, v. THE CITY OF PORTLAND, RESPONDENT.

SEWER IMPROVEMENTS—PROCEEDINGS RELATING TO STREETS DO NOT APPLY.—The common council of the city of Portland, under section 106 af the charter, has power to lay down necessary sewers, and charge their cost to the property directly benefited; and it is not necessary, before proceeding to construct such sewer, that the council shall declare by ordinance that the sewer is necessary, or create a taxing district to be charged with the cost of its construction.

APPEAL from Multnomah County. The facts are stated in the opinion.

W. W. Thayer and Sidney Dell, for appellant.

The common council has made an omission fatal to the assessment, in not having defined and declared the taxing district of the sewer. The complaint shows that the termini of the sewer district are named by the resolution, but the lateral boundaries are not, nor are the lateral boundaries of the latter defined by the law. In ordinary street improvements, the fixing of the termni defines the whole

taxing district, because the lateral boundaries are limited by the charter (section 97) to lots "abutting" on the street, etc. But in case of sewers, the lateral boundaries are not defined by the charter, but that legislative discretion is delegated to the council, indicating the principle of the limit to be the "property directly benefited" (section 106), and excluding the rule for lateral boundaries in other cases. The common council alone has the power, under the charter, to fix the lateral boundaries of the taxing district for the sewer.

That the council has the power to define the district for taxation will hardly be questioned. It may do so under the general right to do everything necessary to the exercise of this delegated power to make sewers; also, under section 78, authorizing it "to determine everything convenient and necessary concerning such improvements." (Burroughs on Taxation, secs. 146, 147; *Hoyt v. E. Saginaw* (1869), 19 Mich. 39; Charter, sec. 106.)

The council can not delegate that power to individuals. It is confined to them. (2 Dillon, M. C., p. 721, n.) The power of the council to pass ordinances to improve streets is legislative, and can not be delegated. (6 N. Y. (2 Seld.) 92.) It can not delegate, unless specially authorized. (56 Ill. 354; 7 Bush Ky. 599, 667; 2 Dillon, M. C., secs. 618, 590, 288, n.; Burroughs on Taxation, secs. 146, 147; Gilm. Ill. 416.) The legislature may define how large the taxable community may be, whether state, county, ward, etc. (58 Pa. St. 320; 104 Mass. 236.)

Defining the taxing district by the council is a fundamental act. Without it, the assessment and all subsequent proceedings are void.

On the Charter. Section 106 declares that when [after] the council shall direct the same [expense] to be assessed on the property directly benefited, "such expense shall in every other respect [*i. e.*, other than the limit of the district and mode of apportionment] be assessed and collected in the same manner as is provided in case of street improvement." And section 79 provides for ten days' "notice thereof by publication." This notice stands in the place of process

in proceedings. (*Scammon v. Chicago*, 40 Ill. 146.) And it is plain that no process could be served or issued unless the parties or the property to be affected were ascertained with convenient certainty; in a word, unless the taxing district were previously defined and declared. *A fortiori*, notice could not be given where it was not known who were intended to be affected. Notice, then, is a fundamental act, the absence of which voids the assessment. (6 Or. 395.) And as the notice would be void for uncertainty in the absence of a declaration, "by the law or charter," of the property and persons proposed to be affected, it follows that the defining of the taxing district prior to notice is absolutely essential and fundamental. Also, to make a remonstrance possible, under section 81. Also section 80, "must specify," etc., taken with section 106, is an express direction to define it.

On principle and authority. This proceeding is the creation of a lien against the will of the lot owner, and since, as we have shown, no one but the council can define the district to be taxed, it is plainly essential to the claim of lien by the council, that it should specify what property it proposed to affect by the lien; just as in any other statutory lien the property proposed to be affected must be described in the original notice of lien, with sufficient certainty, or else it is void. The obtaining of this lien is the sole purpose of this proceeding; and the defining of the district to be taxed for the proposed improvement is the first necessary step. No more particularity of description of the lien is then required, because it only then affects the general rights of notice and remonstrance. It is a fundamental right of the property owner to have all the property in the taxing district assessed, and when a lot is omitted the assessment is void (51 Cal. 15); therefore, it is essential to this right that the district should be declared. Making sewer does not give the lien, but a strict compliance with the statute does. "Municipal liens rest upon the law alone." (79 Pa. St. 272), and "the power to assess the cost of improvement as a lien can not arise from benefit to the abutting owner."

Jurisdiction to create lien is acquired step by step (61

Barb. 469), and everything having the semblance (52 Mo. 133) of benefit to the owner must be complied with before lien is acquired or liability accrues by building the sewer." (48 N. Y. 496; 6 Or. 66.) The result of the decisions as stated by Mr. Cooley (Con. Lim. 494, 502) is that a tax must be uniform throughout the taxing district. A state tax is to be apportioned through the state; a county tax through the county; a city tax through a city. If the rule of apportionment is uniform throughout the taxing district the constitutional provision is not violated. (52 Cal. 20.) And this is also a principle of general law that taxation or assessment shall be equal and uniform. An assessment is in the nature of a tax and implies ratio. (29 Mich. 504.) Every requirement of the charter must be strictly pursued unless so purely formal as in no way to bear upon the protection or the right of the parties to be affected.

The declaration of intention to construct the sewer and defining the boundaries of the sewer district must be by ordinance. Compare the following sections of the city charter, to wit: 39; 38, par. 26; 78; 80; 101; and 106 adopts the old act. (27 Cal. 630.)

The "probable cost" must be assessed prior to the construction of the sewer; which has not been done. (City Charter, secs. 82, 84, 85, 102; 2 Dillon M. C., secs. 605, 610, 654; 2 Or. 81.) After one assessment, no power to order another. Hence mode prescribed must be pursued. Previous assessment is notice of the particular property on which lien is claimed and amount.

The next step is the ordinance declaring the time and manner of doing the work. It delegates a discretion to the committee on streets and is void. It provides for a sewer of ten, twelve and fifteen-inch pipe, and adds, "with catch-water basins, man-holes, lamp-holes, sockets, and branches at such points as the committee on streets and public property may designate." (2 Dillon M. C., sec. 618, citing 56 Ill. 354; 1 Id., sec. 60, citing 6 N. Y. (2 Seld.) 92.) City Charter, sec. 101: "Council must provide." (9 Barb. 152; 43 Mo. 359; 46 Id. 100; 52 Id. 133; 50 Ill. 28; 2 Dillon M. C. 605, n. 2: "Liable to abuses;" 56 Ill. 354; 60 Ill. 441, 572.)

This delegation is the door of fraud. Assessment void, because no time nor manner of giving notice of letting the contract was fixed by ordinance or otherwise, and nothing to declare what a "proper notice" was. This was a discretion imposed on the common council to decide and determine, and failing to do so, there was no legal notice. The charter, sec. 101, requires the council to accept or reject the bid, and vests in that body a discretion as to bids by lot owners. But the council never acted on the bid, and, therefore, the contract is void.

Omission of street railway property and Corbett's four lots voids the assessment. Street railway liable to assessment. (32 Cal. 409, 499; 38 Conn. 42; 10 Ohio St. 159, 164; 12 Iowa, 112; 60 Ill. 441.) If one lot is left out of the assessment, it violates the rule of uniformity and ratability, and it is void. (51 Cal. 15; 31 Id. 241; 32 Id. 409, 499; *Upington v. Oviatt*, 24 Ohio St.)

The proviso to section 106 of the city charter does not authorize the council to delegate its power of *assessment* to three disinterested persons. It only authorizes them "to estimate and determine"—not to assess—"the proportionate share of the cost of the sewer" that ought "to be assessed"—not to the lots or parts of lots, but "to the several owners of the property" which has already been declared by the council to be "benefited thereby." (40 Ind. 235.) Assessment should show the amount each lot is liable for, though there are different owners. It requires the most explicit language to authorize council to delegate its power. (6 N. Y. 92.) The proviso certainly does not authorize the three to define and declare the taxing district; nor to declare what property in that district is directly benefited; nor to estimate and determine what the whole cost of the sewer is or may be; nor to apportion it among the several lots and parts of lots, according to the ratio of benefits. But it assumes all these to have already been done, at the time the three are appointed.

The law requires (sec. 106) the assessment to be in the ratio of direct benefits, and not in the ratio of cash value.

The true rule is the direct increase in the market value, which in this case is shown by the bill to be equal for each lot in proportion to its superficial area; and that by cash value is not according to benefits. (Burroughs on Taxation, sec. 148, p. 472.) City charter, sec. 106, prohibits cash value as mode. (2 Dillon M. C., p. 693, sec. 596 n.) If for benefits, "frontage not sufficient, and the report of commissioners must show it was on right basis." (36 Conn. 66; 20 N. J. L. 104, 115.) "Cash value without improvements" wrong discrimination. (2 D. M. C. sec. 620, citing 4 Scam. Ill. 78; 35 Mich. 159; 51 Cal. 15; 32 Id. 499.) "Just and equal" means "benefits." May be by frontage benefits or superficial contents. (28 Cal. 325; 2 Brod. & B. 691, 10 Coke, 143 a.) "Assessment for sewers ought to be according to quantity of their land, tenants, and rents and by acres and perches according to rate of every man's portion, tenure or profit, or by the quantity of the common or pasture or of fishing or other commodity." Primarily by "acre;" if other interests, by rents, etc. Per acre good. (2 Strange, 1127; 2 Maule & S.; 3 Barn. & Ald. 21.)

By superficial area held good in 48 Miss. 367; 38 Id. 652; 27 Id. 458; 21 Ark. 40; 14 La. 498; in which last case it is intimated that as it costs as much to protect one acre of land from overflow as it does to protect another, the apportionment not unjust. Also 27 Mo. 497; 36 Id. 456. Equity has jurisdiction to set aside the assessment. (2 Or. 146; 17 Wend. 660, 668.)

Equity, where the assessment is void, will not refuse to set it aside on the maxim that "he who asks equity must do equity," because the defendants have no equity to be done. If they have acquired no lien, then they have no rights, but their proceedings constitute an illegal cloud which plaintiffs have a right to remove. (*Upington v. Oviatt*, 4 Ohio St.; *M. Steese v. Oviatt*, 24 Ohio St.) The defendant had a right and equity because, notwithstanding defects, it could recover a *quantum velebat*, and it did not appear but what the amount assessed was reasonably worth it.

J. C. Moreland, City Attorney, and J. H. Reed, for respondent:

The authority relied on by the respondent is found in the charter:

"Sec. 106. The council shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvement of streets prescribed in sections ninety-seven and ninety-eight of chapter eight of this act shall not apply to the construction of such sewers or drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in case of street improvement; *provided*, that the council may, at its discretion, appoint three disinterested persons to estimate and determine the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby."

The complainants allege that the council ought to have first established what their attorney is pleased to term a "sewer district." But there is no authority whatever for such a proceeding. The council, in this case, caused a notice to be published—and in the notice it was stated that certain property would be assessed. This was a matter purely *ex gratia* and can not affect this cause. They were under no obligation to give any notice, or publish any resolution. Their authority is found in the section quoted, and there is certainly nothing in that which requires the council to give a notice, or establish anything which could be called a sewer district. They have the power to appoint three disinterested persons to establish and determine the proportionate share of the cost of such sewer to be assessed to the several owners of the property benefited thereby. This was done, their report was adopted by the common council by ordinance; and we insist that their action in this matter is final, and will not be set aside, or revised by a

court of equity, except for fraud, accident, or mistake, and neither of these is alleged.

As was said by Judge Cooley, in a similar case: "So long as the common council keeps within the limits of its jurisdiction, as defined by the constitution and statutes of the state, and its members are guilty of no intentional wrong or corrupt conduct in the discharge of their official duties, the courts have no power to control the exercise of their legal discretion, or to overrule and set aside their judgment; but must accept their conclusions as warranted by the facts, and as binding alike upon the city and upon all of its inhabitants." (*Motz v. Detroit*, 18 Mich. 516. This was cited and approved in 43 Ind. 197.)

Acting within the scope of their jurisdiction, the findings of the common council can not be impeached, except for fraud. Their discretionary power is not subject to review. (Charter sec. 139; 48 Ill. 285, 293, 296; 2 Or. 298; Dillon on Mun. Corp., secs. 58-476; High on Injunctions, sec. 785; Cooley on Taxation, sec. 528; 32 Barb. 410; 4 Johns. Ch. 344-353; 6 Johns. 28; 25 N. Y. 312; 46 Id. 109; 48 N. Y. 518.)

The allegation that there is property along the line of the street which is benefited will not render the tax void. The case upon which counsel founds his argument upon this point (51 Cal. 15) contains a complete refutation of his position. (See 22 Ill. 311.)

We admit the rule that the burden of taxation must be uniform. This is a constitutional provision and must be observed, but it must be enforced with a view to give the constitution a practical operation. As was truly said in 10 Wis. 242 (quoted with approval in 51 Cal.), "when mere mistakes occur on the part of officers who are endeavoring, in good faith, to discharge their duties, this ought not to invalidate the whole levy." And we respectfully submit that any different view would render nugatory the whole taxing power. But this matter of the benefit to property not included in the assessment, as alleged by complainants, is simply a difference of opinion between the viewers and

the appellants, and certainly a court will not undertake to settle such difference. (60 Ill. 441.)

Appellants claim that the council ought to have ascertained and declared the probable cost of the sewer as is provided in sections eighty-four and eighty-five of the charter in case of street improvements. To this we answer: 1. Those sections do not and can not apply to the construction of a sewer. Section one hundred and six, we insist, furnishes the only rule, and if so, there is no such thing as declaring the probable cost before a contract is let. 2. Sections eighty-four and eighty-five are merely directory and are not mandatory, and the failure of the council to take this step certainly would not invalidate this levy and render the whole assessment void. The omission to take this step injures no one. There is no failure of jurisdiction, and the same presumption at least ought to attach to the proceedings of the common council as attaches to courts of inferior jurisdiction; *i. e.*, that when once a jurisdiction is established all steps that ought to have been taken are conclusively presumed to have been taken. It will be further seen that in sections eighty-four and eighty-five the words "probable cost" are used, while in section one hundred and six, in speaking of sewers, the words "proportionate share of the cost" are used. It would involve an absurdity to say that the council should estimate the "probable cost," and afterward, when the work was done, appoint three disinterested persons "to estimate and determine the proportionate share of the cost" to each owner benefited. Section one hundred and six must stand alone in that regard.

The allegation in their complaint, that the sewer is a benefit to Yamhill street, constitutes no objection to this assessment. The city has no property in the street. The fee is owned by the adjoining lot owners, subject only to the rights of the public to use as a highway. (See 84 Ill. 227; *Bigelow v. Chicago*, Chicago Legal News, Jan. 1879.) But the main objection to the assessment, and the one which was uppermost in the minds of the complainants in seeking this injunction, is the mode adopted by the viewers in making their assessment. As alleged in the complaint, they adopted the

mode of apportioning according to the value of the property, irrespective of the improvements, making some allowance for the distance of the property from the sewer. We submit that this was correct. The method of making the assessment is not defined by the charter except that it must be on the property benefited. The mode is left to the discretion of the council, and under section one hundred and thirty-nine of the charter, this discretion, when once exercised, can not be called in question elsewhere.

The appellants maintain that the proper manner of making this assessment was the superficial area, but if we examine section one hundred and six we find that sections ninety-seven and niney-eight do not apply to the construction of sewers and drains, and section ninety-seven provides that the cost of a street improvement is made upon the basis of a superficial area. Judge Dillon, in section six hundred and forty-five of his authoritative work on muncipal corporations, says: "The apportionment" for building a sewer "should be made upon the value of the land independently of the buildings and should be settled at the time of the transaction." (9 Cush. 233; 35 Mich. 155; 35 Conn. 66; 7 Cush. 200; Burroughs on Taxation, secs. 147, 148; 38 N. J. L. 171, 190.)

Courts of equity will not grant relief when there is a plain, speedy, and adequate remedy at law. If the allegations of plaintiffs' complaint be true they have this remedy at law. They had a complete remedy under our writ of review. "If the power to levy the tax exist, and the property be subject to taxation, mere errors and irregularities should, according to the better considered view, be corrected on certiorari or other appropriate proceedings, or their effect left to be tested at law." (Dillon on Mun. Corp., sec. 787; 5 Wallace, 413-419; 14 N. Y. 534.)

An injunction will not lie to restrain the collection of a tax, unless there are some special equities to render the tax unjust and illegal. (High on Inj. 785.) As to the allegation of cloud upon title, respondents say that if the proceedings are void upon their face, and need no extrinsic evidence to establish such invalidity, they can not cast any cloud upon

their title. (1 Deady, 491; 5 Wallace, 418; 14 N. Y. 534, 541, 542; 47 Mo. 479; 26 Wend. 131; Dillon on Mun. Corp., sec. 476; 9 Paige, 16, 388.) "Courts of equity will not interfere where the act complained of in levying the tax was done according to the best judgment of the assessors, fairly and impartially." (4 Johns. 353, 354; 1 Cal. 455.)

There are no equities in the complaint. This was the principal ground upon which the court below decided this cause for the respondents. In passing upon this point the court said: "The general and well-established doctrine is, that when property is subject to taxation, and the tax is a legal one, equity will not interfere simply because there are irregularities in the assessment. Thus Mr. Dillon says: 'When the defect complained of is merely formal, not impeaching the justice of the tax or assessment, and the plaintiff ought to pay the amount, equity will not interfere, but leave him to his legal remedies.' A large number of cases are cited as sustaining the doctrine." (Dillon on Mun. Corp., sec. 738.)

"In Indiana it is held that where the owner of real estate in a city stands by and sees a street improved adjoining his property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he can not, after the work is completed, or nearly completed, refuse to pay for it. In Michigan, this view of the estoppel of the property owner is taken. In Kansas, it is decided that courts of equity will not interfere to restrain by injunction the collection of taxes, when the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the assessment. There must be a tender of what is equitably due. These are citations from Mr. Dillon's note to the section quoted, and the author adds that the same view is substantially taken by the supreme court of Missouri."

"Who seeks relief from an over-assessment must pay what is justly due. So one who sought to have an invalid tax deed set aside as a cloud on title, he having been in default in not paying his taxes, was relieved only on paying all taxes paid by the holder of the deed. (Story's Equity Jur., sec.

63, note.) These are citations from Mr. Story to illustrate the doctrine of the maxim, 'He who seeks equity must do equity.'"

"In 24 Ohio State Reports, the same principle is applied in a case much like this. In that case a suit by injunction was brought to enjoin the collection of an assessment upon certain lots in the city of Akron, made by authority of the city council, to pay the expense of grading and paving a street. The statute required an advertisement for bids for the work to be published four weeks in two of the newspapers in the city. The court said that this provision was intended for the protection of the tax-payers, to secure competition among contractors, and prevent favoritism and fraud, and that it must be regarded as peremptory; that not having been complied with, the defect was substantial; that it went to the legality of the contract and of the subsequent assessment. The contract having, however, been let and the work done, it was held that equity would not interfere so long as the amount charged upon the lots was no more than the reasonable value of the work ratably chargeable upon such lots; that it would only interfere if the assessment was more than was properly chargeable upon the property, and then only to the extent of granting relief against the collection of the excess." (24 Ohio St. 246.)

"As already stated, it is expressly admitted in the petition in this case that these lots 'are all within one hundred feet of Yamhill street;' that they 'all lie along the line of said sewer, and are directly benefited' by it, and it is admitted also that the lots directly benefited are legally chargeable with the cost of the sewer." "The case is thus clearly within the well-established rule laid down by the authorities cited. The alleged irregularity of the assessment affords no ground for the interference asked for. If the lots of the petitioners are assessed more than their ratable proportion, the court will not, for that reason, relieve the petitioners from payment of their ratable proportion." "They must show a willingness to pay what is due *ex aequo et bono* before this court will interpose in their behalf. This they refuse to do. They ask to be relieved from all liability on ac-

count of work which they admit is for their benefit, and for which they admit their lots are equally chargeable. If it is true, as claimed by counsel for petitioners, that it is threatened to enforce against them a pretended right or lien, which, by reason of the irregularities complained of, does not exist in law, their rights against such threatened attempt are legal rights, which will only be enforced in courts of equity when they rest upon equitable grounds." (See Dillon, sec. 737; Cooley on Taxation, 540; 1 Dan. Ch. Pr. 385, 386.)

These complainants come before this court of equity saying that their property has been benefited; that the city had authority to make the assessment, and yet asking that they may be relieved from all liability. There is nowhere in this charter any power or authority to make a reassessment. If this tax be declared void, either the contractor who constructed the sewer, or the city, must suffer the loss, while these complainants will reap the benefits. If courts of equity are created for the purpose of enforcing such an inequitable decree as this would be, then the ideas prevalent in regard to such courts need reconstruction.

By the Court, BOISE, J.:

This is a proceeding by injunction to restrain the defendants in the collection of certain assessments for the construction of a sewer in Yamhill street, in the city of Portland, and to declare such assessments illegal and void.

The petition alleges in substance that on the twenty-seventh day of June, 1878, the common council of the city of Portland passed a resolution to the effect that notice be given that the council propose to construct a sewer in Yamhill street within specified points and of specified dimensions; "the expense thereof to be assessed upon the property benefited."

That on the sixth day of July following, a notice of the proposed sewer improvement was published in the Daily Standard newspaper, daily, from ten days from said date. This notice concluded as follows: "The expense thereof (of the sewer construction) to be assessed upon the property benefited thereby. It is hereby understood that the property benefited will include all lots or parts of lots

lying within one hundred feet of Yamhill street on either side thereof, and between Front street and the termination thereof."

That within ten days from the publication of this notice a written remonstrance against the proposed improvement was made and filed by the owners of two thirds in value, but not quite two thirds in area, of all the property adjacent to that part of Yamhill street described in the notice.

That on the twenty-second day of August, 1878, an ordinance, numbered 2246, was passed, "providing for the time and manner of improving Yamhill street from the Willamette river to a point one hundred feet west of the west line of Tenth street by putting in a sewer at the expense of the property benefited." This ordinance specified particularly the character of the improvement to be made; that it should be done to the satisfaction of the committee on streets and public property and the superintendent of streets. The ordinance authorized such committee to advertise for and receive proposals for the work, and to enter into a contract with the lowest responsible bidder or bidders therefor. It further provided that the expense of the sewer should be assessed to the property directly benefited thereby.

The petition further alleges in effect that on the fourteenth day of September, 1878, a notice to contractors for sealed proposals for the construction of this sewer was published in the Daily Bee, as provided in the ordinance, and thereafter the committee entered into a contract for such construction, and that such sewer was constructed prior to December 1, 1878.

That on the fourth day of December the council by a resolution appointed Burrage, Holmes, and Norris to assess the cost of the construction of the sewer, as provided by ordinance 2246, to the several lots and parts of lots benefited thereby.

That these commissioners found the probable cost of the sewer to be five thousand nine hundred and ninety-nine dollars and fifty-four cents; that the property benefited

consisted of all lots and parts of lots lying within one hundred feet of Yamhill street and between the Willamette river and a point one hundred feet west of the west line of Tenth street; and that the commissioners made report that they had "apportioned the estimated cost of said sewer to the several lots and parts of lots and assessed the benefits to be derived therefrom as follows:" (Here follows a table showing the number of each block, the number of each lot or part of lot, the name of the owner and the benefits assessed.)

It is further alleged that an ordinance was passed, declaring the probable cost of the sewer, and assessing the same to the property benefited, according to the report of the commissioners, and directing an entry of the assessment on the docket of city liens, and that notice of this assessment was duly given.

The petitioners allege as grounds of complaint that the probable cost of the sewer was not ascertained and determined, or apportionment or an assessment thereof made to the different lots by ordinance prior to the construction of the sewer; that the council did not defend the taxing district of the sewer; that the commissioners did not apportion the cost of the sewer to the property directly benefited in the rates of benefits accruing; that they adopted the mode of apportioning according to the proportion which the cash value of the lots bore to each other, making allowance for the distance of the lots from the sewer; that the lots are of unequal value in proportion to their area; that Yamhill street is the property of the city of Portland, and that a proportionate cost of the sewer should have been assessed to such street against the city; that certain lots have not been assessed as the names of the owners.

It was argued by counsel that the powers exercised by the commissioners in apportioning the benefits and cost of the improvement could only be exercised by the council.

The petitioners admit that their lots are within one hundred feet of Yamhill street; that they lie along the line of the sewer, and are directly benefited thereby.

The defendants demur to the petition upon the grounds that the court has not jurisdiction, and that the petition does not state facts entitling the petitioners to the relief prayed for.

It is urged that the proceedings establishing this sewer, so far as the same seek to impose a tax on the property of the petitioners, are void, and that the collection of the tax can not be enforced, and that the tax is illegal and not a just lien on the property of the petitioners. Petitioners claim that in order to legally establish the right by the city to construct a sewer, the city council should first declare by ordinance that the sewer is necessary, and describe its location and define the district that is to be benefited and charged with the cost of its construction.

The decision of these questions involves the construction of section 106 of the charter of the city of Portland, which is as follows: "The council shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvements of streets prescribed in sections 97 and 98 of chapter 7 of this act shall not apply to the construction of sewers or drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall in every other aspect be assessed and collected in the same manner as is provided in case of street improvements; provided, that the council may, at its discretion, appoint three disinterested persons to estimate and determine the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby."

This is the only section of the charter providing for or regulating the construction of sewers. It provides that sections 97 and 98 of the charter, providing what lots shall be taxed with street improvements, and in what proportion the assessment shall be made on each, shall not apply to the construction of drains and sewers. These sections provide that the assessment for street improvements shall be proportioned to superficial area of the adjoining lots, so

that the provision in section 106, that these sections shall not apply to the construction of sewers, plainly indicated that a different rule was intended to be established in apportioning the cost of sewers to those directly benefited. The proviso at the end of section 106 directs the manner in which the cost of construction of sewers shall be ascertained and apportioned. The provision in section 106, that when the council shall direct the "expense of construction to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in case of street improvements," simply adopts the means of enforcing against those directly benefited the collection of the tax apportioned to them by the estimate made by the disinterested persons appointed to make the apportionment in pursuance of the provisions of section 106. The mode of inferring these charges on the property benefited is provided for in sections 85, 86, and 87.

The elaborate manner pointed out in the charter for acquiring the authority to construct street improvements does not apply to the construction of sewers. The latter may be laid when in the judgment of the city council the same shall be necessary. They may be made without previous notice, the council alone being the judge of their necessity. Sewers are required as a part of the sanitary regulations of the city, to prevent the development of local disorders, and generally to preserve the public health. It may, and often does, happen in populous towns, that active measures have to be taken by city authorities in sanitary measures, and it would not be wise to leave so important a power, often requiring the most prompt exercise, to the tardy mode provided for inaugurating street improvements. Section 106 alone provides for the manner of making drains and sewers. The only question is, Has the city council properly exercised its powers under such section?

It is claimed by the counsel for appellant that the council should have first declared by ordinance that a sewer was necessary. Such an ordinance was not essential to give them power to construct the sewer. The charter does not

require such an ordinance as preliminary to their proceeding to construct the sewer. No public good would be accomplished by such declaration. When they passed the resolution to construct the sewer, and located its termini, that action showed that in the opinion of the council it was necessary. It is also urged by the appellant that the resolution did not fix the lateral bounds of the district to be charged with the cost of construction.

From what has been said, it follows that the council had power to proceed and lay down the sewer, and then ascertain, by the method provided in the proviso of section 106, what property was directly benefited. So there is nothing in this objection. The proceedings of the council, as set out in the complaint, show that the same are a substantial compliance with the provisions of the charter providing for the construction of sewers. The view we take of section 106 of the charter renders it unnecessary to notice any other points which were discussed in the argument.

The decree of the circuit court will be affirmed.

BEN HOLLADAY ET AL., RESPONDENT, v. S. G. ELLIOTT, APPELLANT.

CORPORATION—SUBSCRIPTION TO STOCK.—Articles were filed, under the general incorporation law, to incorporate the Oregon Central Railroad Company, with a capital stock of seven million two hundred and fifty thousand dollars, divided into seventy-two thousand five hundred shares of one hundred dollars each. Six different persons subscribed one share each, when one of them, in behalf of the corporation, made a subscription in the following words: "Oregon Central Railroad Company, by G. L. Woods, chairman, seventy thousand shares, seven million dollars." *Held*, that this subscription for the company was a nullity, and that those who had subscribed the six shares could not lawfully elect a board of directors and organize the corporation, and that a board of directors elected by them could not lawfully transact business for the corporation.

PARTNERSHIP—DISSOLUTION, WHEN BUSINESS NOT PRACTICABLE.—Where, during the continuance of a copartnership, it becomes impracticable to carry on its business without great loss, a court of equity will decree a dissolution of such copartnership, in a suit brought for that purpose by any one of the partners.

APPEAL from Marion County.

This is a suit begun November 5, 1869, for a dissolution and settlement of a copartnership. The case was referred to a referee to report findings of fact and conclusions of law, and upon his report a decree was rendered, in the circuit court, in favor of the respondents, dissolving and settling the copartnership. From that decree, the defendant, Simeon G. Elliott, brings this appeal.

The facts in the case are substantially as follows: On or about the twenty-second day of April, 1867, a corporation was formed under the general incorporation laws of this state, under the name of the Oregon Central Railroad Company, for the purpose of building and operating a railroad from Portland, Oregon, southward to the California line, on or near the stage road, and having its principal office in Salem, Oregon. The capital stock of the corporation was seven million two hundred and fifty thousand dollars, divided into seven thousand two hundred and fifty shares of one hundred dollars each. On the day the corporation was formed, six different persons subscribed one share each to this stock, and thereupon there was an attempt to subscribe seventy thousand shares by the company, of its own stock, by a subscription, as follows: "Oregon Central Railroad Company, by Geo. L. Woods, Chairman, seventy thousand shares—seven million dollars." Upon the same day, the corporation entered into an agreement with Elliott, acting for A. J. Cook, for the construction of one hundred and fifty miles of road. This contract was modified by a supplemental contract, on November 27, 1867.

On the twentieth of May, 1867, Elliott assigned seven twentieths of this contract to one Perrin, and thereupon Perrin and Elliott formed a partnership under the name of "A. J. Cook & Co.," for the carrying out of the contract in question. On the twenty-ninth of the same month, Elliott assigned one tenth of the contract to one Flint. In April, 1868, he assigned seven twentieths to Froham, and in March, of the same year, he assigned to Brooks two twentieths, and to Gardiner Elliott one twentieth. About the

twelfth day of May, 1868, the appellant, S. G. Elliott, in the name of A. J. Cook & Co., entered into another agreement, or contract, for the construction of the balance of said road from the end of the first one hundred and fifty miles to the California line, being two hundred and ten miles more or less. On the second of May, 1867, A. J. Cook, for a consideration of one dollar, assigned the contract of April, 1867, to the appellant.

On the twelfth of September, 1868, the respondents, Holladay and Emmet, and the appellant, Elliott, formed a partnership for the purpose of taking, by assignment, the contracts of A. J. Cook, and A. J. Cook & Co., with the railroad company, and of constructing and operating one or more railroads in Oregon and the adjacent territories. The interest of each in the partnership was as follows: Holladay, twenty-four fortieths parts; Emmet, ten fortieths; Elliott, six fortieths. This is the partnership involved in this suit. The various interests in the contracts referred to passed to this partnership. It was a part of the agreement of partnership that Elliott should not be required to advance money in carrying out the contracts of construction; but, that when the partnership should realize enough on it contracts to cover expenses, he should be charged with his proportion of the expenses, and that he should be general superintendent in the construction and operating of the road, at a salary of five hundred dollars per month. A further stipulation in this agreement is contained in the following writing, delivered to Elliott by Ben Holladay & Co., that being the partnership name:

OFFICE BEN HOLLADAY & CO.,
PORTLAND, OREGON, September 12, 1868.

S. G. ELLIOTT, Portland—Dear Sir: On our purchase of this date from A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Company for the construction of the railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co. and standing to your credit on their books. This money is stated by you to amount to about twenty-one thousand dollars. When

the accounts are fully made up and the balance correctly ascertained, you will be entitled to our obligations for the correct amount. Respectfully yours,

BEN HOLLADAY & Co.

The partnership of Ben Holladay & Co. built a part of the road under these contracts, and appropriated it to their own use, the O. C. R. R. having no legal organization. Subsequently the partnership sold the road to a new corporation formed to purchase and complete it. While the work was progressing Elliott was discharged from the position of general superintendent for incompetency. The respondents claim that Elliott made false and fraudulent representations, to induce them to go into the partnership in question, as to the financial standing and character of A. J. Cook and A. J. Cook & Co., as to the amount of money advanced by them towards the building of the road, as to the bonds which were available in their hands, the amount of work already done, the cost of completing the road to Salem, and as to his own competency to superintend the construction and operating of the road. The referee, Mr. J. C. Moreland, reported fully upon all the issues in the case, and found that the respondents were entitled to recover from the appellant five hundred and thirty dollars and eighty cents.

The case was tried upon the findings and testimony by Mr. Justice Boise at circuit, and some modifications made in the findings of the referee. The circuit court found for the respondents in the sum of four hundred and seventy-seven dollars, but not for costs.

W. H. Effinger and H. H. Gilfrey, for appellant.

Dolph, Bronaugh, Dolph & Simon, and Thayer & Williams, for respondents.

By the Court, KELLY, C. J.:

The complaint abounds in charges of false and fraudulent respresentations alleged to have been made by the appellant to the respondents, to induce them to enter into the

copartnership of Ben Holladay & Co. These are all denied by the appellant in his answer; and while he sets forth no counter allegations of fraud in the answer, yet he insists that the evidence in the cause establishes the fact that the respondents fraudulently entered into that copartnership, with the sole object of taking from him a large amount of valuable property which he then possessed in the contracts of A. J. Cook and A. J. Cook & Co. with the Oregon Central Railroad Company.

We think the evidence, which is voluminous beyond all precedent in the courts of Oregon, fails to establish these charges of fraudulent conduct either on the part of the appellant or the respondents. Doubtless the appellant made statements which were not strictly accurate as to his qualifications to act as superintendent in the construction of a railroad, as to the value of the property and the contracts owned by the firm of A. J. Cook & Co., and as to the amount of money which would be required to complete the grading of the road from Portland to Salem; yet we are satisfied these statements were not made by him with an intention to deceive and defraud the respondents, or to induce them to enter into the contract of copartnership with him. He undoubtedly at the time believed them to be true; and while we believe that all the parties to it entered into the contract in good faith, and honestly intended to construct the road in accordance with the terms of the copartnership, yet we are equally well satisfied that, under the circumstances, it was an impracticable undertaking. Unquestionably the agreement of copartnership was formed on the basis that the stock and bonds of the O. C. R. R. Co. held by A. J. Cook & Co. were of great value, and that by a sale of them money sufficient could be realized by the firm of Ben Holladay & Co. to go on with the construction of the road, and eventually complete it. Within a year preceding that time, the appellant had sold a number of these bonds, amounting to about thirty-eight thousand dollars, at their par value to parties in Boston in payment for locomotives and machinery for the road. He probably had some reason to believe that the remainder of the seven hun-

dred and seventy-five thousand dollars of bonds could be sold on the same advantageous terms. The fact of this sale to parties in Boston was communicated by him to the respondents during the negotiations which preceded the formation of the copartnership, and probably gave them a high appreciation of their worth; and with this estimation of their value they entered into the agreement of September 12, 1868.

The referee found that these bonds were of no value in the market, and that the "preferred interest-bearing non-assessable stock issued by the O. C. R. R. Co. was illegal and of no value." The circuit court approved this finding of the referee, and we entirely concur in this view of the court below. The reason for this opinion we will now proceed to give:

On the twenty-second day of April, 1867, John H. Moores, J. S. Smith, George L. Woods and others filed articles of incorporation in the office of the secretary of state and in the office of the county clerk of Marion county to incorporate the Oregon Central railroad company. The capital stock was fixed at seven million two hundred and fifty thousand dollars, divided into seventy-two thousand and five hundred shares of one hundred dollars each. On the same day stock books were opened, when six shares of stock were subscribed by six different persons; then followed this subscription: "Oregon Central railroad company, by George L. Woods, chairman, seventy thousand shares, seven million dollars." On the same day directors and other officers were elected, and on the twenty-third day of April, 1867, the O. C. R. R. Co., thus organized, entered into the contract with A. J. Cook to construct one hundred and fifty miles of its road from Portland south through the Willamette valley, for five million two hundred and fifty thousand dollars, to be paid in first-mortgage bonds of the company, payable in twenty years, and to be taken by the contractor, A. J. Cook, at par. Payments of eighty per cent. were to be made by the O. C. R. R. Co. for the work done by A. J. Cook, to be paid every month as the work progressed. The O. C. R. R. Co. also agreed at

the same time to issue two million dollars of preferred stock, unassessable and bearing interest at the rate of seven per centum per annum, and deliver the same to A. J. Cook immediately after signing the contract, and that the common stock of the company should be offered to the people of Oregon at ten cents on the dollar. Afterwards the appellant, who became the owner of the A. J. Cook contract, associated others with him under the firm name of A. J. Cook & Co., and on the twenty-seventh day of November of that year, entered into a supplemental agreement with the O. C. R. R. Co., whereby, in consideration of materials bought for the construction of the road, the company agreed to issue and deliver to A. J. Cook & Co. seven hundred and seventy-five thousand dollars of first-mortgage bonds on its railroad and franchises, and the bonds were issued accordingly. The two million dollars of preferred stock specified in the agreement of April 23 had already been issued and delivered by the O. C. R. R. Co. to A. J. Cook & Co. One million dollars of this preferred stock was given back to the directors of the company according to a private understanding with them, that they were to have it to be used by them in procuring the necessary legislation in Oregon to promote the interests of the corporation. This delivery to the directors of one million dollars left still one million dollars of the preferred interest-bearing non-assessable stock in the possession of A. J. Cook & Co. This is the stock, and these are the bonds, less thirty-eight thousand dollars, which were transferred by A. J. Cook & Co. to the firm of Ben Holladay & Co. upon the formation of the copartnership.

We will now consider more fully the manner in which the O. C. R. R. Co. was attempted to be organized on the twenty-second of April, 1867. The constitution of Oregon, article 11, sec. 4, provides that "the stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed, and no more."

By sec. 14, p. 527, of the general laws of Oregon, it is declared that an original stockholder in a corporation who

makes a voluntary sale of his stock is nevertheless liable to any existing creditors for any unpaid balance due thereon, unless the same be paid by the purchaser. No subscriber to the capital stock of a corporation can be exempt from liability to pay the amount of his subscription any more than he would to pay a promissory note subscribed by him. And it is necessary it should be so in order that a corporation may be enabled to pay any indebtedness created by it. The attempt to subscribe seventy thousand shares to the stock of the O. C. R. R. Co., by the corporation itself through a person styling himself chairman, was done simply to evade the liability which the law imposes on all persons who subscribe to the capital stock of corporations.

This act was a mere nullity, and added nothing to the amount of stock subscribed, which was then only six shares of one hundred dollars each. Those who subscribed the six shares then proceeded to elect the directors and other officers of the corporation. It was under the organization so made and by officers thus elected that the O. C. R. R. Co. transacted its business, and issued the stock and bonds before referred to. The corporation was not organized according to law, but in direct violation of the statute which provides that "it shall be lawful in the organization of any corporation to elect a board of directors as soon as one half the capital stock has been subscribed." (Misc. Laws, p. 526, sec. 7.)

Where the statute prescribes the manner in which a corporation shall be organized, its requirements must be substantially complied with, otherwise it will have no legal capacity to transact any business as a corporation. In this case the attempted organization of the O. C. R. R. Co. amounted to nothing. It was absolutely void. Nor did the joint resolution of the legislative assembly, adopted October 20, 1868, recognizing this corporation as the one entitled to receive the land granted by act of congress, to aid in the construction of a railroad, cure the inherent defects of its organization. It had no power to legally transact any business nor to accept or hold the lands so granted.

Upon the formation of the copartnership of Ben Holla-

day & Co. in September, 1868, the work of constructing the railroad under the contracts of A. J. Cook and A. J. Cook & Co. was continued under the appellant as general superintendent. It was prosecuted with reasonable vigor until December, when it was partially suspended, and from that time until July, 1869, but little work was done. During the month of May only nine men were employed, and during June only eleven on the whole line of the road from Portland to Salem. The appellant was absent in the Atlantic states during the preceding winter and returned too late to commence operations on the road during the months when work could have been prosecuted with the greatest benefit to the firm. The best season of the year for profitable labor in railroad building was suffered to go by with singular inactivity and want of foresight, when we take into consideration the necessity of having the first section of twenty miles completed before the twenty-fifth day of December, 1869, in order to secure the land from forfeiture, which the O. C. R. R. Co. claimed to own. The result was that the appellant was discharged by the firm of Ben Holladay & Co. from their employment as general superintendent, and his alleged inefficiency was made the pretext for the discharge. After he ceased to act as superintendent, on the fourth day of October, 1869, a largely increased force of laborers was placed on the road, far higher wages were paid for workmen, and in this way this section of twenty miles was completed on the twenty-fourth day of December, 1869.

The appellant, however, insists that this lack of vigor in the prosecution of the work was not owing to his incompetency as an engineer, nor to his inefficiency as a general superintendent, but that it was caused by want of money to employ a sufficient force of laborers upon the road. He says that Holladay directed him to discharge some men who were then employed because there was no money to pay them. We think the testimony clearly shows that one of the chief causes why the work progressed so slowly during the spring and summer of 1869 was the inability to procure the funds necessary to carry it on more vigorously. At the time of entering into the copartnership and for some months

afterwards the respondents expected to obtain sufficient money to construct the first section of twenty miles by a sale of the bonds of the O. C. R. R. Co., which Ben Holladay & Co. had received from A. J. Cook & Co. In this they were disappointed. Emmett, Goldsmith, and others had tried in vain to negotiate these bonds and found it impossible to sell them at any price. The evidence shows that they were worth nothing in the money markets of the country. The reasons for this are quite apparent from the testimony in the case. Suits had been commenced in the United States circuit court and in the circuit courts of this state against the O. C. R. R. Co. to test the legality of its existence as a corporation, and they had so far progressed as to foreshadow its overthrow. Joseph Gaston, the president of a rival corporation of the same name, known as the Oregon Central Railroad Co. (west side), had issued circulars and sent them to bankers and brokers in the east, setting forth in language more forcible than elegant, that "the corporation was a humbug and its bonds were worthless." It was known that the company was hopelessly insolvent; that Ladd & Tilton had presented to it for payment certain interest coupons which were protested for non-payment, and that there were no subscribers to the capital stock of the corporation, from whom any money could be collected to defray the rapidly accumulating interest on the bonds, and its preferred interest-bearing stock. Under these circumstances it could hardly be expected that the bonds offered for sale would be considered of any value anywhere.

But it is contended by the appellant that the respondents were under obligations to furnish the means to construct the road. It is stipulated in the articles of copartnership that the appellant shall not be called upon to advance any money out of his own private means towards the work undertaken by the copartnership, and an inference might be raised that the respondents were required to do so. But it can hardly be presumed in the absence of any express stipulation in the agreement that they were to furnish out of their own private funds many millions of dollars to build a railroad, and, as it should be constructed in sections of twenty miles, transfer the same to the O. C. R. R. Co. for its worthless bonds,

and its equally worthless stock. To have gone on and attempted to complete the road under the contracts of A. J. Cook & Co. with that corporation, would have been simply an act of folly. It would have bankrupted not only Ben Holladay & Co., but financially ruined every member of the firm. In short, we consider that it was an impracticable undertaking to construct the railroad under the copartnership of Ben Holladay & Co., and in such cases courts of equity will decree a dissolution of the copartnership, where any one interested in it brings suit for that purpose. (*Fogg v. Johnson*, 27 Ala. 432; *Durbin v. Barber*, 14 Ohio, 317; *Brien v. Harrison*, 1 Tenn. Ch. 467; Story on Partnership, sec. 290.)

Having taken this view of the case it becomes unnecessary to consider many other questions raised by counsel, and the only matter remaining to be considered is the disposition of the assets, and the payment of the debts of the firm.

At the time of entering into the copartnership the firm of Ben Holladay & Co., in consideration of the transfer to it of the property of A. J. Cook & Co., agreed to pay the indebtedness of that company, including a debt due to the appellant, then estimated at twenty-one thousand dollars. Some time after the formation of the copartnership, Ben Holladay & Co. gave the appellant a written instrument to this effect, which was antedated so as to conform to the date of the agreement. It is as follows:

OFFICE OF BEN HOLLADAY & CO.. }
PORTLAND, OREGON, September 12, 1868. }

S. G. ELLIOTT, Portland—Dear Sir: On our purchase this date from A. J. Cook and A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Co. for the construction of a railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co., and standing to your credit on their books. This money is stated by you to amount to about twenty-one thousand dollars. When the accounts are fully made up and the balance correctly ascertained, you will be entitled to our obligation for the correct amount. Respectfully yours,

BEN HOLLADAY & CO.

This writing was accepted by the appellant, and the question now to be determined is how much, if anything, there is due upon it by the firm of Ben Holladay & Co. to the appellant. The respondents contend that there is nothing due to him, and so it was found by the referee. We think, however, that he erred in his findings of fact in regard to this indebtedness. The basis of the referee's finding was a statement of what purported to be the account of S. G. Elliott with A. J. Cook & Co., amounting to sixty-four thousand one hundred and nine dollars and eighty-two cents, which was made out by a Mr. Cushman for Judge Shattuck, and offered in evidence by the attorney for respondents. The appellant at the time protested that this was not a correct account from the books of A. J. Cook & Co., and we are satisfied it was not. Mr. Cunningham, the book-keeper of Ben Holladay & Co., testified that there had been expended up to the twelfth day of September, 1868, the sum of seventy-two thousand four hundred and ninety-six dollars and fifty-eight cents. The appellant claims that the books of A. J. Cook & Co., as made up by Mr. Harriman, show that the amount of his account against that firm was eighty-one thousand four hundred and fifty-five dollars and thirty-one cents. These books are not in evidence, and we have not even a transcript of the account before us. Mr. Holladay, in his testimony, states that the firm of Ben Holladay & Co. agreed to pay the appellant the amount which the books of A. J. Cook & Co. would show that he had expended for that firm. Soon after the formation of the copartnership, Mr. Holladay employed Mr. Harriman, a competent book-keeper and accountant, and sent him from San Francisco to Portland to adjust the account of the appellant with A. J. Cook & Co. This duty was performed in the fall of 1868, and Mr. Harriman died soon after and before his deposition could be taken. It must be presumed when he made a statement of the account that it was a full and correct one; and that he took into consideration and passed upon the several items which the referee charged against the appellant in his fifty-first finding. From the best evidence before us we are satisfied that Mr. Harriman found the amount of twenty-one

thousand dollars to be due to the appellant, and that he is now entitled to that sum, less the amount which was paid to him by Ben Holladay & Co.

In his evidence, Mr. Holladay states that at various times the firm of Ben Holladay & Co. paid to the appellant, on account of this indebtedness, sums amounting to about nine thousand dollars. The appellant, on the other hand, says he received only six thousand two hundred and ninety-nine dollars and sixty cents. However, in an amended answer which he proposed to file in this suit, and which was sworn to by him on June 1, 1871, he denied that any part of this sum of twenty-one thousand dollars had been paid by the firm of Ben Holladay & Co., except the sum of about eight thousand dollars. This admission under oath must be taken against him. Deducting that sum from twenty-one thousand dollars leaves twelve thousand dollars, and interest thereon since September 12, 1868, due to the appellant from the firm of Ben Holladay & Co.

At the time this suit for a dissolution of the copartnership was commenced, the assets of the firm of Ben Holladay & Co. consisted in part of a section of twenty miles of railroad, then nearly completed. By the terms of the contract entered into between the O. C. R. R. Co. and A. J. Cook & Co., the latter firm was to receive thirty-two thousand dollars per mile for the construction and equipment of that portion of the road, or six hundred and forty thousand dollars for the twenty miles. This sum was to be paid to the firm of Ben Holladay & Co. under the contract of A. J. Cook & Co., in bonds of the O. C. R. R. Co., which we consider were of no value for reasons already stated. That corporation, however, having no lawful organization, the respondents appropriated and converted that section of the railroad to their own use and benefit, and subsequently sold it to the Oregon and California railroad company, a new corporation organized to complete it.

The amount of money necessarily expended in constructing that section of the road can not be satisfactorily ascertained from the evidence in the case. On this point it is meager and uncertain, and the statements of the parties

differ very widely. The appellant places it at four hundred and twelve thousand three hundred and eight dollars, including the sum of eighty-one thousand four hundred and fifty-five dollars paid out by A. J. Cook & Co. prior to September 12, 1868, while on the part of the respondents the book-keeper of Ben Holladay & Co. states that they paid out six hundred and sixty-eight thousand nine hundred and ninety-one dollars from September 12, 1868, to December 24, 1869, in completing that section of twenty miles. This sum is given by him as the aggregate of the expenditures taken from the books of the firm. The items of the account are not set forth, and we can not, therefore, determine whether the whole amount is properly chargeable for building the road or not. The referee found that the total amount paid out by the firm of Ben Holladay & Co. in the construction of the road, exclusive of the sum paid to the creditors of A. J. Cook & Co., was five hundred and ninety-six thousand five hundred and ten dollars, but he did not say whether all of it was expended upon the first section of twenty miles, or whether part of it was paid out for work done on the road between that section and Salem.

Inasmuch as the respondents appropriated that section of the road, as well as all the work on the other portions, to their own use, without the consent of the appellant, it may be fairly presumed that it was worth to them what it cost to construct it, including not only what they paid out upon it, but also the unpaid balance of twelve thousand dollars which A. J. Cook & Co. had expended upon it, and which Ben Holladay & Co. assumed to pay to the appellant when the copartnership was formed. Having terminated that copartnership, and excluded the appellant from any participation in the settlement of its affairs and the disposal of its assets, the respondents should be held liable to pay the debts of the firm, as well as those due to themselves, as the amount due to the appellant.

Beside the railroad property belonging to Ben Holladay & Co., that firm had the machine shops, saw mills, wagons, carts, horses, etc., which the respondents also appropriated to their own use, and subsequently transferred to the O. &

C. R. R. Co. There is no evidence as to the value of the machine shops at the time the respondents terminated the copartnership, but, judging from the prices paid for the machinery in Boston by A. J. Cook & Co., the freight, insurance, expenses of putting up the buildings, etc., the value of the machine shops may fairly be estimated at twelve thousand dollars. The book-keeper of the firm testified that Ben Holladay & Co., at the commencement of this suit, had three mills, carts, horses, wagons, picks, and shovels and office furniture worth probably seven thousand five hundred dollars. Of all this property, amounting in the aggregate to nineteen thousand five hundred dollars, the appellant was entitled to four fortieths or one tenth, that being the interest which he had in the copartnership at the time this suit was commenced, making his share therein the sum of one thousand nine hundred and fifty dollars.

We will now proceed to consider the claim of Ben Holladay & Co. to the lands granted by congress to aid in the construction of the O. C. R. R. In law that firm had no title to any of these lands, yet in equity it was entitled to them. All these lands were earned by the money and labor of Ben Holladay & Co., and were in fact afterwards transferred to the O. & C. R. R. Co., and whatever may be realized by the sale must in equity be regarded as part of the assets of that firm, and although the partnership was terminated by the respondents before the lands for the first section were fully earned, yet they will not be permitted to exclude the appellant from his rightful share in the lands by effecting a dissolution of the copartnership a few weeks before the title to them became perfected.

Nearly all the valuable lands embraced within the limits of the railroad grant for the first twenty miles had already been disposed of by the United States government before the grant was made, and the testimony of the agent employed to select and sell the railroad lands shows that up to September, 1875, there had been selected and patented to the O. & C. R. R. Co., for the first section of twenty miles, thirty-two thousand two hundred and sixty-seven and thirty-six hundredths acres, and about the same number of

acres more could be selected whenever the surveys should be made. These lands he estimated to be worth in the aggregate about twenty-five cents per acre, and taking into consideration their inferior quality, their remoteness from market, the taxes to be paid on them, and the expenses of the selection and sale, we think his estimate of their value is not an unfair one, and that all the lands, patented and unpatented, amounting to about sixty-four thousand five hundred and thirty-four acres, were worth sixteen thousand one hundred and thirty-three dollars, of which sum the appellant ought to have the one tenth, or one thousand six hundred and thirteen dollars.

We therefore consider that upon a fair settlement of the partnership transactions the respondents are justly indebted to the appellant in the following sums: Balance of A. J. Cook & Co., indebtedness unpaid by Ben Holladay & Co., twelve thousand dollars; interest since September 12, 1868, thirteen thousand dollars; appellant's interest in machine shops, saw-mills, etc., one thousand nine hundred and fifty dollars; interest since November 5, 1869, one thousand eight hundred and eighty-six dollars; equitable share in land grant, one thousand six hundred and thirteen dollars; eight years' interest on same, one thousand two hundred and eighty dollars; total, thirty-one thousand seven hundred and twenty-nine dollars.

Of this sum the respondents should pay in proportion to the interest which they had respectively in the copartnership of Ben Holladay & Co.; that is, respondent Holladay is to pay twenty-four parts, or twenty-two thousand four hundred dollars, and respondent Emmett ten parts, or nine thousand three hundred and twenty-nine dollars.

It is therefore ordered and decreed by the court that the copartnership of Ben Holladay & Co. be dissolved, and that the appellant, Simon G. Elliott, have and recover from the respondent Ben Holladay the sum of twenty-two thousand four hundred dollars, and that he also have and recover from the respondent C. Temple Emmett the sum of nine thousand three hundred and twenty-nine dollars.

[Upon a rehearing in this suit, had at the same term, the

above decree was so modified as to require Holladay to pay twenty thousand six hundred and thirty-three dollars instead of twenty-two thousand four hundred dollars, and Emmett eight thousand five hundred and ninety-six dollars instead of nine thousand three hundred and twenty-nine dollars. REP.]

JOHN P. SMITH, RESPONDENT, v. MARGARET SMITH, APPELLANT.

MARRIAGE CONTRACT—FRAUDULENT CONCEALMENTS AT TIME OF.—Where a woman before marriage conceals from her intended husband the fact that she had some time before been the mother of an illegitimate child, such concealment is not such a fraud as will annul the marriage.

GROUNDS FOR DIVORCE—FALSE ACCUSATION OF UNCHASTITY.—If a husband or wife either falsely accuse the other of unchastity, such accusation is a sufficient cause for a divorce.

APPEAL from Linn County.

This is a suit by the respondent against the appellant for divorce upon two grounds: 1. Fraudulent representations by the appellant relied upon by the respondent at the time of the marriage to the effect that she had always led a chaste life, while in fact she had prior to such time given birth to an illegitimate child; 2. Cruel and inhuman treatment, by falsely charging the respondent in the presence of others of the crime of adultery with his daughter-in-law.

The allegations relied upon by the respondent were denied by the appellant, except that which related to the fact that the appellant had given birth to an illegitimate child before the marriage. The court granted a decree of divorce.

C. E. Wolverton and N. B. Humphrey, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

The appellant claims that the first count of the complaint which alleges that the appellant was guilty of fraud and false representations or concealments of her real char-

acter, and thereby induced the respondent to contract the marriage, does not state sufficient facts to constitute a cause of suit.

The allegations of the complaint referred to as charging fraud are, that the appellant before the marriage represented herself as having been always a chaste and virtuous woman, and that by reason of these representations the respondent was induced to contract the marriage, and that these representations were false. These allegations being denied, and proof having been taken thereof, we think the evidence fails to show that such representations were made and that the appellant did nothing more than conceal from her intended husband that she had been the mother of an illegitimate child some years before. We think the mere fact of this concealment is not such a fraud as would be a sufficient cause for annulling the marriage. It therefore becomes unnecessary to pass on the question as to whether the allegations in this part of the complaint are sufficient to constitute a cause of divorce, for these allegations are not proven by the evidence.

The appellant also claims that the part of the complaint charging cruelty is not sufficient to constitute a cause of suit. The charge is that the appellant since the marriage has falsely charged the respondent with the crime of adultery with his daughter-in-law. Such an accusation by either the husband or wife against the other has often been held sufficient cause for a divorce, and many divorces have been granted for such causes, and it is now the settled law of this state that such accusation is sufficient cause for a divorce. But while counsel for the appellant concede that this accusation may be sufficient in some cases, they still claim that it is not sufficient in this case, because these accusations were made after the parties were separated and had ceased to live together as husband and wife. We think this makes no difference, for neither a husband nor wife can claim a right to continue the marriage relation while falsely charging the other with unchastity. No domestic happiness or peace can be expected to exist between parties thus falsely criminating each other.

The only question then is, Were the charges made? On this subject there is no doubt, for the appellant alleges the charge in her answer, but offers no evidence even tending to prove it. We think, therefore, that the respondent has made out his case on this part of the complaint, and is entitled to a divorce.

The decree of the circuit court will therefore be affirmed with costs.

DOUGLAS COUNTY ROAD COMPANY, RESPONDENTS, v. CANYONVILLE AND GALESVILLE ROAD COMPANY, APPELLANTS.

PUBLIC ROAD—COUNTY COURT MAY MAKE AGREEMENT FOR APPROPRIATION BY PRIVATE CORPORATION.—A corporation, having been organized to construct a road, located a portion of its road upon a public road, but made no application to the county court to agree upon the extent, terms, and conditions upon which such public road might be used, as provided in section 26 of the corporation law. Afterwards another corporation was organized to construct a road, and made an agreement with the county court as to the extent, terms, and conditions upon which the public road might be appropriated by the corporation as a part of its road. *Held*, that such agreement was valid, and that the corporation first organized had not the exclusive right to contract with the county court for the use and appropriation of the public road, although it first surveyed and located the line of its road on the public highway. *Per* Mr. Justice Boise, dissenting: A road corporation may, when it is necessary and convenient, locate its road on the county road, whether the county court assent to it or not, and having done so, the right becomes property of which the corporation can not be deprived by the county court. The assent of the county court is only necessary to the right to collect tolls upon the road appropriated.

APPEAL from Jackson County. The facts are stated in the opinion.

W. R. Willis and R. S. Strahan, for appellant:

A corporation formed for constructing a road, by surveying, locating, and adopting its line of road, acquires the right to acquire or appropriate land, right of way, public roads, etc., necessary for its purposes. And this right is property. (See Abb. Dig. Law of Corp. 585, sec. 13; 7 Met. 78; 3 Cush. 91, 106; 4 Id. 467; 1 Gray, 340, 360; 16

Curtis U. S. R. 793, 805; Civ. Code, 529, 530, secs. 23, 26; 23 Cal. 324.) When one corporation has acquired this right, no other person or corporation can acquire the same right to the same lands, etc., so as to interfere with the former company. (16 Curtis, 793, 801, 811; Abb. Dig. Law of Corp. 626, sec. 239; 10 Pick. 270; 54 Barb. 389, 390; 1 Gray, 1, 36, 37; 4 Id. 474; 13 Cal. 520; 23 Id. 324, 331.)

The appellant had surveyed, located, and adopted its line of road, and completed about five miles of it, before the respondent was organized. If a corporation does not have the right to appropriate, the county court has no authority or jurisdiction to agree with it to appropriate a public road, under section 26, page 530 of Misc. Laws; and such jurisdiction must affirmatively appear on the face of the record of such proceedings. (16 U. S. Annual Dig. 171, 621, secs. 5, 40, 41; 19 Id. 157, sec. 27; 4 Zabr. (N. J.) 547; 2 Or. 34-40.) The word "appropriate," used in sections 24 and 26, page 530, Misc. Laws, does not refer to the right to acquire lands or the use of the public highway, but to the final appropriation. (Misc. Laws, 529, 530, 533, 534, 535, secs. 23, 24, 26, 28, 40, 47, 52.)

There being no time fixed in the agreement between the county court and the respondent, during which the agreement is to continue in force, either party can terminate it at pleasure. (Fry on Specific Performance, sec. 43, 222-230; 7 U. S. Dig. 172, subd. 191; 39 Wis. 562.)

John M. Thompson and J. F. Gazley, for respondent:

No corporation has the power or legal right to appropriate a highway by user, without in the first place attempting to make an agreement with the county court. (5 Or. 322; Misc. Laws, 530, sec. 26.) The agreement between the respondent and Douglas county was binding on Douglas county, and duly made. (6 Or. 300.)

Generally, as a contract can be made only by the mutual consent of all the contracting parties, it can only be rescinded by the consent of all. (2 Parsons on Con. 677.) The statute fixes the time the agreement is to run, which is at least ten years. (Misc. Laws, 533, sec. 38.)

By the Court, KELLY, C. J.:

The subject matter of this controversy, in one shape or another, has been several times before this court, and certain points of law and questions of fact have been settled by its decisions, which can not any longer be considered as open to controversy. These matters, so far as they are *res judicata*, will be referred to hereafter. The matter especially in contention between the parties is, as to which of the corporations, the respondent or the appellant, is entitled to establish a toll gate and collect tolls on the road running through what is known as the Big canyon in Canyonville and Cow creek precincts in Douglas county.

In 1853, a military road was laid out, under Major Alvord, by Jesse Applegate on substantially the same ground as that now occupied by the road in controversy; and on the sixteenth of January, 1854, the legislative assembly of Oregon territory, by an act passed that day, enacted "that the military road from Myrtle creek in Douglas county to Jacksonville, Jackson county, be and the same is hereby declared a territorial road."

By an act of the legislative assembly, approved October 29, 1860, all territorial roads in this state were declared to be county roads, and by the act of January 17, 1861, were placed under the supervision of the county court. In the case of *Douglas County Road Company v. Abraham et al.* (5 Or. 319), this court decided that the same road referred to in this suit, having been used continuously for twenty-five years by the public, it became a public highway by continued and uninterrupted use. There can, therefore, be no doubt that this road, in August, 1873, when the corporate appellant was organized, was a county road, and under the supervision of the county court of Douglas county. In September, 1873, soon after its incorporation, the appellant employed J. W. Webber to survey and locate its road through the Big canyon, and it is admitted that the line of survey was along and on the county road with some slight deviations, which are of no importance in the consideration of this case. In December, 1873, the Douglas County Road

Company, the respondent, was duly incorporated to construct a plank and clay road through the Big canyon, commencing at the southwest quarter of the northeast quarter of section 34, T. 30 S., R. 5 W., running thence in a southerly direction and terminating at a point where the military wagon road crossed the south line of section 2, in T. 32 S., R. 5 W.

It is admitted that the line of this road, which passed through the Big canyon, is along and upon the county road and substantially over the same route as that surveyed in September, 1873, by the appellant, for its road. On the tenth of April, 1874, the respondent entered into an agreement with the county court for the appropriation, use, and occupation of the road in controversy. In this agreement it was stipulated that the respondent should have the right to collect certain tolls from persons traveling over the road; and in consideration of this privilege the respondent covenanted to bridge the streams, and to keep the highway in good condition for the public travel.

The following are the sections of the law under which the agreement was made: "Where it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used and occupied by such corporations, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of said road." (Misc. Laws, 530, sec. 26.) "Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 26, such corporation may place such gates thereon, and charge and receive such tolls thereat, as such local authorities may consent to, by such agreement, and none other." * * (Id. sec. 28.)

The agreement between the county court and the respondent before referred to was filed in the office of the county clerk but was not entered in the journal of the court, and for this want of record, it is held by the majority of this court that it was ineffectual and inadmissible as evidence in other courts until it was entered upon the records of the county court. And it was only after protracted litigation and through the mandatory power of this court that it was finally, on the thirty-first day of May, 1870, entered upon the journal of the county court. It is unnecessary here to refer to the history of this litigation. It is fully set forth in the opinion of the supreme court in the case of *The Douglas County Road Company v. The County of Douglas*, 6 Or. 300. It must now be considered as conclusively settled, so far as this court can settle anything by its adjudications, that the agreement entered into between the county court of Douglas county and the respondent, on the tenth day of April, 1874, was a valid contract, binding and conclusive between the parties to it. This matter is no longer open to controversy. But the appellant claims that as it was not a party to any of the litigation heretofore had concerning this contract, it is not bound by the decision of the court in reference to it, and it asserts that so far as its rights are concerned, that contract was a nullity. The appellant claims that in the location of its road in September, 1873, it was necessary and convenient for it to appropriate a part of the public highway running through the canyon, and that having surveyed and located its line of road along the county road before the incorporation of the Douglas County Road Company, it had the exclusive right to appropriate the county road as a part of its own road, and that it alone had the right by virtue of its first survey and location to enter into an agreement with the county court for the purpose of making and keeping the road in repair, and charging toll to persons passing over it.

The appellant had a right, under the law in relation to corporations, to enter upon any lands between the termini of its road for the purpose of examining, surveying, and locating the line of it, and to appropriate a strip of land not

exceeding sixty feet in width for its road where the lands belong to private individuals. And it had also the right, in case it could not agree with the owners thereof as to the compensation to be paid therefor, to maintain an action against such owner, to have the value assessed and the land condemned and appropriated to its own exclusive use. And we think that if the appellant entered upon, surveyed, and selected any land for its road, which belonged to private persons, it had the exclusive right from the time of such survey and selection to appropriate the same, and that the respondent could not in any way interfere with such right, nor construct its road upon any such lands. But it does not follow that, by surveying a public highway, and making it a part of its corporate road, the appellant thereby acquired the right to appropriate the same to its exclusive benefit; nor does it follow that the respondent had no right to use such public road as a part of its corporate road, in the same manner as the appellant. The statute contemplates that in the construction of a road by a corporation, it may sometimes be necessary or convenient to use part of a highway, as where it passed through a defile, or where it is difficult to construct a road along side of the public highway, and in such cases it is provided that the public road, or so much thereof as may be necessary and convenient, may be used, or, in the words of the statute, "may be appropriated by the corporation." The road appropriated is not, however, to be here understood in the same sense as in the appropriation of lands belonging to private individuals where the corporation becomes entitled to the property. By the appropriation of part of a highway, the corporation acquires no right except to use the public road in common with all others traveling upon it, unless it makes an agreement with the county court as provided in section twenty-six, above quoted. This section of the statute does not provide that any part of a public road "may be appropriated, or used and occupied," by only one corporation; nor that the first one which so uses and occupies it, or which first surveys it, shall have any exclusive privileges over any other corporation which may

subsequently be organized. And we think it would be unwise and impolitic to construe the statute so as to confer exclusive benefits upon one corporation and exclude all others from the right to compete for the public travel on the public highways.

The old doctrine was, that when a grant of a franchise to construct a road, to build a bridge, or to keep a ferry, was made to a person or corporation, it was an exclusive privilege, with which no other person or corporation could interfere by competition so as to lessen the profits of the first grantee. But this subject was thoroughly discussed in the case of *Charles River Bridge v. Warren Bridge* (11 Pet. 421); and the right of exclusive franchises of this kind in favor of the first grantee was completely overthrown. (*Indian Canyon Road Co. v. Robinson*, 13 Cal. 519.)

If we were to give the construction to the statute contended for, then the appellant, having first surveyed and selected the part of the county road through the Big Canyon, could virtually fix its own rate of tolls for traveling over the road, and the county court would either have to make a contract acceding to its demands, or suffer the road to become impassable for the want of necessary repairs. If the county court should make no agreement, the appellant could nevertheless appropriate and use the road, while it would be under no obligations to make any repairs upon it, and could refuse to do so until necessity would compel the court to yield to the terms demanded. We do not say that this would have been the case, but it might have been, and we should not give such a construction to the law as would place it in the power of any corporation to exact its own terms for the use of the public roads of the state. We ought to construe it for the public good, rather than private gain, or as conferring exclusive privileges upon any corporation. And this can only be done by inviting competition, and by authorizing the county court to confer the privilege of taking tolls on that corporation which will make the less onerous exactions on the traveling public.

Although the appellant caused a survey and location of its road to be made in September, 1873, yet from that time

until February 8, 1875, it made no application to the county court to enter into a contract to construct and keep in repair the public road leading through the canyon, and for the privilege of collecting tolls therefrom. Indeed, the evidence shows that during all that time the appellant refused to recognize the existence of any public road through the canyon, and all the money expended by it in the construction of the road was for the purpose of making a corporate road, rather than to improve the public highway. Under these circumstances, the county court had a right to enter into the agreement of April 10, 1874. That agreement this court has heretofore held to be a valid and binding contract, and we can not now question the correctness of its decisions upon this point.

It is claimed by the appellant that on the fifteenth day of January, 1878, the county court of Douglas county revoked and annulled the agreement entered into by it with the respondent. It is hardly necessary to call any authority to show that this attempted revocation, without due process of law, amounted to nothing.

The circuit court rendered a decree in favor of the respondent for seven thousand dollars damages, sustained by reason of the wrongful acts of the appellant in collecting toll from February, 1875, to May, 1877. This we think was erroneous. At the December term, 1874, this court, by its decree, adjudged that the agreement of April 10, 1874, was ineffectual as a contract, because it was not entered upon the journal of the county court. And until it was so entered, the respondent refrained from collecting tolls from persons traveling on the road. If it could not lawfully collect these tolls from travelers, then neither has it a right to recover them from the appellant now, even though it wrongfully received them from persons traveling on the road. The contract was not entered on the county record until May 31, 1878, but a few days before the amended complaint was filed, and the respondent was not, therefore, entitled to recover anything in this suit for the unlawful collection of tolls by the appellant. With this exception, the decree of the court below is affirmed.

Decree modified.

Mr. Justice BOISE, dissenting:

In this case, I have not been able to agree with a majority of the court in their conclusions that the decree in this case should be affirmed.

It appears from the evidence that the appellant in August, 1873, became an organized corporation by electing directors, and soon thereafter caused their road through the canyon to be laid out, surveyed, and located, which survey was adopted by the board of directors as their location of said road, and said company commenced constructing their road on such location, and had made considerable progress therein, before the Douglas County Road Company was organized. After the appellant was organized and had located the line of their road, the respondent also organized and located a road over substantially the same route, for it is evident from the testimony that there is but one route through the canyon for a road. And the first question in the case is, Had the appellant acquired by this location such an interest in the route and that part of the county road before constructed through the canyon that it could legally maintain the right of way over said county road, and hold it against the alleged rights of the respondent acquired through its contract with the county court of Douglas county?

The statute (Misc. Laws, 529, sec. 23) provides generally, "that a corporation organized to construct a road shall have the right to appropriate the lands over which it may be located," and section 26 provides "that such corporation may appropriate such parts of any county road as shall be necessary and convenient in the construction of such road."

In the first instance, where the lands of private persons are taken, the statute points out how compensation shall be made to owners of lands so taken, for damages sustained by them in locating the road over their lands. In the case where a county road is appropriated, the county court can agree with the corporation on the terms on which said county road may be used by the corporation. But if the

county court and the corporation can not agree, then the corporation may appropriate so much of said county road as may be necessary and convenient in the location and construction of said corporate road.

Section 28 provides "that when such public highway (or county road) is taken by agreement with the county court, such corporation may place such gates thereon and charge such tolls thereat as the county court shall consent to in such agreement, and none other."

So it appears from these provisions of the statute that the corporation has the right on the location of its line of road to appropriate a county road where necessary and convenient, whether the county court assent to it or not, but have no right to charge tolls on such county road unless the same be allowed by an agreement with the county court; and the object of this agreement with the county court would seem to be to obtain the right to collect tolls on the roads so far appropriated; for the county court has no power to prevent the corporation from using such county road, and their using the same for the purposes of travel would be no public injury, and the rights of the public are protected by the inhibition of the corporation from collecting tolls on such portions of the county road as are taken and used on the line of the corporate road, unless the same are allowed to be collected by an agreement with the county court.

I think, therefore, that the appellant, having first established its line of road through the canyon, acquired thereby the prior right to appropriate this county road, and that this right was property of which they could not be deprived by the action of the county court. That is, that the appellant had the same right to locate its road on this county road as it had to locate it over the lands of private persons, and that the only object in making an agreement with the county court was to obtain the privilege of putting a gate on such county road and collecting tolls.

These are rival corporations, each seeking to secure the right to construct a road over substantially the same route, and I think that the one that was first in time in organizing

and locating the route, thereby appropriated it to the exclusion of one less expeditious. It has been held in Maryland, in the case of the *Chesapeake Canal Co. v. Ohio R. R. Co.*, 4 Gill & J. 1, that the right to select and acquire land for the authorized purposes of a corporation is property. It is an incorporeal hereditament, not a legal title to the land itself, nor a mere capacity or faculty to acquire land, such as every individual possesses, but a right or privilege to acquire that right in the land necessary to the enjoyment of the franchise. And no corporation, after the previous grant of such right to another, can legally acquire any such right of way over or title to the land over which the franchise extends, as will hinder the corporation first acquiring the right from the enjoyment of its franchise; and the same doctrine is announced in the case of *West Bridge Co. v. Diw*, 16 Curtis, 802; in Massachusetts in the *Charleston Branch R. R. Co. v. County of Middlesex*, 7 Met. 78; and in the case of *Boston Bridge Petitioners v. County of Middlesex*, 10 Pick. 269; Abb. Dig. Law of Corp. 626, sec. 239. I think, therefore, that the Canyonville and Galesville Road Co. are first in time and first in right in securing their franchise.

It is claimed that the appellant lost its right to appropriate this county road by not making application for an agreement with the county court of Douglas county before respondent made an agreement with such court giving to respondent the right to use said county road.

This may be answered by an illustration: Suppose that after the appellant had organized and proceeded to locate the line of its road the same crossed the land of a private person; and the respondent, having subsequently organized, had proceeded to such private person and by agreement with him got the right of way, while the appellant was diligently pursuing the business of its location, but before it had reached that part of the line over the land of such private person; such purchase would not defeat the right of appellant to proceed and appropriate the land for the use of his former acquired right of way over it, and I think the same principle applies to the appropriation of a

county road. It was first necessary for the corporation to locate the line of its road before it could know how much and what part of said county road it would be necessary and convenient to appropriate. I do not think that the decision of this court in a former case, affirming the order of the circuit court to enter *nunc pro tunc* an order made by the county court of Douglas county on its records, in any way settles or determines the right of appellant under its corporate privileges. These rights were not litigated in that case.

THE STATE OF OREGON, RESPONDENT, v. J. H. McDONALD AND WILLIAM BELL, APPELLANTS.

WITNESS—IMPEACHING QUESTION.—In a prosecution upon an indictment for larceny, the prosecuting witness was asked the following question by defendant's counsel: "Between the time you lost your money and the time you went out to Forest Grove, was you not on the streets of the city of Portland with L. Besser, chief of police, looking for the men that got your money, and did you not see McDonald, one of defendants, and did not L. Besser point out McDonald to you, and ask you if he was the man that got your money?" *Held,* that the question did not relate the circumstances of time, place, and persons present, so as to entitle the defendant to impeach the witness.

DISCRETION OF THE COURT.—A motion for a new trial, based upon matters *dehors* the record, is addressed to the sound discretion of the court, and will not be reviewed on appeal.

OBJECTIONS TO A JUROR on the ground of incompetency are waived by failing to challenge at the proper time.

APPEAL from Multnomah County. The facts are stated in the opinion.

George W. Yocum and Francis Clarno, for appellants:

Our statute, page 274, sections 830, 831, has provided how a witness may be impeached, and this is nothing more than the common law rule. (1 Greenl. Ev., sec. 462, and note 1, and cases cited in note 1.) This rule is adopted by our statute, as the rule is not uniform in all the states. (2 Graham and Waterman, N. Tr. 665, 613.)

We insist the foundation was fully and fairly laid to impeach Wallace, and if Besser and Daniels had been allowed

to testify, the corrupt and false testimony of Wallace would have been overthrown.

In many of the states a witness may be impeached without first inquiring of the witness if he has not made contradictory statements to other persons at other times and places. (*Tucker v. Welsh*, 17 Mass. 160, 164; *Titus v. Ash*, 4 Foster, N. H., 319; *Hedge v. Claggs*, 22 Conn. 622; *Robinson v. Hutchinson*, 31 Vt. 443; 9 Cush. 338; 3 Gray, 463; 2 Phillips Ev. 774.)

Here is the authority of four respectable states holding that a foundation to impeach need not be laid, and also the authority of one respectable text-writer, and the reasons given for not apprising a witness of your intention to impeach him, are equally as cogent as those given in favor of the rule. But we are nevertheless bound by the rule prescribed by our statute; yet the spirit of the statute and the object to be attained must be kept steadily in view. The witness must have a fair chance, his attention must be called to the conversation, time, place, and person. This was done.

Was W. L. Higgins a competent juror, or did defendants waive their objections by failing to challenge him? It is conclusively shown by the affidavits of defendants and the affidavit of Higgins, the juror, that he was not born a citizen of the United States. There is no evidence showing that Higgins ever was naturalized. The affidavit of Higgins is not competent to prove the judgment of a court of record, and besides all this, his affidavit is indefinite, and does not state what court he was naturalized in, likely before a justice of the peace. The affidavit of Higgins is a declaration that he is not a citizen of the United States. It might be competent evidence to enable him to vote at an election where the statute of the state expressly makes the oath or affidavit of a person sufficient. (2 Graham & Waterman, N. Tr., 2 ed., 189, note 2; 1 Greenl. Ev. sec. 86.)

Did the defendant waive the objection to the competency of this juror by failing to challenge him? Under section 182 (Code, page 142), subdivision 2, a defendant may challenge a juror for "a want of any of the qualifications pre-

scribed by law." The defendants might have challenged the juror, but the state put them on trial, and was bound to give them a competent panel. (2 Graham and Wat. N. Tr. 187, 277; 6 Johns. 332; *Geykowski v. The People*, 1 Scam. 476; *State v. Babcock*, 1 Conn. 401; *Borst v. Becker*, 6 Johns. 332; *Judgon v. Eslava*, Minor (Alabama), 2; Hillard on N. Tr. 87, sec. 6; *Seal v. The State*, 13 S. & M., Miss. 398; *Burnshill v. Giles*, 9 Bing. 13.)

J. F. Caples, District Attorney, and M. F. Mulkey, for the State:

Our code expressly provides that before a witness can be impeached by showing that he has made inconsistent statements, such statements must be related to him with the circumstances of times, places, and persons present. We claim that this was not done, and the foundation required by the statute was not laid. "Before this can be done," the circumstances of times, places, and persons present must be related to the witness as well as the statements. It is not enough to ask the witness the general question whether he has ever made such statements, but his attention must be called to the particular circumstances of time, place, and persons present, so that he may recollect, and if he does recollect, so that he may explain or rebut. This is the common law rule, and the rule of our statute, and is fair and right, due to the witness, and not unjust to the defendants. (Civ. Code, 274, sec. 831; 1 Greenl. on Ev., 10 ed., sec. 462, and note 1; 16 Cal. 177; 33 Id. 522; 44 Id. 457.) They do not attempt to fix the time nor the place. They say between "the time you lost your money and when you went to Forest Grove." This includes the first, second, and third days of January, and calls the attention of the witness to no particular time or circumstance of time. They say on the streets of Portland, but do not call the attention of the witness to any particular street, corner, or block. "When you and Besser were on the streets of the city of Portland looking for the men who got your money," does not call the witness' attention to any circumstance of time or place, for they might have been and

in fact were upon many streets on different days, that is, on the first, second, and third of January, looking for the defendants. It is objected that Higgins, one of the jurors, was not a citizen; this is not true. It appears from the record that he was a citizen; he swears that he is a citizen, and there is no competent evidence to contradict this statement.

But it was for the defendants to ascertain that he was not a citizen, if that were so, by proper examination, and having neglected to do so, the verdict in this case will not be disturbed. If Higgins was an alien they could ascertain that before as well as after trial, otherwise they could allow an alien to sit for the purpose of defeating justice. (Proffatt on Jury Trial, sec. 172; *Chase v. People*, 40 Ill. 352.)

By the Court, PRIM, J.:

This is an appeal from a judgment in a criminal case. The appellants were jointly indicted for the crime of larceny for stealing five hundred dollars from S. R. Wallace by means of a fraudulent trick or device called the Kentucky Lottery. They were jointly tried, convicted, and sentenced to the penitentiary for the term of ten years.

The appellants sought to impeach the witness Wallace by showing that he had made at another time statements inconsistent with his testimony on the trial, and to lay the foundation for this, asked him the following question: "Between the time you lost your money and the time you went out to Forest Grove, were not you on the streets of the city of Portland, with L. Besser, Chief of Police, looking for the men that got your money, and did you not see McDonald, one of the defendants, on the street, and did not L. Besser point McDonald out to you and ask you if he was the man that got your money, and did you not then and there say to L. Besser, 'No, he is not the man—he don't look like the man—the man that got my money was of a sandy complexion?' or words to that effect?" And the said Wallace then and there answered said cross-question and said, "No, I never told Besser so, I did not tell Besser that McDonald was not the man that got my money."

And in the further progress of the trial the appellants introduced said L. Besser, chief of police, as a witness, and offered to prove by him that between the first and third days of January said S. R. Wallace was with L. Besser upon the streets of Portland looking for the men that got his money, and that Besser pointed out to Wallace, McDonald, and asked Wallace if McDonald was not one of the men that got his money; and that said Wallace then and there said, "No, he (McDonald) is not the man—he don't look like the man—the man that got my money was of a sandy complexion." And thereupon the district attorney objected to this evidence by defendants because there was no time or place fixed in the impeaching question, and because there was no foundation laid to contradict the witness, Wallace. The court sustained said objections.

This ruling of the court is assigned as error.

The code provides that "a witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statement must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them." (Code, 274, sec. 831.) This was the common law rule as laid down in Greenleaf and other works on evidence. (1 Greenl. on Ev. 462, note 1.) The question propounded to the witness was indefinite as to the circumstances of time, place, and persons present, and was properly overruled by the court. (16 Cal. 177.)

After conviction, the appellants, by their counsel, filed a motion for a new trial, on the ground that W. L. Higgins, one of the jurors who tried the case, was not a citizen of the United States, and therefore not a competent juror. This motion was based upon the affidavit of McDonald, one of the appellants, to the effect that he had been informed that said Higgins was an alien and had never been naturalized; that said information came to him after the case had been submitted to the jury. The motion was resisted on the affidavit of said Higgins, which is to the effect that he

had been a citizen of Multnomah county in this state for twenty-nine years; that he did not know whether he was born in the United States or not; that at his earliest recollection he was in Newburyport, Mass.; that to prevent any question as to his citizenship, he was naturalized in Boston, Mass., either in 1846 or 1847. He did not recollect which.

The motion for a new trial was overruled, to which ruling of the court the appellants excepted and assign here as error.

This motion, being based upon matters *dehors* the record, was addressed to the sound discretion of the court below and can not be assigned and reviewed on appeal. The code provides that "after hearing the appeal the court must give judgment without regard to the decision of questions which were in the discretion of the court below." (Crim. Code, p. 371, secs. 245-6.) This court has heretofore ruled to this effect in several cases. (*State v. Fitzhugh*, 2 Or. 228; *State v. Wilson*, 6 Or. 428.)

This is sufficient to dispose of this appeal on this point, but we will further say that, whether Higgins was a competent juror or not, it was too late to make that objection after the trial. It was waived by failing to challenge at the proper time. It was claimed in the argument that this being a criminal case the accused should waive nothing. Upon this proposition they cited *Geyhowski v. The People*, 1 Scam. 476. That case was afterwards overruled and held by the same court not to be good law in the case of *Chase v. The People*, 40 Ill. 354.

Finding no substantial error in the record, the judgment is affirmed.

HENRY WARREN, APPELLANT, *v.* MARY M. HEMBREE, RESPONDENT.

CONSTRUCTION OF WILL—VESTED LEGACY.—A testator made the following bequest: "I give and bequeath to my nephew, F. M. S., one-tenth of all my personal property, outside of my real estate, the said one-tenth to be given to him when he is twenty-two years of age." *Held*, that F. M. S. took a vested legacy; and that having died before he became twenty-two years of age, his personal representative is entitled to recover the legacy.

APPEAL from Yamhill County. The facts are stated in the opinion.

H. & A. M. Hurley, for appellant.

Where a legacy is given to a person generally, by express terms, which is to be paid to him at a certain age or upon the happening of a certain event, it will confer such a vested interest in the legatee, that although he should die before the age mentioned, or the happening of the event, his heirs at law or personal representatives would be entitled to the legacy; for the time mentioned in the will is not annexed to the substance of the gift, the legacy, but to the possession, use, and enjoyment of it. (Willard's Eq. Jur. 513; 1 Jarman on Wills, 462; 1 Am. Dec. 97; 9 Id. 605; Dayton on Surrogates, 390.) Where the residue of an estate is first given by the use of language which would, beyond all controversy, confer a vested interest, the subsequent use of expressions of a contrary tendency will not suspend the vesting of the legacy. (1 Jarman on Wills, 648; N. Y. Dig. 2490; 2 Am. Dec. 97; 9 Id. 605.) Where there is language used which renders it uncertain whether the testator intended the legacy to be vested or contingent, the rule is to construe the language most strongly in favor of the vesting of the legacy. (Willard's Equity, 513; 2 Redfield on Wills, 248.)

There is no distinction between the words "to be *given* when he shall arrive at the age of twenty-two," and the words "to be *paid* when he shall arrive at the age of twenty-two years. (2 Redfield on Wills, 232-234.) Where a vested estate is clearly given in the body of the bequest, vague words following are not to be so construed as to render the bequest contingent. (Id. 235.) A bequest to the testator's grandson, "if he shall arrive at the age of twenty-one years, then to be paid over to him by my said executor," was held to be vested and not contingent. (Id. 248.)

The testator intended by the use of the words, "except as hereinafter provided," that his wife should have the use, control, etc., of all his property, except the special legacy provided for in the will. Where two clauses in a will are

so contradictory and conflicting that force can not be given to both, the first must give way to the second, and force and effect must be given to the second or last clause while the first is to be rejected. (52 N. Y. 12; 9 Id. 113; 1 Jarman on Wills, 293.) The language used in the first sentence in the bequest is: "I give and bequeath to my nephew, Frank M. Shadden, the one-tenth part of all my personal property, outside of my real estate." This relates to the present, and expresses an act done by the testator himself.

McCain & Fenton, for respondents:

The language used in the bequest to Shadden, even standing alone, is hardly sufficient to vest the legacy *in praesenti;* it is not the language ordinarily used for that purpose—the language being ambiguous. (Will. Eq. 513, 517; 11 Wend. 259; 6 C. E. Greenl. 326, 26; 49 Me. 159; 21 Pick. 312; 13 Penn. St. 503; 34 Ga. 8; 2 Williams on Executors, 1332, 1353; 2 Redfield on Wills, 168, 172, note 55; 39 Miss. 233; 2 Redfield on Wills, 230, secs. 26, 27.) Where there is an ambiguity in any provision, resort must be had to the remaining provisions for a proper construction. (Willard's Eq. 495.)

It is natural that the first care of the testator should be of his own immediate family. It appears from the will itself that Shadden was a young man not likely to have a family in whom the testator would have an interest in the event of the death of the legatee. These circumstances should be considered in connection with the language used in the will. (Willard's Eq. 493; 2 Redfield on Wills, 245, 250, 252.)

If the construction that the legacy vested in *praesenti*, to take effect in possession when the legatee should arrive at twenty-two years of age, be given, the provision is repugnant to that in favor of the widow. Such repugnancy is to be avoided if possible. (1 Redfield, 245, 250, 252; Jarman on Wills, 396.) If the bequest to Shadden was contingent to vest at twenty-two years old, and to take effect in possession at the marriage or death of the widow, effect is given to all the provisions and the whole instrument is consistent.

The provision in favor of Frank M. Shadden is in the nature of an exception out of the general bequest to Henry L. Hembree, upon the termination of the present estate vested in Mary M. Hembree. It is so engrafted upon that bequest as to become a part of it, and can no more take effect in possession pending the estate in the widow than can the general bequest to Henry L. Hembree. Hence the inconsistency of the construction claimed by counsel for the appellant, that Shadden was to come into the enjoyment of the legacy at twenty-two years old, when the immediate estate in the widow might not yet be terminated. (24 N. Y. 466.) A vested legacy usually has these characteristics—enjoyment of interest or annuity by legatee, during minority, out of vested fund; a separation of the legacy from the common fund; a direction to a trustee to deliver or pay over to guardian or to the beneficiary, at a time convenient to the estate, the whole amount. (Wigram and O'Hara on Wills, 261.)

In this will none of these distinctive features exist; the fund is entire, no interest is accruing, no new estate is being created, the widow is the sole beneficiary of the whole, with contingent estates to be carved out, at certain times and upon certain events.

By the Court, KELLY, C. J.:

Lycurgus Hembree died on the thirty-first day of March, 1876, leaving a will made on the eighth day of November, 1875. The material portions of the will are as follows: "2. I give and bequeath to my son, Henry L. Hembree, my farm in Lane county, known as the Green B. Rogers donation land claim. 3. I give and bequeath unto my beloved wife, Mary M. Hembree, my town property in the town of McMinville. 4. It is my will that my beloved wife shall have the use, control and management of all my property, both personal and real, during her natural life, or so long as she shall remain my widow, and then the said property shall all go to my son, Henry L. Hembree, except as hereinafter provided. 5. I give and bequeath to my nephew, Frank M. Shadden, one-tenth of all my personal property

outside of my real estate. The said one-tenth to be given to him when he is twenty-two years of age. 6. It is my will, that in the event my beloved wife and my son, Henry L. Hembree, shall die before my son Henry L. Hembree shall become twenty-one years of age, then it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event so mentioned I do so will the same to him. And it is my will farther in the event just mentioned, the death of my wife and son, that all my personal property shall be equally divided, one-half descend to my brother, I. N. Hembree, my sisters, Levina Preston and Susetta Preston, and Elizabeth Montgomery, each to have an equal share; and the other half to my beloved wife's brother and sister, each to have an equal share. It is my will that my son be thoroughly educated as far he will receive an education. 8. I hereby appoint my beloved wife my sole executrix, and it is my desire and will that she be not required to give bonds in administering upon my estate."

This will was admitted to probate on the third day of July, 1876, and Mary M. Hembree, the widow of the testator, was appointed executrix thereof. Frank M. Shadden died on the thirtieth day of September, 1878, and was at the time of his death twenty-one years two months and six days old. Henry Warren was appointed administrator of his estate. Mary M. Hembree, the widow of the testator, is still living and unmarried, and has duly administered the estate, and paid the indebtedness of the decedent, and has on hand twenty thousand dollars subject to distribution.

This suit was brought by the appellant for one-tenth of that sum, under the fifth clause of the will, and the only question presented for our consideration is, whether the bequest to Frank M. Shadden was a vested or a contingent legacy. The intention of the testator is always to govern in the construction of his will, and it is to be so construed, if possible, as to harmonize the several provisions and give effect to them all. But in case of doubt or uncertainty as to whether the testator intended to give a vested or contingent legacy, certain rules have been laid down by elementary law writers and by the decisions of courts to govern in the

construction of the will. Blackstone says: "If a contingent legacy be left to any one, as when he attains, or if he attains the age of twenty-one and dies before that time, it is a lapsed legacy. But a legacy to one to be paid when he attains the age of twenty-one years is a vested legacy; an interest which commences *in praesenti* although *solvendum in futuro*." (2 Bl. Com. 513.) The question in such cases usually is whether the gift and the time of payment are distinct. If they are, then, as each clause in a will is to have some operation, the gift is deemed to be vested at once, and payable at a future time. (O'Hara on the Construction of Wills, 262.)

Tested by the rules here laid down, the bequest to Frank M. Shadden in the fifth clause of the will was clearly a vested legacy, and the words "to be given to him when he is twenty-two years of age," are equivalent in meaning to the words "to be paid to him when," etc., and it is conceded that if the latter phraseology had been used by the testator, the legacy would have vested on his death in the legatee. Other portions of the will tend to show that this was the intention of Lycurgus Hembree, when he made his will. By the sixth clause it appears that he was especially careful to provide how his other property should be disposed of in the event of the death of his wife and son before the latter should become twenty-one years of age, but in regard to the one-tenth part bequeathed to Frank M. Shadden, he made no disposition whatever in case of his death, showing clearly, we think, that the testator considered this portion of his estate as finally disposed of and that it would become vested in Shadden as soon as the will should take effect. But it is contended in behalf of respondent that this construction is inconsistent with the provisions contained in the fourth clause, and that the widow is entitled, during her life and widowhood, to the use, control, and management of all the property of the testator, including as well that bequeathed to Shadden as that which was devised to his son. That is not the proper construction to be placed upon this provision of the will. The last words of it, "except as herein provided," exclude the idea that she was

to have the use and control of all the property of the testator. They except from her control a part of it, and this exception can apply only to that portion bequeathed to Shadden. The widow was entitled to use and control it until he should become twenty-two years of age, when, in the language of the will, it was "to be given to him by the executrix." The degree of the circuit court is reversed and this cause remanded for further proceedings.

R. JACOBS ET AL., APPELLANTS, v. ROBERT McCALLEY ET AL., RESPONDENTS.

CHATTEL MORTGAGE—FORECLOSURE WHERE MORTGAGE PROVIDES MANNER OF.—Where, in a mortgage of chattels, there is a manner provided for foreclosing the same, either party may insist that the foreclosure shall be in the manner provided; but such party must comply with the mortgage stipulation on his part. If the mortgagor insists that the foreclosure be in the manner stipulated, he must, if delivery of possession to the mortgagee is necessary to such foreclosure, deliver the mortgaged property to the mortgagee to enable him to sell the same.

IDEM—A MORTGAGOR MAY SELL or assign mortgaged personal property, subject to the lien of the mortgage.

APPEAL from Linn county.

This is a suit in equity to foreclose a chattel mortgage. The mortgage provided that in case of default the mortgagee should take possession of the mortgaged property and sell it at public auction after giving two weeks' notice of the sale. The mortgagor remained in possession of the property under the mortgage, and while in such possession sold it and thereupon delivered possession to his assignee.

R. S. Strahan and L. Flynn, for appellants.

Powell & Bilyeu, Humphrey & Wolverton, and Dolph, Bronaugh, Dolph & Simon, for respondents.

By the Court, BOISE, J.:

It is claimed by the respondents that as there is a manner for foreclosing this mortgage provided in the instrument itself, the provisions of section 2, page 688, of the statute

apply to it, and that it must be foreclosed by the mortgagees under and in pursuance of the stipulation of the parties contained in the mortgage. Section 2 provides that "whenever in any mortgage of goods and chattels the parties to such mortgage shall have provided the manner in which such mortgage may be foreclosed, such mortgage, upon breach of the conditions thereof, may be foreclosed in the manner therein provided, and not otherwise." Section 1 provides that on the breach of the condition of such mortgage, the mortgagee shall be entitled to the immediate possession of the property mortgaged. The stipulation in the mortgage is a mutual agreement between the mortgagor and mortgagee which both parties are bound to observe, and neither party can avail himself of it unless he has kept the agreement on his part.

On breach of the conditions of the mortgage by the mortgagor, by failing to pay the note, it was his duty to deliver to the mortgagee the property, that he might sell the same according to the stipulation. On his refusal to give up the property, the mortgagee might have brought replevin against him, which action the mortgagor could have defended by showing that the property had been in some manner released from the mortgage. This remedy by replevin was a remedy which existed in such cases before this statute was enacted. In the prosecution of such action to recover the possession of the property, the mortgagee would or might be subjected to delays, and might be obliged to take an alternate judgment for the property or its value, and would not be able to reach the property with that certainty as in a suit in equity, where the property could be put into the hands of a receiver. His remedy would not be as complete and adequate in an action as in equity. In this case, where an assignment had been made, there might be difficulty in proceeding under the stipulation in the mortgage, in determining to whom the surplus, if any remained after satisfying the mortgage, should be paid.

We think the proper construction of section 2 is, that when the parties have agreed to a certain manner of foreclosing, either has a right to insist on a foreclosure in that

manner, but before the mortgagor can insist on the sale of the property by the mortgagee, in the manner stipulated, he must fulfill his part of the agreement by suffering the mortgagee to take possession of the goods, and that the mortgagor can not refuse to fulfill the agreement on his part, by refusing to give up the goods, and at the same time insist on a performance by the mortgagee. To give any other construction to the contract would be to hold that the mortgagor can take advantage of his own breach of contract to defeat the just claim of the mortgagee, which is contrary to the maxim that no man can avail himself of his own wrong. Such a construction will also harmonize the provisions of section 2 with section 410, which provides that "a lien on real or personal property, whether created by mortgage or otherwise, shall be foreclosed by suit." Such a construction will do no violence to the plain meaning of the statute, and will facilitate the administration of justice and be in harmony with the general principles of the construction of statutes.

It is also claimed by the respondents that this mortgage is void as to subsequent creditors, for the reason that the mortgagor retained the property in his possession with a general power to sell the same. If this be true, then the mortgage would be void. (*Iri Orton v. M. W. Orton*, 7 Or. 478.) In *Orton v. Orton*, it appeared from the testimony on the trial, as a fact, that Iri Orton had made M. W. Orton, his mortgagor, his agent to sell the mortgaged goods, consisting of a stock of merchandise in his, the agent's, business as a retail merchant, and put him in the store for that purpose. In this case the agreement in the mortgage is, that "until default is made in the payment of said sum of money, the parties of the first part (the mortgagors), their executors, administrators, and assigns, may retain and continue in the quiet and peaceable possession of said goods and chattels, and in the full and free use and enjoyment of the same, except as hereinbefore provided;" and that proviso was that said goods should not be removed from within said county and state, so that whatever assignment was made, said goods were to remain in the county.

We think the right to assign is by this instrument confined to an assignment subject to the lien of the mortgage, and that such a power of assignment would not render the mortgage void. Until condition broken, the mortgagor is the owner of the property, and "he may sell, incumber, devise, or convey the mortgaged property." (Harmon on Chattel Mortgages, 459.) So that the power to assign contained in the mortgage gave the mortgagor no more power over the goods than he would have had if that word had not been inserted in the mortgage.

The demurrer in the suit will be overruled, and the decree of the court below sustaining said demurrer be reversed, and the suit remanded to the circuit court for further proceedings.

E. A. JONES, RESPONDENT, v. ANDREW SNIDER, APPELLANT.

VERDICT.—In an action to recover specific personal property, where the jury find a general verdict for damages, without finding on the issues of ownership and of the value of the property, such general verdict is not warranted by the statute, and no judgment can be rendered thereon.

WHAT PRESUMPTIONS NOT RAISED UPON VERDICT.—Where the statute directs a special finding upon certain issues, a general verdict for the plaintiff will not raise a presumption that the jury have passed upon the issues not named in the verdict.

APPEAL from Multnomah County.

This action, as appears by the complaint, was brought to recover personal property with damages for the withholding thereof. The cause was tried in the circuit court by a jury, who found generally for the plaintiff, and assessed his damages at the sum of three hundred dollars.

Hill, Durham & Thompson, for appellant.

W. Scott Beebe, for respondent.

By the Court, BOISE, J.:

This being an action to recover specific personal property, the statute regulating such a proceeding in section 211 has

provided what the verdict shall find is as follows: "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property if the verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, may at the same time assess the damage, if any is claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."

The issues presented by the pleadings were: 1. As to the ownership of the property described in the complaint; 2. As to its value; 3. As to the amount of damages which the plaintiff had sustained by reason of the wrongful taking or withholding of the property. The jury found the following verdict: "We, the jury, in the case of E. A. Jones *v.* A. Snider, find for the plaintiff, and assess the damages at the sum of three hundred dollars, and interest one hundred and eleven dollars and sixty-seven cents—total, four hundred and eleven dollars and sixty-seven cents."

This verdict does not find on the issues as to the ownership of the property, or assess its value, but finds on the issue as to the damages. The statute directs that the verdict shall be special and find on all these issues, and where the statute directs that the jury shall find a special verdict, and on certain named issues, the rendering by the jury of a general verdict for damages, will not raise the presumption that the jury have found on the issues not specially named in the verdict. To warrant the jury in making inquiry as to the damages, they must first find that the plaintiff was the owner of the property or entitled to the possession. A verdict, to be valid, must find on all the issues in the case, so that the controversy shall be finally determined. In cases where a general verdict is proper, the presumption is from such finding that the jury has passed on all the issues necessary to sustain the finding. But where the court or the statute direct a special verdict, the court will not render a judgment on a general verdict; for it is not de-

cided by it how the special issues have been determined. In this case it does not appear which party was the owner of the property in controversy, or what was its value, and leaves the case at issue and undetermined.

It is claimed that the notice of appeal does not specify the errors complained of, which have been argued and which we have noticed above. We think there is nothing in this objection; for the notice of appeal does specify as error that the court rendered a judgment on the verdict, and claim that no judgment could be rendered thereon, and this is, we think, a sufficient specification of error.

The judgment will be reversed and a new trial ordered.

H. O. TENNY ET AL., RESPONDENTS, v. N. E. MULVANEY ET AL., APPELLANTS.

SEVERABLE CONTRACT.—T. contracted to cut and deliver at the mill of M. one million feet of merchantable logs within the year, at four dollars and twenty-five cents per thousand feet, to be scaled and received as each one hundred thousand feet were placed in a certain creek. *Held*, that the contract was severable and not entire.

APPEAL from Douglas County. The facts are stated in the opinion.

W. R. Willis, for appellant.

The contract in this case is entire, to furnish one million feet of logs in one year, and keep logs on hand, etc., at the rate of four dollars and twenty-five cents per thousand feet, and payment was to be made on its fulfillment, and not on the delivery of each one thousand feet, as stated in the charge to the jury by the circuit court. (*Shinn v. Bodine*, 60 Penn. 182-185; *Coburn v. City of Hartford*, 38 Conn. 290; *Isaacs v. McAndrew*, 1 Mon. T. 437, 450, 451; Cow. Tr. secs. 271, 272; *Averill v. The Hartford*, 2 Cal. 310; *McMillen v. Vandyke*, 12 Johns. 165; *Clark v. Baker*, 5 Met. 452.)

This contract fixes the quality of logs to be furnished, and it was error and calculated to mislead the jury to admit evidence of the character of the timber in the vicinity of the

defendants' mill, and what quality of logs witness (Comstock) would expect to receive, etc., also that the logs delivered were average logs on Pass creek. By the terms of this agreement the plaintiffs were required to deliver good, sound, merchantable logs, at defendants boom, unincumbered with rotten and unmerchantable logs, and defendants were not required to be at great or any expense or trouble in selecting or separating them, nor to have the boom obstructed by such bad logs, and the court erred in refusing the instruction asked to be given by defendants and in giving the instructions he did on that subject.

Good, sound, merchantable logs in one place are good, sound, merchantable logs in any other place, and it does not depend upon the character of the timber in the vicinity. The evidence shows that there was plenty of good, sound, merchantable logs in the timber furnished by defendants, if plaintiffs had picked them out; also, that out of three hundred and four thousand eight hundred and twenty-four feet of logs put in the water, there was but one hundred and thirty-seven thousand and fifty-four feet of good, sound logs; also, that defendants offered to receive and pay for all that was good, but refused to select them out from the bad in the water.

It was no breach of the conditions of this agreement on the part of defendants to receive the logs, until they were separated from the bad; and no default in payment, for there was nothing due until the end of the year, and one million feet of logs had been delivered.

John Kelsay, and Herman & Ball, for respondents:

It is provided in the contract that the defendants shall pay the plaintiffs four dollars and twenty-five cents per thousand feet for good, sound, merchantable logs delivered at the boom. When the kind of logs mentioned in the contract were delivered in the boom the defendants were undoubtedly liable. The plaintiffs did not agree that there should be no rotten logs with the good ones. (30 Cal. 449, 450; Chitty on Contracts, 113; 3 Graham & Wat. on New Trials, 710.) The instruction refused by the court was

substantially given in the charge of the court. (47 Cal. 95, 96.)

The court did not err in its charge to the jury, in which it is stated that "the defendants were not to receive or scale or pay for any logs which were not good, sound, or merchantable, but the fact that plaintiffs may have put into floating water some logs that were not good or sound or merchantable, if such shall be found by you from the evidence to be the fact, did not excuse the defendants from their agreement to receive and pay for those that were good, sound, and merchantable. (1 Chitty on Contracts, 113.) There is no exception in the contract or reservation that would interfere with or render erroneous this charge. (Id. 137, note d.)

The court did not err in its charge in relation to the general quality of the timber, etc. The construction of the contract was for the court, being a question of law. (2 Parsons on Contracts, 492; Civ. Code, 248, sec. 686; 1 Chitty on Contracts, 117, note y, 103.)

The court charged the jury as to the construction of the contract that "the purchase price of all logs delivered under the contract at the boom, due," etc. (35 Cal. 241; 2 Chitty on Contracts, 1084; 2 Parsons on Contracts, 551, 552; Id. 499-521; 3 Wend. 363; 1 Chitty on Pleadings, 322; 1 Chitty on Contracts, 117, note p, 113-126.)

In ordinary cases, if the court see that notwithstanding a misdirection a new trial ought to produce the same result, a new trial will not be granted. (1 Graham & Wat. on New Trials, 208, 270, 301; 3 Id. 717; 13 Cal. 429; 22 Id. 50; 18 Id. 377.)

By the Court, PRIM, J.:

This is an action to recover damages on a breach of contract based upon the following facts as alleged in the complaint: That about the twenty-ninth of May, 1878, the respondents and appellants entered into an agreement by which the respondents promised to furnish the appellants at their boom in Pass creek, in Douglas county, good, sound, merchantable logs for four dollars and twenty-five

cents per thousand feet. The appellants agreed to scale and pay for each one hundred thousand feet of said logs when placed in floating water in the creek above the boom; that the respondents delivered before the commencement of this action, in the boom, one hundred and sixty-five thousand one hundred and sixty-nine feet of good, sound, merchantable logs, and that they delivered in said floating water above the boom, one hundred and thirty-nine thousand six hundred and fifty-four feet of good, merchantable logs; that appellants became liable for the logs in the sum of one thousand two hundred eighty-five dollars and fifty-nine cents, on which has been paid one hundred and thirty-five dollars, and no more; that there is due one thousand one hundred and fifty dollars; and for a separate cause of action, it is alleged that by the terms of the agreement, the appellants were to furnish the standing timber within one mile of the creek above the boom, and to scale and pay respondents for each one hundred thousand feet of said logs, when placed in the floating water of the creek. Respondents were to deliver to appellants at the boom one million feet of good, sound, merchantable logs, with the privilege of furnishing as much more as they could put in the creek in one year.

It is alleged that respondents proceeded under the contract, and had cut a large amount of logs, and were proceeding to complete the contract, when the appellants, about the fourteenth of August, 1878, broke the contract and refused to receive or pay for the logs; that the respondents could and would have delivered within the year one million five hundred thousand feet of good, sound, merchantable logs but for the breach; that respondents have been damaged on account of said breach three thousand dollars, in addition to the amount claimed in the foregoing cause of action.

The appellants, for answer to the complaint, deny that the respondents agreed to furnish good, sound, merchantable logs for four dollars and twenty-five cents per thousand feet; but allege they were to furnish at the mill in one year, from the twenty-ninth of May, 1878, one million feet

of good, sound, merchantable logs, and keep logs on hand so the mill should not be shut down for want of logs, at four dollars and twenty-five cents per thousand feet, with the privilege of putting more than one million feet in the boom, at the same price, if they could do so within the year; deny that they agreed to pay for each one hundred thousand feet, or any part thereof, until the contract was completed; deny that the respondents delivered one hundred and sixty-five thousand one hundred and sixty-nine feet of merchantable logs, or more than thirty-five thousand feet, or that they delivered in the floating water one hundred and thirty-nine thousand six hundred and fifty-four feet, or any more than ninety-five thousand feet; deny that they became indebted for said logs in the sum of one thousand two hundred and eighty-five dollars and forty-nine cents, or any sum; deny that there is due one thousand one hundred and fifty-four dollars, or any part thereof, or that they were to pay for each one hundred thousand feet placed in the floating water, or any part thereof, until the end of the year.

The agreement in question is as follows: "This article of agreement, made and entered into this the twenty-ninth day of May, 1878, between N. E. Mulvaney and E. C. Bemis of the firm name of Mulvaney & Bemis, parties of the first part, and H. O. Tenny and Neil McKenzie of the firm name of Tenny & McKenzie, parties of the second part. Parties of the first part agree to pay parties of the second part four dollars and twenty-five cents ($4.25) per thousand (1,000) feet for good, sound, merchantable logs, delivered at the boom in Pass creek; also, agree to furnish timber for logs, not to exceed a mile from the bank of the creek; to scale each one hundred thousand (100,000) feet that is in floating water.

"The parties of the second part agree to furnish logs to the parties of the first part one million (1,000,000) feet, with privilege of furnishing as much more as can be put in the creek in the year, from this date, at the boom in Pass creek; the parties of the second part shall keep logs on hand for the parties of the first part, so that the mill shall not be shut down during the year, and are to cut four hundred

thousand (400,000) feet, more or less, from Richey canyon."

It is alleged that the respondents failed and refused to comply with said agreement; that they put into the boom and floating water a large amount of unsound and unmerchantable logs, and prevented appellants from getting logs to keep their mill running; that their mill was for a long time shut down by reason of respondents' failure to perform the conditions of said agreement on their part, to appellants' damage in the sum of four thousand dollars.

The first ground of error complained of by appellants was the admission of certain testimony on behalf of the respondents to show the general character of the timber on Pass creek and in the vicinity of the appellants' mill, and to show that the logs furnished by respondents were average logs from said timber.

The bill of exceptions shows that respondents called J. J. Comstock and asked him this question: "What is the character of the timber near defendants' mill?" The question was objected to, and the witness answered: "The timber on Pass creek, where defendants' mill is situated, is a great deal of it bad and punky, some of it rotten, some knotty, and some not; if I sent a man to cut logs I would expect to take what was on the ground; I have owned and run a saw-mill on Pass creek for several years."

Wm. Rosee was called and asked to state if the logs furnished by the plaintiffs were an average of the logs on Pass creek. Defendants' counsel objected. The witness testified that the logs furnished were average logs on the creek.

It will be seen by the terms of the contract that appellants were to furnish the standing timber from which these logs were to be cut, none of which was to be located further than one mile from the bank of the creek. As the logs were to be selected and cut from the timber in a particular locality, we are of the opinion that the admission of the evidence was proper. Witness Comstock was probably allowed to go a little too far in stating what he would expect to do if he put a man out to cut logs; but it appears that

the jury were instructed by the court that he "admitted this evidence merely to assist them in determining whether the logs in dispute were merchantable at the place where they were delivered—that saw-logs which are merchantable in one locality may not be merchantable at another."

The second and third assignments of error will be considered together.

The second is that the court erroneously refused to charge the jury as requested by appellants. The third is that the court erroneously charged upon the point requested. The court was asked by the appellant to charge: "That in this case the plaintiffs can not perform their agreement by delivering in the boom at the defendants' mill good, sound, merchantable logs, mixed promiscuously with a large portion of rotten, unmerchantable logs, and require the defendants to select the good, sound, merchantable logs."

This instruction was refused, but instead thereof, the court charged the jury: "That the defendants were not bound to receive or scale or pay for any logs which were not good, sound, or merchantable, but the fact that plaintiffs may have put into floating water some logs that were not good, or sound, or merchantable, if such shall be found by you from the evidence to be the fact, did not excuse the defendants from their agreement to receive and pay for those which were good, sound, and merchantable. But if it would be impossible to separate them, or it could not be done without great expense, it would excuse them."

The evidence bearing upon this point, as disclosed by the bill of exceptions, tends to show, that after the logs were in the water, one of the appellants told one of the respondents they would take and pay for all the good logs, but could not divide and separate them from the rotten ones in the creek, and that was the reason why they had refused to receive them; that there was plenty of good, merchantable logs in the timber furnished by appellants, if respondents had seen proper to select and cut them, but a large proportion of the logs put in floating water above the boom were rotten and unmerchantable, and they were mixed up with good ones. Thus it will be seen that the evidence tends to show

that the respondents undertook to deliver a lot of good, sound, and merchantable logs, mixed promiscuously with a large proportion of rotten and unmerchantable ones. This they could not do, as by the terms of the contract they were required to deliver a certain quality of logs unincumbered with a large number of other logs not receivable under the contract. Appellants having taken the precaution to contract for good, sound, and merchantable logs, should not have been subjected to any considerable expense and trouble in separating the good logs from the bad ones.

But it is insisted by respondents that no injury resulted to appellants from the refusal of this instruction, for the reason that it was afterwards substantially given in the instruction that followed. That instruction is to the effect that while appellants are not bound to scale, receive, or pay for any logs not good, sound, or merchantable, the fact that some of that quality may have been put in floating water by respondents, did not excuse the appellants from their agreement to receive and pay for such as were good, sound, and merchantable. So much of the instruction is not objectionable, but the clause which follows is. It is in these words: "But if it would be impossible to separate them, or if it could not be done without great expense, it would excuse them." In our opinion, this instruction fails to embrace the substance of the one asked for and refused.

The court further instructed the jury as follows: "The parties to this action have reduced their contract to writing—all the terms of the contract must be sought in the written agreement. The construction of the contract is a matter of law for the court. An issue is made in the pleading as to when the contract price for any logs became due and payable. This issue must be decided by the court. It depends altogether upon the construction of the written contract. I now instruct you that by the terms of the contract, the purchase price of all logs delivered under the contract became due immediately upon their delivery at the boom of defendants. Defendants agreed to receive and pay for all good, sound, merchantable logs delivered to them at the boom by plaintiffs, four dollars and twenty-five

cents per thousand feet. This price they agreed to pay when the logs were delivered at the boom." To this instruction appellants excepted, and assign it as error.

It is insisted by the appellants that this contract is entire and not severable; that it should be construed to mean that respondents were to furnish one million feet of logs within the year, at the rate of four dollars and twenty-five cents per thousand feet, and to keep a sufficient number on hand to keep the mill running—payment to be made on its fulfillment and not on the delivery of each one hundred thousand feet.

As to whether this contract is entire or severable is a question of construction, which depends upon the intention of the parties, to be ascertained from the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed. (2 Parsons on Contracts, 517.)

Adopting this rule of construction, we have reached the conclusion that the contract is severable and not entire. While the whole number of logs to be delivered was one million of feet at a certain price per thousand, yet they were to be delivered in quantities of one hundred thousand feet at a time, and the contract being silent as to the time of payment, it will be implied that they were to be paid for when delivered.

Error having been committed in the refusal of the court to instruct, as asked by the appellants, the judgment is reversed and the cause remanded to the court below for a new trial.

JAMES A. CAUTHORN, RESPONDENT, v. SOL KING AND M. H. BELL, APPELLANTS.

JOINT WRONG-DOERS—GENERAL VERDICT.—Where, in an action for a wrongful conversion of property against two defendants, both answer, and a general verdict is rendered, it is a verdict against both defendants, and judgment should be given against both. But if, in such case, judgment is rendered against one only, it is error. If the defendant against whom the judgment is rendered appeals from the justice's court, where the judgment was rendered, to the circuit court, and on the trial had in the circuit court both defendants appear and defend, the circuit court has jurisdiction to render judgment against both defendants on a verdict of guilty against both.

PLEADINGS, AFFIDAVITS NOT ADMITTED TO EXPLAIN.—In order to determine the issues to be tried in an action, the court can only look to the pleadings, which cannot be enlarged or explained by affidavits.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth, for appellants.

R. S. Strahan and J. W. Rayburn, for respondent.

By the Court, BOISE, J.:

The complaint alleges that appellants, in April, 1878, had in their possession fifty-five and thirty-five sixtieths bushels of wheat belonging to respondent, of the value of one dollar per bushel, and that appellants wrongfully and unlawfully converted it to their own use.

The answer denies all the allegations of the complaint, and alleges further that the transaction complained of arose between appellants and one Jerry E. Henkle, who had stored wheat with appellants, and by accident and mistake had got the warehouse receipt of appellants for fifty-five and thirty-five sixtieths bushels too much, and that said Henkle transferred said receipt to respondent, and that respondent brought suit thereon before W. H. Johnson, justice of the peace. The reply denied the mistake. The real issue was as to whether there was a mistake, or whether appellants had the wheat of respondent. The issue was tried before a jury, who rendered the following verdict: "We,

the jury, find for the plaintiff the sum of forty-four dollars and twenty-four cents."

Judgment was rendered against the defendant, Bell, alone. From this judgment Bell appealed to the circuit court. It is claimed by the appellants that King did not answer, and that Bell alone appeared in the case in the justice's court. But on examining the answer, it appears to be the answer of both defendants, and is signed by F. A. Chenoweth and E. Holgate, attorneys for defendants. With this answer on file, no judgment could be taken against the defendant, King, without a trial, and it is a mistake of fact by appellants to now assert that there was no issue to try between the plaintiff and King. As the case stands on the pleadings, it was necessary for the plaintiff to make out his case, and it being a case of tort, he could have a verdict against both defendants, or either of them, as the proof should warrant. The parties had answered together, and the trial necessarily proceeded against both, and as the jury found a general verdict, it was a verdict against both. If the evidence did not implicate both in the wrong complained of, then the verdict should have been against the guilty party alone, and the other party should have been found not guilty of the wrong charged in the complaint.

The record shows that on the trial "E. Holgate and F. A. Chenoweth appeared for Bell and filed answer;" but that answer is, in form, by both defendants. The attorneys, Chenoweth and Holgate, signed the answer as attorneys of defendants, and on the back of said answer is indorsed, "Chenoweth & Holgate, defendants' attorneys." To determine what the issue was that was before the court for trial, we must be controlled by the pleadings, and in this case they show that both defendants appeared and answered, and it is clear that the verdict in the justice's court was against both defendants, and that the plaintiff was entitled to a judgment against both. The judgment, however, was rendered against Bell alone, and was, therefore, erroneous, whether entered on the motion of plaintiff or not. And from this judgment either party could appeal to the circuit court. The defendant Bell appealed, and the cause came

on for trial in the circuit court on the issues as presented by the pleadings in the justice's court. (Civ. Code, 221, sec. 533.) King was as much a defendant in these pleadings as Bell.

It is claimed by the appellants that Bell being the only party to the judgment appealed from, King was not brought into the circuit court by the appeal; that he was no party to it, and that he was not compelled to appear in the circuit court, and did not appear, and is not bound by its judgment against him. On looking into the record, we find that when the cause was tried in the circuit court, the "defendants and appellants, by their attorneys, Messrs. Chenoweth & Holgate," appeared and proceeded with the trial, which resulted in a general verdict for the plaintiff. This record must be taken as true, and shows that the defendant King did appear in the circuit court; and we think he waived any want of notice of the appeal and submitted himself to the jurisdiction of the court for the trial of the issues presented in the pleadings; and this does away with the appellant's objection that King was not properly in court to assert his rights. It is not, therefore, necessary to decide in what position he would have been had he not appeared and defended the action in the circuit court. It is true that Bell appeared alone to make the motion for a judgment, notwithstanding the verdict, and excepts to the ruling of the court on that motion; and it also appears in the bill of exceptions that both Bell and King appeared and excepted to the entry of the judgment on the verdict in the circuit court, which is the subject of this appeal. In the bill of exceptions is this language: "Defendant M. H. Bell excepts to the decision of said court in overruling said motion for judgment in favor of said defendant, notwithstanding the verdict; and defendants, King and Bell, except to the decision or order directing judgment to be rendered in said action against Sol King and M. H. Bell."

It therefore appears, not only by the record of the trial, but by the appellant's bill of exceptions, that King appeared in court after the verdict was rendered and objected to the entry of judgment thereon. We think that this record

shows that both defendants appeared and answered and went to trial in both courts, and are bound by their proceedings, unless the verity of the record can be impeached by the affidavits which are set out in the bill of exceptions. These affidavits are offered to explain the record and show that its recitals, showing the appearance of King, are not true. This, we think, can not be done; that the record is a verity and can not be contradicted by affidavits. A record can only be tried by the record itself, and we can not and have not considered the affidavits in determining the case.

The judgment of the circuit court will be affirmed, with costs.

W. O. KENDALL, APPELLANT, v. WALLACE POST, RESPONDENT.

ROAD SUPERVISOR—SOLE JUDGE OF NECESSITY FOR TAKING MATERIALS.—In repairing a public road, the supervisor of roads has authority to enter upon any lands adjoining or near the public road, whether the same be inclosed or not, in order to obtain stone with which to repair the road; and the supervisor alone is to be the judge whether it is necessary to use stone or not in order to make the repairs.

IDEM—COURT OF EQUITY WILL NOT INTERFERE.—So long as the supervisor does no act to willfully oppress or annoy the owner of the premises where the stone or other materials are procured to repair the public roads, a court of equity will not interfere to restrain him in the discharge of his official duties as supervisor.

IDEM—DAMAGES—COUNTY COURT MUST ASSESS.—If the owner of lands from which stone or other materials are taken to repair the public roads feels aggrieved by the acts of the supervisor, he must apply for redress to the county court, while transacting county business, to assess and determine the damages sustained by him.

DAMAGES ASSESSED WITHOUT JURY.—Section 29 of chapter 50 of the miscellaneous laws, which provides for the assessment of damages for taking stone or other materials to repair the public roads, is not unconstitutional because it authorizes the county court to assess the damages without a trial by jury.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth, for appellant:

Private property cannot be taken for public uses without

compensation. (1 Abb. Dig. 639, sec. 2.) Where the statute fails to provide for the assessment of damages, the act is void. (24 Cal. 432; 19 Barb. 118.) Where private property is taken without the consent of the owner, the statute must be strictly pursued. (Id. 431.) There is no authority of law for entering a man's inclosure. (Cooley on Constitutional Law, 530; 27 Barb. 207.) At the passage of the road law, 1860, most of the land in Oregon was uninclosed.

There is no right of trial by jury before the county court, nor right of appeal. (Misc. Laws, 729; 15 Barb. 255; 1 Abb. Dig. 640, sec. 6; 12 Am. R. 147, 585, 692; 2 Id. 59-64; 12 Id. 147.) The county is not competent to try its own case. Where there is no necessity to take private property, there is no right. (43 Conn. 234; 21 Am. R. 643.) A court of equity has jurisdiction to enjoin a man from disfiguring a cemetery. (21 Am. R. 647, note.) A ministerial officer is liable for acts done without authority of law, or going beyond authority of law. (Cooley's Const. Lim. 560, and note; 19 Am. R. 718; *Monroe v. Pardee*, 64 Barb. 353.) A court of equity has jurisdiction, because a court of law is not adequate to restrain.

John Burnett and W. S. McFadden, for respondent:

The respondent, as road supervisor, had a legal right to enter on the premises in question and take gravel or dirt therefrom to build or repair the county road. (Misc. Laws, 728, sec. 28.) The statute provides the manner of compensating persons damaged by the acts of the supervisor in taking materials from adjoining land to repair a road. (Id. 729, sec. 29.) Until the claim was presented to the county court, as provided by statute, the appellant would have no cause of action or suit. (18 Cal. 144; 28 Id. 662.) The mode of compensation being fixed by statute, the appellant must follow that course. (Cooley's Const. Lim. 700.) It is competent for the legislature to make the supervisor the sole judge of the necessity for the taking of materials to repair the highway. (Id. 672, 673, and notes.) Public agents who

keep within the statute are not liable to a common law action of trespass. (Id. 705; 1 Parsons on Contracts, 96.)

No action lies against a road supervisor who acts for the public, unless given by statute. (8 U. S. Dig. 386, sec. 8; 5 Neb. 385; 66 N. Y. 62.) A road supervisor is the agent of the county, and is liable to a fine for a failure to perform his duties in repairing the county roads in his district, and the county is liable to persons injured by the road being out of repair. (Misc. Laws, 730, sec. 35; 3 Or. 424.) When the right of a party is doubtful, the court will not grant an injunction. (Willard's Eq. 382; 3 Paige Ch. 213; 2 Barb. Ch. 101; 3 Johns. Ch. 282; High on Injunctions, 7, sec. 8.)

By the Court, KELLY, C. J.:

The appellant in his complaint sets forth that he is the owner of a certain tract of land in Benton county, and that the respondent was and is the supervisor of roads, and as such supervisor was engaged with a number of men in working on the county road in the vicinity of the said premises; that while so engaged he entered upon the lands of appellant, pulled down the fences, quarried rock and stones and hauled them away to repair the highway; that the quarry from which the rock and stone were taken was within an inclosure in which the appellant had a garden, orchard, meadow, and growing grain which were turned out to the commons by opening the fences; that the teams and men engaged in hauling away the rock and stone have trodden down his grass, and that the quarrying and carrying away the stone and rock has greatly disfigured his premises and will materially lessen their value; that the place where the stone was dug is near a family burial place and upon grounds which have been prepared and kept neat for many years, and that money would not compensate the appellant for disfiguring the premises as respondent proposes to do. The complaint further states that the said grounds are one-fourth of a mile from the county road upon which the stone and rock are placed, and that the same kind of rock can be had without entering any inclosure, by going one-half a

mile farther; that there is good material more covenient to said road and suitable to repair the same outside of his inclosure, and that respondent was not compelled for want of suitable materials to enter his inclosure to obtain the materials to replace the road. He further alleges that respondent threatens to haul five hundred wagon loads of stone more from said premises and will do so unless restrained. The appellant then alleges that he has sustained damage in the sum of five hundred dollars in the destruction of his grass, exposure of his garden and orchard, etc., and prays for a decree awarding him that sum and for an injunction to restrain the respondent from trespassing on his premises and removing stone and rock from the same. The respondent demurred to the complaint and the court sustained the demurrer and dismissed the complaint.

The law imposes a duty upon the supervisor of roads to open and keep in good repair all public roads in his road district, and in order to do so he is authorized, among other things, "to enter upon any lands adjoining or near the public road and gather, dig, and carry away any stone, gravel, or sand * * * necessary for making and repairing any public road." Upon the supervisor devolves the duty of determining how a public road is to be repaired and what materials are to be used for that purpose. If, in his judgment, stone or gravel are better materials than clay, he can go upon any lands adjoining or near the public road, whether inclosed or not, and dig and carry away the stone or gravel required for the purpose of making the repairs. And it is not necessary for him to wait until he can procure the consent of the owner or the judgment of a court assessing the damages to be paid for appropriating the materials necessary for the public use. Every owner of the land holds it subject to be taken for the public use whenever it is necessarily required for that purpose and to be appropriated in such a manner as the constitution and law provide.

It is alleged in the complaint that stone of the same kind could be procured by the supervisor without entering an inclosure, by going a half mile farther for it. We think it it is the duty of that officer as well as all others to procure

whatever materials he may require for the use of the public with as little expense to the tax-payers as possible, and in our opinion he would not have been justified in going to the needless expense of hauling the stone half a mile farther than he did. Another allegation in the complaint is that a family burial ground is near where the rock was quarried, but how near is not stated. There is no charge, however, that the respondent has injured it or that he threatened to injure it, or in any way disturb the respose of the dead. The appellant, moreover, alleges that he has for years kept the grounds inclosed and in a neat condition and that the acts of the respondent have despoiled them of their beauty. It may be unfortunate for the appellant that this is so, and that the highway passes so near his premises. But in this utilitarian and progressive age, the beautiful must often give way to that which is useful, when it is for the public good.

The highways must be kept in repair to accommodate the travel upon them, and it so happens in this case that the appellant's land is the nearest and most convenient where suitable materials for that purpose can be had. It is true the appellant alleges in his complaint that good materials and suitable for repairing the road can be had outside of the inclosure. But he is not to be the judge of what is suitable. That is for the supervisor, and for him alone. It does not appear from the allegations in the complaint that the respondent in the exercise of his official duties was doing any act to oppress or wantonly annoy the appellant by entering his inclosure and taking away materials to repair the public road, and where that is the case the court ought not to interfere and restrain him from discharging those duties which the law has imposed upon him.

Section 29, chapter 50, of miscellaneous laws, provides, that "if any person shall feel aggrieved by the act of any supervisor cutting or carrying away timber or stone as aforesaid, he may make complaint thereof in writing, to the county court, at any regular meeting within six months after the cause of such complaint shall exist, and such court shall proceed to assess and determine the damages, if any, sustained by the complainant, and cause the same to be paid

out of the county treasury. The appellant contends that this section of the road law is unconstitutional and void, because it provides for the assessment of damages without a trial by jury, and to sustain this view, we are referred to article 1, section 17, of the constitution, which declares that "in all civil cases the right of trial by jury shall remain inviolate."

This constitutional provision does not apply to cases of taking private property for public use, but to actions in courts of justice. It was intended as a safeguard in the trial of those cases for which it is stipulated that the courts shall remain open, and wherein the parties to the suit shall have a trial by due course of law. In 2 Dillon on Mun. Corp. (sec. 483), the law on this subject is thus stated by the distinguished author: "The determination of the question, 'What is the *value of property* taken, or what is the *amount of damages* sustained by the taking?' is undeniably judicial in its nature and peculiarly adapted for decision of a jury under the direction of the court. Yet it has been held that the ordinary provision as to the right of trial by jury, in civil cases, has no relation to original assessments in such cases, and that in the absence of special provision in the organic law, giving the right to have a jury assess the damages, it is competent for the legislature to provide for assessments by any other just mode, and to conclude the owner, as to the amount, without giving him the right to be heard before a jury." The authorities referred to by Judge Dillon, in support of his position, show that this question has been long since settled beyond any doubt or controversy. (*Livingston v. Mayer*, 8 Wend. 85; *Beekman v. Railroad, etc.*, 3 Paige, 75; *Railroad Co. v. Heath*, 9 Ind. 558; *Heynemon v. Blake*, 19 Cal. 519; *Brazos R. R. Co. v. Ferris*, 26 Tex. 588.)

If the appellant felt aggrieved by the acts of the supervisor, he should have applied to the county court, composed of the county judge and the county commissioners, while transacting the county business. That is the only tribunal which has authority to assess and determine the damages to which he was entitled for the acts of the respondent.

The decree of the court below is affirmed.

SARAH BIGLOW ET AL., APPELLANTS, v. J. R. LEABO AND CHARLOTTE LEABO, RESPONDENTS.

UNDUE INFLUENCE MUST BE CLEARLY SHOWN TO SET CONVEYANCE ASIDE.—In order to warrant a court of equity in setting aside a deed alleged to have been executed under undue influence, exercised by the grantee over the grantor, the evidence must clearly establish that such influence was exerted, and that the deed was executed by reason of such influence, and would not have been executed had not the influence been exerted, and that the deed was not the free act of the grantor.

APPEAL from Yamhill County.

This is a suit by the appellants to set aside a conveyance executed by one John G. Parrish, on March 14, 1876, to the respondents. The complaint, in substance, alleges "that John G. Parrish died in Yamhill county, state of Oregon, on the tenth day of November, A. D. 1876, and left surviving him, as heirs at law, the above-named appellants—Sarah Biglow, Margrette E. Chrisman, Wm. H. Parrish, and Ella Wisecarver; that on the fourteenth day of March, 1876, and long prior thereto, the said John G. Parrish was the owner of a certain tract of land containing one hundred and sixty-nine and twenty-five hundredths acres, situated in Yamhill county, state of Oregon; that he was, on the fourteenth day of March, 1876, and long prior thereto, old and infirm, and wholly incapacitated from attending to any business, by reason of his being of weak mind; that the defendants on said day, fraudulently taking advantage of his inability and imbecility of mind, did overpersuade him to make, sign, and deliver to them the deed to said land, without any consideration therefor, and in fraud of the rights of plaintiffs, who are children of the deceased John G. Parrish."

The respondents deny the allegations of incompetency in Parrish, and of undue influence. For a separate defense, they allege, in substance, that on the twenty-sixth day of January, 1876, Parrish came to reside with the respondents, and to make his home with them, and continued to so reside with them till the date of the execution of said deed

by him, and thereafter until his death; that during this time he was old and infirm in health, and not able to take care of himself, or do any work, and that they, at his request, boarded him and furnished him a home, and took care of him, and paid out for him money for medicines and medical treatment and necessaries of life; that on the said fourteenth day of March, 1876, Parrish and the respondents entered into a contract whereby they agreed to keep, board, lodge, maintain, and care for Parrish the remainder of his life; and Parrish agreed, in consideration of said board, lodging, etc., to convey to the respondents the land described in the complaint, and they were to execute to Parrish a life lease upon said land for the purpose of further securing to him the performance of said agreement and the conditions of the deed, and that said deed was executed and delivered in pursuance of said agreement, and that the agreement was fully complied with on their part; that since the execution of the deed they have made valuable and permanent improvements on said land to the value of eight hundred dollars, and that the appellant, Wm. Parrish, son of said John G., abused and ill-treated his father, said John G. Parrish, and that by reason thereof he was compelled to leave his house and go and reside with the respondents.

Upon the testimony taken in the suit, the court below dismissed the complaint at the appellants' costs.

Bradshaw & Moreland and Bonham & Ramsey, for appellants:

Where imbecility of mind and inadequacy of consideration coexist, courts of equity presume that the transaction was fraudulent without other proof. (Willard's Eq. Jur. 203-4; 4 Or. 291.) The defendants, having induced J. G. Parrish to leave his home and put himself under their care and "protection," he being infirm in mind and unable to take care of himself, became his *quasi* guardians, and courts of equity will presume that the deed made during the existence of this confidential relation was obtained by fraud and undue influence, and annul it. (Bigelow on Fraud, 281, 285; Kerr on Fraud, 182, *Cadwalder*

v. West, 48 Mo. 483; *Whelan v. Whelan*, 3 Cow. 587; 21 Md. 338; 6 N. Y. 568; 1 Barbour, 408; 31 Id. 9; *Gilmore v. Burch*, 7 Or. 374; *Greenwood v. Cline*, 7 Or. 17; *Huguenin v. Baseley*, 2 L. C. in E., part 2, 1184, 1185, 1206, and notes.)

H. & A. M. Hurley and McCain & Fenton, for the respondents:

Mere weakness of mind, if the man be legally *compos mentis*, is no defense to an action founded on the contract, or other acts of such party. (Willard's Eq. 201; 25 N. Y. 70, 71; 8 Id. 358; 68 Id. 148; Dean's Med. Juris. 556; 3 Leading Cases in Equity, 136; 16 Am. Dec. 473, 651, 652; 4 Id. 336.) Weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy or delusion, they can not properly be considered unsound. (Willard's Eq. 201; 25 N. Y. 68.)

A deed, will, or other instrument, will not be set aside on the ground of imbecility, if the party knew perfectly well what he was doing. (Dean's Med. Juris. 564; 3 Leading Cases in Equity, 112.) To establish undue influence it must appear that the opportunity or influence was such as to deprive the testator or grantor of the free exercise of his will, and that it was exerted. (34 N. Y. 155; 68 Id. 152; 66 Id. 145; 70 Id. 394.) Evidence of non-professional witnesses must be based upon acts and declarations. (34 N. Y. 194; Civ. Code, 250, sec. 696.) There must have been undue influence, and there must be evidence that it was exerted. (77 Ill. 397; 68 N. Y. 148; 76 Pa. St. 106.)

The rule of evidence is different where a fiduciary relation exists. In such case—perhaps where consideration is inadequate and parties are greatly unequal in mind by reason of old age or other circumstances—the law might presume undue influence or incapacity, and the *onus probandi* might be on the beneficiary to show the want of undue influence. Where, however, the fiduciary relation does not exist, and where the consideration is adequate and the parties competent to contract, the burden of proof is on the contestants, and the undue influence must clearly appear. (2 Selden,

268; 66 Pa. St. 292; 2 Johns. Ch. 22; 1 Redfield. 535. sec. 38, n. 22, 34; 1 Story's Eq. sec. 238.)

By the Court, BOISE, J.:

This being a proceeding seeking to set aside a deed, alleging as a reason that the grantor (who was the father of the plaintiffs) was, at the time he executed the deed, old and of weak mind, and that he was overpersuaded and made the deed under undue influence exerted over him by the defendants, it will be necessary, in order to arrive at a just understanding of the merits of the transaction, to look into the history of the case. It appears from the testimony, that J. G. Parrish, deceased, the grantor in this deed, some fourteen years before the execution of the deed, had some difficulty with his wife, with whom he had lived many years, and who is the mother of the appellants, and was divorced from her; that some time after the divorce he went to live with his son, W. H. Parrish, with whom his divorced wife was living; that he gave to his son, William, a farm, and agreed to reside with him as long as he lived. He became dissatisfied with the treatment he received with his son and divorced wife, and sought to find some one to go on the farm now in controversy, in order that he might make a home there. After trying several persons, he got the respondents to go on the farm, and he soon went there. This was in January, 1874. He lived with them until he died, on November 10, 1876. This deed was executed March 14, 1876. It is claimed by the respondents that before they went on this farm, J. G. Parrish, the grantor, agreed to give them the farm for taking care of him during life, and that this deed was executed in fulfillment of this agreement. The proposition is disputed by the appellants, and there is some conflict of testimony on this subject. The question as to the time when the contract to make the deed was concluded, is left in some doubt; but this issue is not very material in the case, and can have no other significance in enabling us to come to a correct conclusion on the merits of this controversy than this: If it was fully established that the bargain was fully entered into in 1874, it would appear that the

grantor had long contemplated making the deed, and that the act was more fully considered than if entered into at the time when the deed was executed.

In order to set this deed aside for undue influence, it must be shown by the appellants that the grantor's mind was weak, and that undue influence was exerted over him, and that it was the undue influence which caused him to execute the deed, so that it was not his free act. (68 N. Y. 148; 76 Pa. St. 106; 77 Ill. 397.) It appears in this case that there was a sufficient inducement for making the deed resulting from the desire of the grantor to remove himself from a home which had become disagreeable to him. This was a valuable consideration, and the evidence clearly establishes the fact that he did desire to remove from the house of his son. The evidence as to the state of his mind at the time he executed the deed is conflicting. The weight of the testimony is in favor of the proposition that he was capable of fully understanding the transaction, and the effect of the deed and of the life lease which he took to secure his maintenance. Mr. Corey, the magistrate who drew the deed and life lease, is probably the most intelligent witness to that transaction, and had the best opportunity to observe his capacity. He testifies that the grantor was competent. We think the weight of the testimony is in favor of the proposition that he was competent, and that he executed the deed of his own free will.

Many witnesses testify to the declarations of the grantor, to the effect that he was dissatisfied with his treatment at his son's house, and that he was satisfied with the treatment at Leabo's. The number of witnesses who testify to the fact that he was competent to contract at the time he made the deed is much greater than those who express a contrary opinion, and they are equally as intelligible and creditable. The evidence all taken together does not establish the proposition that the deed was executed either without consideration or under undue influence.

The decree of the circuit court will be affirmed with costs.

MARY E. BARRETT, APPELLANT, v. XARIFA J. FAILING, RESPONDENT.

RES ADJUDICATA.—The judgment of a court of competent jurisdiction is not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not.

IDEM—PAROL EVIDENCE NOT ADMISSIBLE TO SHOW THAT QUESTION WAS WITHDRAWN.—In a suit or proceeding to recover property or its value when the plea of a former adjudication is interposed by the defendant, the plaintiff will not be permitted to offer parol evidence to show that an issue made by the pleadings in the former suit was withdrawn from the consideration of a referee before whom it was tried.

APPEAL from Multnomah County. The facts are stated in the opinion.

O. P. Mason and W. Scott Beebe, for appellant.

Wm. Strong & Sons, for respondent.

By the Court, KELLY, C. J.:

On the eighteenth day of February, 1871, Mary E. Barrett, the above-named appellant, recovered a judgment against Charles Barrett in the circuit court of the state, for the county of Multnomah, in the sum of five thousand nine hundred and twenty-one dollars and thirty-two cents and forty-six dollars and thirty cents costs. The foundation of the action was a decree for alimony in a divorce case prosecuted in the state of California wherein the said Mary E. obtained a divorce from the said Charles Barrett.

On the first of November, 1873, Charles Barrett died, leaving the judgment entirely unsatisfied, but at the time of his death there was pending against him and Xarifa J. Failing, then Barrett, a suit in equity to set aside as fraudulent a certain conveyance of real property and a sale of personal property—the same that is in question in this proceeding. The result of that suit was the securing of a payment on the judgment of three thousand and sixty-four dollars and forty-seven cents on the first day of May, 1876. On the tenth of August, 1878, the appellant obtained leave to issue an execution on the judgment for seven thousand three hundred and thirty-five dollars and sixty-seven cents, that being the

amount then due. Execution was issued on the judgment against Charles Barrett, who was then dead; upon which a garnishee process was served on X. J. Failing, the respondent, on the thirteenth of August, 1878, in accordance with the provisions of sections 308 and 309 of the civil code. Written allegations and interrogatories were filed by the plaintiff, which the garnishee was required to answer by an order of the judge of the circuit court. Among these allegations, the principal one charged that on or about the —— day of November, 1870, the said Charles Barrett, with the intent to delay, cheat, and defraud his creditors, particularly the plaintiff, and to prevent her from collecting her said judgment, transferred and delivered to the said Xarifa J. Failing, at the city of Portland, all his property, to wit, the said goods and chattels, fixtures, etc., known as the Barrett bookstore, worth fifteen thousand dollars, and that she received the possession thereof with full knowledge of all the facts herein stated.

On the fifth day of December, 1878, the garnishee, X. J. Failing, filed her answer denying all the allegations of fraud, and averring that the property so received by her from Charles Barrett was of no greater value than three thousand dollars, and that she received and paid for the same in good faith. She then, for a further answer, alleged that on the second day of June, 1871, the said plaintiff commenced a suit in the circuit court for Multnomah county against the said Charles Barrett and this garnishee, in which suit the plaintiff sought to set aside the same sale and transfer of personal property which is set forth in the plaintiff's allegations in these proceedings; that she asked in substance and effect that the sale and transfer of the personal property known as the Barrett bookstore, etc., from the said Charles Barrett to this garnishee, on the fourteenth day of September, 1870 (described herein as of about the ——day of November, 1870), might be declared fraudulent and void as against her, and that the garnishee be decreed to account for all the said property; that she, the said garnishee, answered the said complaint, and it was made one of the issues in the said suit in equity, whether or not the said transfer

of personal property to this garnishee was fraudulent and void, and whether or not the said plaintiff was entitled to have the said property or its proceeds applied to the payment of the said judgment against Charles Barrett.

The garnishee then alleges that the said suit was referred by the circuit court to E. C. Bronaugh, who was appointed a referee to take testimony; that the referee took the testimony upon all the issues in said suit in relation to the sale and transfer of the said Barrett bookstore, and on the twenty-second of September, 1873, made his report thereon to the effect that the sale and delivery of the said personal property to this garnishee, on the fourteenth of September, 1870, was not fraudulent and void, and that this report, so far as it relates to the personal property, was not excepted to, and on the eighth day of June, 1874, the said circuit court adjudged and decreed that the findings of said referee, in reference to the said personal property, should in all things be confirmed.

The plaintiff (appellant), on December 17, 1878, filed a reply, and on January 25, 1879, an amended reply, in which, among other things, she makes a denial substantially as follows: "And in reply to the further and separate answer of the said Xarifa J. Failing, to wit, the allegations of a former adjudication of the subject-matter of this proceeding, this plaintiff alleges that it is not true that the subject-matter of this proceeding was, in the suit commenced on the second day of June, 1871, or at any other time, adjudicated in any manner, and that there was not, at any time during the pendency of said suit, any evidence offered or taken by said referee, or introduced by either party to said suit, of the subject-matter in this proceeding, to wit, the said bookstore; denies that any evidence was introduced before or received by said referee, at any time, relating to the transfer, sale, or delivery of the subject-matter of this proceeding, to wit, the bookstore in controversy, or the rights of the garnishee; denies that the referee passed on the same, and alleges that, long before the finding of said referee therein, and before any trial thereof, this plaintiff, by her attorney, expressly and without objection

from either of the defendants therein, and with the consent of said Xarifa J. Failing and her attorney, abandoned and withdrew from said suit all claim to personal property, which is the subject-matter of these proceedings, and no objection was made to the withdrawal by said Xarifa J. Failing (the garnishee herein) or her attorneys; denies that the referee passed upon or found any fact or law upon the matter herein sought to be litigated in said suit, or in any suit; denies that on the twenty-second of September, 1873, or at any time, the said referee made or filed any finding of fact or conclusion of law to the effect that said sale of personal property was not fraudulent and void; and denies that the circuit court at any time rendered any decree that the finding of the referee in reference to the personal property described herein should be or was confirmed, adjudged, or passed upon."

There are other defenses interposed by the garnishee, but it is unnecessary to present or consider them, as the view we take of the defense of a former adjudication disposes of this proceeding.

Upon filing the reply, the respondent, by her counsel, moved the court for judgment and decree upon the pleadings, and that the proceedings against the garnishee be dismissed; which motion was sustained by the court, and a decree entered accordingly.

From the answer filed in this case, it appears that on the fourteenth day of September, 1870, a suit in equity was commenced by the appellant, Mary E. Barrett, against Charles Barrett, and Xarifa J. Failing, the respondent herein, to set aside the sale of certain property, including the Barrett bookstore, made by Charles Barrett to the respondent, because the same was made to defraud the creditors of said Charles Barrett. An answer was made in that suit by the respondent, denying the fraudulent sale. It is not denied by the appellant that the suit was concerning the subject-matter of this proceeding. Nor is it denied that the issue presented by the pleadings in that case was the same in regard to the Barrett bookstore as that now presented for consideration in this proceeding. The appel-

lant, in her reply, alleges that so far as the Barrett bookstore was concerned, the same was expressly withdrawn by her attorney from the consideration of the referee appointed in the suit in equity; that no evidence was offered or received before the said referee in regard to this issue made by the pleadings in that suit; that it was withdrawn from the consideration of the referee without objection from either of the defendants, and with the consent of the said Xarifa J. Failing, and that her attorney in that suit abandoned and withdrew from the said suit all claim to the personal property which is the subject-matter of this proceeding; that there was no finding by the referee or decree made by the court in regard to the matter now in controversy in this proceeding.

These matters set forth in the reply can not be considered as any defense to the allegation of a former adjudication set up in the answer, because it does not appear that the withdrawal of the litigation concerning the bookstore from the consideration of the referee was entered upon the record, or made a matter of record in the suit in equity. It is well settled that parol evidence can not be admitted to show that any issue presented by the pleadings in a former action or suit was withdrawn from the consideration of the court. The rule is that the judgment of a court of competent jurisdiction is not only conclusive on all questions not actually and formally litigated, but as to all questions within the issue, whether formally litigated or not. (*Bellinger v. Croigne*, 31 Barb. 537.)

In the case of *Davis v. Talcott* (12 N. Y. 184), where the defendant, in his answer, alleged that the matter in controversy had been adjudicated in a former action, and the plaintiff replied, alleging "that on the trial of the former action, the defendant therein withdrew from the consideration of the referee, before whom it was tried, the matters alleged in the complaint in the second suit, and that the same did not pass into or form any part of the judgment rendered in that action," it was held by the court of appeals that the plaintiff could not be permitted to prove that on the trial of the former suit, before the referee, no

evidence was offered or introduced, on the part of the defendant in that action, to prove or establish the claim for damages set up by way of recoupment in the answer therein, but that, on the contrary, the defendant in that suit, on the trial thereof, expressly withdrew from the consideration of the referee the whole and every part of such claim. Gardiner, C. J., delivering the opinion of the court, said: "The learned judge who tried this cause erred in determining that the judgment in the first suit between these parties was not a bar to the present action, and in permitting the legal effect of the record to be explained or qualified by parol evidence of what then occurred before the referee."

In the case of *Underwood v. French* (6 Or. 66), where the plaintiff sought to recover damages for the breach of a contract, and the plea of a former adjudication was interposed by the defendant, it was held by this court that where it appeared, from an inspection of the record in the former action, that the same cause of action was presented in the former suit, and an issue joined thereon, the whole must be considered as *res adjudicata*, and that parol evidence would not be permitted to show that an issue joined by the pleadings was not tried by the evidence. This rule is applicable to suits in equity, as well as to actions at law. (1 Johns. Cas. 492.)

According to the law, as declared in these cases, if this proceeding were now before the circuit court for trial upon the issues presented in the pleadings, the appellant would not be permitted to offer any evidence outside of the record itself to prove the allegations in her reply as to the withdrawal of the matters now in litigation from the consideration of the referee, and necessarily the matters herein sought to be litigated would have to be considered as *res adjudicata*.

Under the views herein taken, it becomes unnecessary to consider the other assignments of error. The decree of the court below is affirmed.

JOHN L. KRUSE AND CHAS S. MOORE, APPELLANTS, v. C. W. PRINDLE, RESPONDENT.

TWO CONVEYANCES EXECUTED AT THE SAME TIME between the same parties, and relating to the same subject-matter, should be construed together as forming parts of a single conveyance.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—BURDEN OF PROOF.—A creditor may make an assignment of his property in trust with a provision that it be converted into money, and the proceeds thereof distributed equally among his creditors, excepting such as may be secured by mortgage, and when such assignment is attached for fraud and illegality by a creditor, the *onus* is upon him to establish the fraud and illegality by proof, and in order to defeat it on that ground, it must be shown that the assignor and assignee both participated in the fraud.

APPEAL from Clackamas County.

One Thomas Robertson, having a mortgage upon certain real property, brought a suit of foreclosure against D. W. Williams, the mortgagor. Subsequent to the Robertson mortgage and on June 13, 1877, Williams, the mortgagor, had, so it was claimed, conveyed the mortgaged property to one C. W. Prindle, in trust for the benefit of his creditors. After the so-called trust conveyance to Prindle, and on November 10, 1877, one Kruse and one Moore obtained judgments against Williams and one Wittenberg. These judgments were rendered upon promissory notes executed by Williams and Wittenberg long prior to the conveyance to Prindle. In the Robertson foreclosure suit, Prindle, Kruse, and Moore were made parties defendant with Williams. The property was sold upon Robertson's foreclosure, and Robertson's mortgage paid. There then remained a surplus amounting to two thousand and seven hundred dollars. This suit relates to the distribution of this surplus. Prindle claimed under his alleged trust deed, while Kruse and Moore claimed a prior lien by virtue of their judgments of November 10, 1877.

The facts relating to the trust to Prindle are as follows: Williams executed a conveyance to the premises in question on the thirteenth of June, 1877, to Prindle in the usual form, and reciting that it was in consideration of one dollar,

"and other valuable consideration." This instrument was sealed, witnessed, and acknowledged in due form. On the same day Williams executed another instrument without seal or acknowledgment, which purported to convey the same premises to Prindle in trust for the payment of Williams' debts, giving preference to unsecured creditors.

It was claimed in behalf of Prindle that these two instruments were in effect one, and that they convey the premises to Prindle in trust for the creditors. It was claimed in behalf of Kruse and Moore, that the two instruments should not be construed together; that the deed was without consideration and is void as to creditors; that the instrument declaring the trust was a mere assignment in writing, and being without seal or acknowledgment, was inoperative; that at the time of making the conveyance Williams and Wittenberg were insolvent, and Prindle knew it, and that the conveyance was made to defraud Kruse and Moore. Williams had other property at the time of the conveyance.

The court ordered the surplus distributed as provided in the trust instrument, except that Kruse and Moore, who were not named in the list of creditors annexed thereto, should take *pro rata* with the other creditors. From this decree Kruse and Moore appealed.

F. O. McCown and Richard Williams, for appellants.

The deed from Williams and wife to Prindle did not create a trust against parties without notice. (Misc. Laws, sec. 771, 264; Hill on Trustees, 57, 112, 114, 117.) Kruse never had any notice of the paper in pleadings marked Exhibit "A," until it was filed, and if it is held to come within the statute of frauds, it certainly could not affect Kruse without notice. There is not a single word in the deed to indicate in the remotest degree that Prindle was charged with a trust as to the land.

When a deed purports to be an absolute conveyance in terms, "but is made, or is intended to be made, defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected as against any person other than the

maker of the defeasance, or his heirs or devisees or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded." (Misc. Laws, sec. 28, 519; 8 Wend. 208; 12 Mass. 456; 38 Maine, 447.) As a matter of law the deed of defeasance should have been executed with the same formality as the original deed. (13 Mass. 543; 22 Pick. 526; 7 Watts, Penn. 261; 8 Maine, 43, 206; 1 Bouv. Law Dictionary, 477.)

In conclusion, we insist that it clearly appears in this case that Kruse and Moore loaned their money to Williams and Wittenberg; that they used due diligence to enforce the collection of the same, and obtained a lien by judgment on Williams' property; that Williams undertook to defeat its collection by an assignment to Prindle; that Prindle knew it; that it does not appear that there are any other creditors interested; that Prindle does not attempt to show, nor is it pretended to be shown, that there is another single individual interested in Williams' estate; that he does not claim that he is the legal owner of the land in question; that all the acts of Prindle and Williams were a fraud on the rights of Kruse and Moore; and that the defendants, Kruse and Moore, come into court with clean hands, and ask of the court that the wrongful and fraudulent acts of Prindle and Williams may be set aside, and their just claims paid.

Catlin, Killen & Nicholas, for respondent.

The question in construing an instrument is not whether a fraud may be committed by the assignee, but whether the provisions of the instrument are such that when carried out according to their apparent and reasonable intent they will be fraudulent in their operation? (Bump on Frd. Conv. 369, and cases there cited.) The property may be conveyed by deed and the trust created or declared by a separate instrument in writing subscribed by the party creating or declaring the trust. (Adams' Equity, 147, and note 2; 6 Cow. 705, 725.) No schedule, either of the creditors or property, need be annexed, unless preferences are made or release required. (Bump on Frd. Conv. 347, 348; 7 Pet. 608-614 (Curtis); 4 Mason, 206, 220.)

It is not necessary to have assent of creditors to the assignment. They are presumed to assent. It is not material whether or not the beneficiaries are apprised of the conveyances. (Bump on Frd. Conv. 339, 340.) The assignment should not contain a provision for creditors to sign it, or to become parties to it. (Id. 340.) An exception in the deed, whereby a portion of the property of the insolvent is not conveyed, does not render the assignment void. (*Carpenter v. Underwood*, 19 N. Y. 520, 521.) The deed need not convey all the debtor's property. (21 N. Y. 25.)

Williams had a right to prefer creditors, though the preference would defeat all others. (Bump on Frd. Conv. 304; 11 Wheat. 78.) Assent of creditors to the assignment is presumed, and the refusal of a portion of creditors does not render deed void. (Bump, 342; 4 Mason, 217.) "It is not sufficient to invalidate an assignment that the debtor, at the time of making it, is embarrassed or executes it voluntarily or without the request or knowledge of the creditors. It is not necessary that the creditors shall be consulted or that the fact shall appear upon the face of the deed. The assignment may convey all the debtor's property. It need not convey at all." (Bump on Frd. Conv. 371.) The right to make an assignment is an incident to the ownership of property. (7 Pet. 614.)

Intent to hinder and delay creditors; what necessary. (Bump on Frd. Conv. 356; 4 B. Monroe, 430, 431.) Fraudulent intent; what is. (Id. 362.) The fraud must be in the beginning. (Id.) Fraudulent intent upon the part of the debtor alone is not sufficient. Either the assignee or creditors must participate in the fraud to render the conveyance void. (Bump on Frd. Conv. 363; *Bonser v. Miller*, 5 Og. 110.) The assignment is upon a valuable consideration. (Bump on Frd. Conv. 363, 364, 556; 4 Mason, 214.)

By the Court, PRIM, J.:

The only questions presented here for determination are: 1. Did Williams and Prindle collude and conspire together and cause the said conveyance to be made for the purpose

of defrauding Kruse and Moore, and to prevent them from collecting their debts? 2. Was the said conveyance made without consideration? The facts developed in this case show that both of these questions should be answered and determined in the negative.

The appellants having charged Williams and Prindle with collusion and conspiracy in procuring this conveyance to be made for the purpose of defrauding and preventing them from collecting their debts, the *onus* is upon them to prove it by legal and competent evidence. This they have failed to do. (Bump on Frd. Conv. 368.) These conveyances having been made and executed on the same day, and between the same parties, and relating to the same subject-matter, should be treated and considered together as one instrument. (*Cornell v. Todd*, 2 Denio, 130.)

In this case the evidence not only fails to show collusion and conspiracy between Williams and Prindle with intent to delay or defraud the appellants, but on the contrary, it shows that Williams was an insolvent debtor, and that these conveyances were executed for the purpose of making an equal distribution of the proceeds of his property among his creditors. The fact that such creditors as were secured by mortgage were preferred in said assignment, did not vitiate and render the same void, as under the law a debtor has the right to prefer one creditor to another. (Bump on Frd. Conv. 344; 11 Wend. 241; 3 Paige, 537; 11 Wheaton, 556.)

A special defense is made in the answer of Prindle against the claim of Kruse, upon the ground that the assignor, Williams, was, in fact, surety in that case, and that the debt was secured by a chattel mortgage, which Kruse had failed to enforce, by which he was released as such surety. In the recorded deed, the considerations recited are one dollar, and other valuable considerations, which have been fully shown in this case.

It was urged, on the argument of the case, that Williams had no interest in the property to assign after having executed the recorded deed. We regard that argument as extremely technical, and entitled to no weight, and especially

when we find that they were both executed at the same time. There being no evidence showing fraud in the execution or delivery of these deeds of assignment, either on the part of the assignor or assignee, they should be upheld and sustained by a court of equity.

The decree of the court below is affirmed.

GEORGE HOLSTINE, RESPONDENT, v. THE OREGON AND CALIFORNIA RAILROAD COMPANY, APPELLANT.

EVIDENCE—VALUE OF PROPERTY, PURCHASE PRICE NOT MATERIAL.—In an action to recover the value of horses killed by a railroad, the plaintiff, testifying as to the value of the horses, stated on cross-examination that he bought and paid for them in sheep at a stated price. The defendant then asked where he got the sheep, how much he paid for them, and whether they had been sheared: *Held*, that such questions were irrelevant.

SLIGHT NEGLIGENCE will not prevent a recovery, if the negligence complained of has been gross.

APPEAL from Clackamas County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Simon, for appellants:

The court erred in instructing the jury as follows: "If the company was guilty of gross negligence, and the plaintiff was guilty of slight negligence, or if the agents of the company were willfully or intentionally negligent, then the plaintiff is entitled to recover, notwithstanding his own negligence."

The rule upon this subject is thus stated in Sherman & Redfield on Negligence: "It has been held, in some cases, that the plaintiff's slight or ordinary negligence is no defense where the defendant has been guilty of gross negligence. But this exception to the rule was in part founded upon the idea that gross negligence was equivalent to fraud or malice, which we have already shown to be contrary to both principle and authority. And it is now generally held in the most important courts of America, that the degree of the defendant's negligence is immaterial in determining questions of contributing negligence."

It is contended that this court, in *Bequet v. The People's Trans. Co.* (2 Or. 200), adopted a different rule. We are free to confess that we think the decision in that case erroneous; and if a distinction does not exist between "the least negligence," which is the language used in the instruction asked, and in the opinion of the court in that case—and "slight negligence," which is the term used by the court in the instruction given in the case at bar—we ask the court to adopt the rule upon this subject which prevails in all but two of the states in the Union, notwithstanding the case of *Bequet v. The People's Trans. Co.* In fact, this court has already, as it appears to us in the subsequent cases of *Stone v. The Oregon City Manufacturing Co.*, 4 Or. 52, and *Cogswell v. The Railroad Co.*, 6 Id. 417, followed the rule as above quoted from Sherman and Redfield.

The court erred in refusing to instruct the jury, as requested by the defendant, that certain facts, if found by the jury from the testimony to exist, constituted negligence which would preclude the plaintiff from recovering. The general rule on this subject is briefly stated thus in Sherman and Redfield upon Negligence (sec. 1): "The question whether a party has been negligent in a particular case is one of mingled law and fact. It involves, indeed, two questions—(1) Whether a particular act has been performed or omitted; and (2) Whether the performance or omission of this act was a breach of legal duty. The first of these is a pure question of fact, the second a pure question of law."

Of course, to this rule, as to all general rules, some modification exists; but we insist that in this case it was the duty of the court to determine whether, if the facts stated in the instruction asked were found to exist, they constituted negligence; and if a jury whose sympathies are all with the plaintiff, are told that if the plaintiff is guilty of slight negligence and the defendant of gross negligence, the plaintiff can still recover; and are then told that they may find not only whether the facts exist which it is claimed constitute negligence, but also whether the facts, if found, do constitute negligence, parties might as well try their cases without the assistance of the court. In the following cases the

court instructed the jury that if certain facts were found by them to exist, such facts would constitute negligence, or the refusal to so instruct was held to be error (*Finlayson v. Railroad Co.*, 1 Dillon, 584; *Stone v. The Oregon City Mfg. Co.*, 4 Or. 53; *Illinois Central R. R. Co. v. Buckner*, 28 Ill. 299; *Arts v. The Chicago and P. R. R. Co.*, 34 Iowa, 153; *Wilcox v. Railroad Co.*, 39 N. Y. 358.) And in the following cases, the facts being clear or undisputed, which it was claimed constituted negligence on the part of the plaintiff, and which in the opinion of the court, as matter of law, precluded a recovery, the court granted a nonsuit: *Cogswell v. O. & C. R. R. Co.*, 6 Or. 419; *McGlynn v. Brodie*, 31 Cal. 376; *Wilds v. The H. R. R. Co.*, 29 N. Y. 315; *Gonsales v. N. Y. & Harlem R. R. Co.*, 38 Id. 432; *Deyo v. N. Y. Central R. R. Co.*, 34 Id. 9.

R. Williams, for respondent:

The instruction given by the court was correct. If the company was guilty of gross negligence, or if the agents of the company were willfully or intentionally negligent, the plaintiff would be entitled to recover, notwithstanding he was guilty of slight negligence. (*Bequet v. P. T. Co.*, 2 Or. 200; *The Peoria, etc. R. R. Co. v. Champ*, 75 Ill. 577.) But this was not the entire charge of the court upon this subject, as a reference to the charge will show.

The instruction asked by defendants' counsel was properly rejected. It required the court to say to the jury, not that the circumstances mentioned (which was only a portion of the evidence bearing upon the point presented) in the charge asked might be considered by the jury, in determining whether the plaintiff was guilty of contributory negligence, but that these circumstances conclusively proved negligence on the part of the plaintiff, which contributed to the injury to such an extent as to prevent his recovery. This is in direct violation of sections 198 and 835 of the code of civil procedure. It was proper for the court to refuse to give the instruction as asked, and to qualify or explain the same before giving it to the jury. (*Knapp, Burrell & Co. v. Sol King*, 6 Or. 243.)

The following is the charge of the court to the jury upon the question of negligence: "The plaintiff had a right to be where he was on the highway, so also the defendant had a right to be upon the track in question with his locomotive and train, and to be using it in the manner described. The question is, Could either party, that is to say, the plaintiff and the agents of the company having the train in charge, have prevented the accident by the exercise of such care as the circumstances surrounding them required? In all cases the law requires of each party the exercise of ordinary care. The railroad company is required in all cases to exercise this care. Persons having occasion to pass and repass in the vicinity where trains are accustomed to pass, are also required to exercise this care. The more dangerous the locality the greater is the degree of care required. A greater degree of care is required of the company where its trains are passing along near to a public highway or thoroughfare, or crossing where people are at all times passing and repassing, than is required when they are not near to such a highway or public place; and at the same time the same doctrine holds those who travel about where trains are frequently passing, to greater diligence than is required of them at other times. I leave you to consider, as men of judgment and experience, what degree of care was required in this case, subject to the general rule which I have stated. If you find that the company failed to exercise that care which the circumstances required of them, and that the accident resulted as a consequence, then the company is liable, unless the plaintiff also failed to exercise proper care, and by his failure contributed to the injury. If both parties were negligent, and the negligence of both contributed to the injury, there can be no recovery. The law can not apportion the responsibility among those who are jointly responsible. If, therefore, as I have stated, the plaintiff by his own negligence contributed to his injury, he can not recover. If, however, the negligence of the plaintiff—if he was negligent—did not contribute to the injury; if the company was guilty of gross negligence, and the plaintiff was guilty only of slight negligence, or if the agents of the

company were willfully or intentionally negligent, then the plaintiff is entitled to recover notwithstanding his own negligence."

By the Court, KELLY, C. J.:

This is an action brought by the respondent to recover damages for the killing of some horses and injury to others by a freight train on appellant's railroad, alleged to have been caused by the negligence of the appellant. In the answer, negligence on part of the appellant is denied, and negligence upon the part of the respondent, which contributed to the injury, is averred.

The facts are substantially as follows: In October, 1878, the respondent was the owner of a band of eleven horses, which he was driving along the county road leading from Oregon city to Salem. When about half a mile above Canemah, where the county road runs parallel with and near to the railroad track, but separated by a board fence, he met a freight train going north. The respondent was riding a horse and driving the eleven head. The horses which he was driving became frightened and ran back along the county road until they reached the place where it crosses the railroad below Canemah, a distance of more than a mile. At this crossing a part of the horses ran on the railroad track before the train, and three of them were killed, and one injured so that it afterward died, and the others were injured to some extent. The horses had recently been brought from Eastern Oregon and were unaccustomed to the sight of a railroad, and at the time they took fright the eleven head were driven loose by the respondent, who had no one to assist him. When they became frightened they were about one hundred yards ahead of respondent, and he was watching two boats on the Willamette river.

During the trial the respondent was a witness in his own behalf, and after describing the horses which were killed and injured he was questioned by his counsel about the value of the horses, as follows: "What was the value of the two bay horses?" to which he answered: "I paid three hundred and fifty dollars for them." "What was the value

of the dun horse?" to which he answered: "I paid one hundred and fifty dollars for him." The respondent also afterwards testified in effect that such horses were respectively worth the sums which he stated he paid for them. Although the above answers were objectionable, because not responsive to the questions asked, yet no exception was taken.

On cross-examination the respondent stated that he had bought the horses in Baker county, Oregon, from one Toney, about September, 1878, and did not pay for them in money, but paid for them in sheep at the rate of two dollars for each sheep, receiving the horses at the prices above specified. Appellant's counsel then asked the witness the following questions, which were severally objected to by respondent as immaterial, and the objections were sustained by the court, to which rulings appellant excepted: "Where did you get the sheep you traded for the horses you bought of Ben Toney? How much did you pay for the sheep you traded to Ben Toney for the horses, and in what manner and when did you pay it? Where were the sheep at the time you traded them to Toney, and how long had you owned them? When had the sheep you traded to Toney for the horses been sheared? Where had the sheep you traded to Toney for the horses been kept the summer you traded, and how had they been kept?"

The court properly sustained the objections to these several questions. The inquiry was as to the value of the horses, about which the witness had testified. On the cross-examination he stated that he had traded sheep in payment for them at a stipulated price, and by the questions asked it was sought to elicit facts too remotely connected with the subject of inquiry before the court.

After the evidence was closed the court charged the jury, among other things, as follows: "If both parties were negligent, and the negligence of both contributed to the injury, there can be no recovery. The law can not apportion the responsibility among those who are jointly responsible. If, therefore, as I have stated, the plaintiff by his own negligence contributed to his injury, he can not recover. If,

however, the negligence of the plaintiff, if he was negligent, did not contribute to the injury; if the company was guilty of gross negligence and the plaintiff was guilty only of slight negligence, or if the agents of the company were willfully or intentionally negligent, then the plaintiff is entitled to recover notwithstanding his own negligence." The appellant excepted to the following portion of the charge just quoted: "If the company was guilty of gross negligence, or if the agents of the company were willfully or intentionally negligent, then the plaintiff is entitled to recover notwithstanding his own negligence."

This being excepted to, it was assigned as error. This must be taken in connection with the context, and so taken it was not erroneous. This court, in the case of *Bequet v. The People's Transportation Co.* (2 Or. 200), laid down the rule that slight negligence on the part of the plaintiff would not excuse gross negligence on the part of the defendant, whereby the plaintiff's property was destroyed. The ruling of the court below, in the case under consideration, was in accordance with the principle declared in that decision.

On behalf of the appellant the court was asked to instruct the jury as follows: "If the jury find from the evidence that the plaintiff was driving a band of eleven horses loose upon the highway, in known proximity to the railroad of the defendant, knowing that his horses were not accustomed to the sound or sight of a railroad train, at about the time for the passing of a regular train, and permitted the horses to get the distance of a hundred yards in advance of him, and was watching some steamboats upon the river, and, while so occupied, a train approached and said horses took fright, which caused them to run into the train, by which a portion of the band was killed and others injured, he is guilty of such contributory negligence as prohibits his recovery, unless the defendant was guilty of willful misconduct." This instruction was asked on the hypothesis that the respondent was bound to know when the regular freight trains of the appellant would pass along close to the place where the horses took fright, and that he had no right to travel on the

public highway with horses unaccustomed to the sight or the sound of a railroad train.

The respondent was under no obligation to ascertain the exact time when the freight trains would pass along the railroad and to abstain from driving his horses on the highway when these trains should go by. He had a right to be on the public road, and if he exercised ordinary prudence and care in driving his horses he would not be liable to the charge of being negligent in the management of his property.

The court did not err in refusing to give the instruction which was asked, and the judgment is affirmed.

HORATIO COOK, APPELLANT, v. MULTNOMAH COUNTY, RESPONDENT.

CORONER'S FEES—SUMMONING A JURY.—Where in a statement of expenses of a coroner's inquest returned by the coroner to the county court, said coroner has charged five dollars for summoning a jury, the court may, in its discretion allow a less sum.

IDEM—COUNTY COURT MAY ALLOW IN ITS DISCRETION.—No fee is fixed by the statute for the coroner for summoning a jury of inquest. The county court may fix the compensation in such case. The finding and order of such county court, in such a case, is not the subject of a writ of review.

APPEAL from Multnomah County.

The appellant presented the following bill to the county court for holding an inquest: Holding inquest, five dollars; summoning jurors, five dollars; swearing jurors, sixty cents; summoning and swearing nine witnesses, seven dollars and fifty cents; deposition of fourteen folios, three dollars and fifty cents; mileage, twenty cents; bringing corpse to morgue, three dollars. The county court refused to allow the item of five dollars for summoning a jury, but allowed two dollars and twenty cents for such service. The rest of the bill was allowed. A writ was brought by the coroner to review the order of allowance. Upon the hearing, the circuit court dismissed the writ, whereupon the appeal was taken.

Woodward & Woodward, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for the State.

By the Court, BOISE, J.:

The question presented in this case must be determined by the construction of certain sections of the statute. Section 5, on page 603, which provides that the coroner's fee for taking an inquest concerning the death or wounding of any person, shall be five dollars, has reference to his service for holding the inquest; that is, for presiding at and conducting the inquest, and does not include his services or expenses in summoning a jury, or witnesses. When he summons a jury or witnesses, he does it in his capacity as coroner, and not as sheriff, for he only acts as sheriff in such cases as the statute has provided for, where he executes process in cases where the sheriff is disqualified.

The duties of coroners in taking an inquest are defined and regulated by statute in chapter 39, and all their duties and powers relating thereto are there specified. Section 463 of said chapter provides that "the coroner must return to the county court a written statement, verified by his own oath, of the expense of any inquest or burial made by him, which account must be audited and paid to the persons to whom the items thereof are due, in the same manner as ordinary claims against the county."

This item for summoning a jury was one of the expenses of the inquest, the same as the summoning of witnesses, and was to be audited. It was so presented in this case, and there being no statute expressly providing what sum should be allowed, it was the duty of the county court, under the power conferred on them by said section, to allow such compensation as was reasonable, and such county court could take evidence to determine the propriety or amount of any item contained in the statement made to them by the coroner. Their finding on any of these items as to the proper amount to be allowed, could not be reviewed by the circuit court, nor can it be by this court.

We think, therefore, that the allowance made in this case for summoning the jury is not the subject of review, and that the writ of review was properly dismissed by the circuit court, and its judgment will be affirmed, with costs.

H. W. DAVIS, ADMINISTRATOR OF THE ESTATE OF WILLIAM A. PERKINS, DECEASED, APPELLANT, *v.* THE OREGON AND CALIFORNIA RAILROAD COMPANY, RESPONDENT.

EVIDENCE OF PRIOR ACCIDENT IN ACTION FOR NEGLIGENCE.—In an action against a railroad company to recover damages for an injury sustained by one of its passengers in consequence of alleged negligence on the part of the company, evidence of another accident having occurred at the same place, under similar circumstances, is inadmissible.

CONTRIBUTORY NEGLIGENCE — DRUNKENNESS — PROXIMATE CAUSE.—Drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the death of the deceased. If the person injured got drunk under such circumstances that any reasonably prudent man could foresee that he was putting himself in such a condition that that which resulted might probably happen, then his drunkenness would be a defense.

IDEM—PASSENGERS, PRESUMPTIONS BY.—A passenger has no right to presume that a ferry boat has landed on account of the chain guard and barriers across the bow of the boat being down, when warned and personally notified at the time by those in charge that a landing had not been made.

APPEAL from Multnomah County. The facts are stated in the opinion.

Sidney Dell, for appellant.

Dolph, Bronaugh, Dolph & Simon, for respondent.

By the Court, PRIM, J.:

This action was brought by the administrator of W. A. Perkins, deceased, against the respondent, to recover damages for the drowning of said intestate, as it is alleged, through the negligence and carelessness of the servants of the respondent.

At the time of the action complained of, the respondent

was a corporation and in the possession and management of a line of railroad from the city of Salem to the city of Portland, Oregon. It was in the possession and management of cars, and also a steam ferry boat across the Willamette river at Portland, for the purpose of carrying passengers to the end of its line at the latter place. On November 16, 1878, the deceased took passage on the cars of respondent at Salem, to be transported to Portland, having paid the usual fare therefor. While said ferry boat was attempting to make its landing upon the west side of said Willamette river, and before it had done so, the deceased, in attempting to go ashore, stepped off the boat into the river and was drowned.

It is alleged that this accident occurred in consequence of the gross negligence and carelessness of the respondent in this, in failing to have sufficient lights and a chain or other guard across the bow of the boat to prevent passengers from walking off into the river in the night time. It is also charged that there was unskillful management in landing the boat. The negligence and carelessness of the respondent is denied in the answer, and it is further alleged therein, for separate answer, that said accident was wholly caused by the gross negligence and recklessness of said deceased himself; that before the boat had landed he left the passenger cabin upon said boat and walked to the forward end of the deck of said boat, intended to be occupied by teams and vehicles, and not by passengers; that although warned by the servants of respondent, then in charge of said ferry boat, said deceased, in attempting to go ashore before said boat was landed, carelessly stepped off of the boat into the river and was drowned.

The bill of exceptions discloses the following facts: The train arrived at East Portland behind time—at about six o'clock P. M.; it usually arrives there about four, but was delayed that day on account of the freight train being off the track ahead of it at Oregon City. It was dark when it arrived, and the train passengers (Perkins among them) were put upon the ferry boat, to be crossed over to the west side of the Willamette river. There was no chain guard up that night. The watchman had a lantern, and while the boat was

crossing stood on the bow with his back to the pilot-house and lantern in front of him, to enable the captain to see how to steer. While the boat was attempting to make its landing, and before it had done so, the deceased left the cabin and walked to the bow of the boat, and in attempting to walk ashore stepped into the river, the captain and several others proclaiming in a loud voice that the boat had not landed and telling him to stand back. The evidence also tended to show that he had been drinking, and was intoxicated at the time; that when he attempted to get off at one side of the boat some one took hold of him and turned him back, and that he immediately went to the other side and stepped off; that when he stepped off the bow of the boat it was only two or three feet from the pontoon.

The first error assigned is as follows: 1. The court erred in sustaining the objection to question Jones, one of plaintiff's witnesses, on direct examination, whether or not he knew anything of an accident having happened at the same place on defendant's ferry boat, under similar circumstances, prior to the drowning of Perkins; and, if so, what he knew about the circumstances, and in ruling out said evidence offered.

This evidence was properly rejected by the court. The authorities cited by counsel for appellant to sustain this proposition are inapplicable and fail to support it. Every case of this nature must depend on its own facts and circumstances. If the appellant should be allowed to prove that another accident had occurred there under similar circumstances at some prior date, the other side would have been entitled to inquire into the circumstances of that transaction. The tendency of such evidence would have been to mislead and confuse the jury.

The second and third assignments will be treated together.

2. The court erred in refusing to give the following charge to the jury, as requested by the plaintiff in writing: "Drunkenness is not a defense by way of contributory negligence, unless it was the substantial cause of the injury. The law protects persons who happen to be drunk as tenderly at least as it does persons capable of taking care of themselves."

3. The court erred in modifying the charge requested, as aforesaid: "Drunkenness is not a defense by way of contributory negligence, unless it was the substantial cause of the injury," by omitting the remainder of said request and by adding the following: "In addition to that, I will say that if the drunkenness was the proximate cause of the death of this person; if he got drunk under such circumstances as any reasonable, prudent man could forsee that he was putting himself in such a condition that this result might probably happen; if he did that under those circumstances, then his drunkenness would be a defense; but the mere fact that he was drunk, unless his drunkenness contributed as a proximate cause, would not be any defense."

The modified instruction given by the court was as favorable to appellant as he was entitled to ask, if not more so. (42 Iowa, 315; 71 Ill. 177.) There was evidence tending to show that the deceased was intoxicated, but no showing that there was any discrimination against him on that account. There was no error in either the second or third assignments.

The only remaining assignment of error is the refusal of the court to give the following charge to the jury, as requested by appellant: "It was the duty of defendant to have some proper means whereby, when their ferry boat landed in the night-time, it could be made known to the passengers whether or not, and when the boat was properly moored; and if, in the absence of any such signal or notice, the passengers were permitted by defendant to pass off from the boat in a dark night, without any reasonable barrier interposed by defendant, the deceased had a right to presume that defendant had safely moored its boat, and to act on that presumption."

In this case, the deceased had no occasion to act on the presumption that the boat had landed when he stepped off, from the fact that the chain guard was down, for the reason that it appears from the evidence reported in the bill of exceptions that he was then and there warned and informed by the servants of the company, and by several of the passengers, that the boat had not landed, and to stand back.

In the absence of any such warning and actual information, the instruction, and the authorities cited to support it, would have been applicable.

That part of the instruction relating to the duty of the respondent to furnish all suitable guards and barriers necessary to make a ferry boat safe, had already been given, substantially, in the charge of the court, and it was not error to repeat it. The court charged as follows: "1. It was the defendant's duty towards deceased to use the utmost care and skill of a prudent man, skilled in the particular duty (of a common carrier) which he had in charge. 2. It was defendant's duty to furnish all suitable guards and barriers necessary to make their ferry boat a safe means of transit over the river. 3. When the negligence of the defendant is proximate, and that of deceased is remote, the action can then well be sustained, although the plaintiff or deceased is not entirely without fault. If there be negligence on the part of deceased, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, plaintiff may recover. The law requires greater care where life is in peril than in other cases affecting rights of less importance; and when a party is rendering service for compensation, the law holds him to a greater degree of care than it does when the service is rendered gratuitously. Those who render service for compensation are held to great care for the safety of human life. When the contributory negligence of a party is relied upon to prevent his recovery, such negligence, to avail as a defense, must be at least ordinary negligence; the fact that the plaintiff has been guilty of slight negligence, will not defeat his right to recover—no man is required to use more than ordinary care for his own protection."

The principal defense interposed in this case was that the gross carelessness of the deceased was the proximate cause of his death; and there being much testimony disclosed in the bill of exceptions, tending to sustain that defense, the verdict can not be disturbed here.

The judgment is affirmed.

STATE OF OREGON, RESPONDENT, v. TOM, A CHINAMAN, APPELLANT.

CHALLENGE OF JUROR—BILL OF EXCEPTIONS MUST SHOW ALL THE EVIDENCE.—Where the decision of the circuit court on the trial of the challenge of a juror for actual bias is assigned as error, the supreme court will not review such decision, unless it appears in the bill of exceptions that all the evidence adduced on the trial of such challenge in the circuit court is reported to this court.

WITNESS—RAPE—PROSECUTRIX, THOUGH A CHILD, MUST BE SWORN.—On the trial of a case of rape on a child, where the child is called as a witness, and found by the court not to possess sufficient intelligence to testify as a witness, the declarations of such child as to the circumstances of the alleged rape can not be given in evidence. No person can testify as a witness unless first sworn, unless by the consent of the parties.

APPEAL from Linn County.

The appellant was tried and convicted of the crime of rape, at the March term of the circuit court for Linn county. George Klum was called as a juror, and being challenged for bias, in answer to the usual questions stated, "that he had a fixed opinion as to the guilt or innocence of defendant; that it would take evidence to remove such opinion; that it was founded upon what he had read in the newspapers touching the accusation, and upon statements made to him by persons who professed to detail the facts." The court denied the challenge.

Lewis Cox was called as a juror, and having been challenged for bias, answered as follows:

Question. Have you formed or expressed an opinion as to the guilt or innocence of the defendant in this cause? Answer. I have.

Q. Is that a fixed opinion? A. It is.

Q. Would it take evidence to remove that opinion? A. It would.

Q. Upon what is that opinion based? A. Upon what I have read, and upon what I have heard from persons who pretended and professed to detail the facts. There has been a great deal of talk about this case.

The juror was then submitted to the court by appellant's counsel, and the court asked him the following question:

"Can you try this case fairly and impartially?" Appellant objected to the question, by his counsel. The court overruled the objection, and appellant, by his counsel, excepted; and the juror answered, "I think I can." Whereupon the court held that said Lewis Cox was a competent juror, and refused to sustain the challenge.

Upon the trial, two witnesses were allowed, against the appellant's objection, to testify to statements made to them by the prosecutrix, a child five years of age, as to the facts constituting the alleged rape. In the one case, the conversation took place eleven days after the event, and in the other, on the day "the Chinaman was arrested." The prosecutrix was offered as a witness, and objected to on the ground that her age rendered her incapable of receiving just impressions of the facts to which she was to testify. Thereafter the court allowed her to be examined without being sworn.

R. S. Strahan, L. Flynn, and Bonham & Ramsey, for appellant.

J. J. Whitney, District Attorney, for the state.

By the Court, BOISE, J.:

The first question presented is as to the challenges of the jurors, George Klum and Lewis Cox, for actual bias. To disqualify a juror for actual bias, he must be shown to have a state of mind in reference to the action or party challenging, which satisfies the judge trying the cause, in the exercise of a sound discretion, that the juror can not try the issue impartially. (Code, sec. 183.) "But on the trial of such challenge for actual bias, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause, from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion, and try the issue impartially." (Code, sec. 185.) These provisions of the statute have somewhat modified the practice from what it was in the matter of trying

challenges of jurors, and the questions presented in this case must be determined so as to harmonize with these provisions.

The questions propounded to the jurors elicited answers from them, that they had formed opinions as to the guilt or innocence of the prisoner, and that they thought they were fixed opinions, and that it would take evidence to remove them. The opinions were therefore not so fixed that they could not be removed by evidence which should show the facts of the case different from what the jurors had heard them related. This kind of opinions would not, under the rule laid down in section 185 of the code, disqualify a juror, for his opinion could and would be changed if the evidence should show the facts not to be as he had heard them stated. As to whether the juror was impartial or not, was a question to be tried by the court from the evidence before him. Before we can judge whether the discretion exercised by him in overruling the challenges was a sound discretion and properly exercised in this case, we must have all the evidence before us in this court that was adduced on the trial of the challenge in the circuit court.

It does not appear from the bill of exceptions whether or not all the evidence that was before that court has been reported to this court. We can not, therefore, try the challenge here, for this court will not review any question of fact unless all the evidence is reported on which the circuit court based its opinion or finding. If all the evidence adduced in the court below in the trials of these challenges is in the bill of exceptions, that fact should have been stated; and as it is not stated, we must presume that the circuit court had sufficient evidence to support its findings.

The next question presented is as to the objections to the evidence of the declarations of Ruby Sumption, the child on whom the rape was alleged to have been committed. The court held that she was not possessed of sufficient intelligence to receive just impressions of the facts concerning which the counsel for the state proposed to examine her, or of relating them truly. But the court permitted her mother and step-father to detail communications they had had with

her, in which she related to them facts concerning the conduct of the prisoner towards her, and what he said and did to her at the time and in the commission of the alleged crime on her person.

It is a rule that the declarations of the prosecutrix in case of rape, made immediately after the commission of the crime, may be given in evidence to corroborate her testimony on the trial, and it may also be proved that she made complaint, but the particulars of the complaint made can not be admitted in evidence as to the truth of her statement. In Phillips on Evidence, vol. 1, p. 184, the rule is laid down, "The particulars stated by the prosecutrix as to the violence used, or the person who committed the violence, can not be received. The evidence should be confined to the bare proof of the fact that a complaint of personal violence was made, and that an individual was charged, without mentioning his name." Also the appearance of the person of the prosecutrix and her clothing may be shown, and that she promptly divulged the crime and made search for the offender. If the rape be charged to have been committed on an infant, her declarations of the circumstances can not now be proved further than that she made complaint. It was once held by Sir Matthew Hale, that though the infant had not sufficient understanding to be competent to testify as a witness, still she ought to be heard without oath, to give the court information.

But, says Sir William Blackstone (4 Com. 214): "It is now settled (Brazier's case, before the twelve judges), that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected." The rule that the declarations of one incompetent to testify can not be admitted in evidence, is now the established doctrine in the states of the Union, so far as we have been able to discover. In New York, in the case of *People v. McGee* (1 Denio, 24), the court says: "The rule is that when the person upon whom the offense is charged to have been committed is incompe-

tent by reason of infancy, idiocy, insanity, and the like, to be sworn and give evidence as a witness, no evidence of the assertions or declarations of such person, descriptive of the offense or of the offender, can be received in evidence; and that the declarations of the person upon whom the injury has been committed in relation to it, are only proper to be given in evidence to affect the credibility of the person, after having testified in the case.

The only remaining point in the case is that there was error in the proceedings in the circuit court, in admitting the statements of Ruby Sumption to be made to the jury without her having been first sworn. The statement shows that she had some intelligence, and was capable of relating what she knew, and that she should have been sworn, and her statement then taken. Under our present practice, more liberality prevails in admitting witnesses than formerly, and all the tests, except unsoundness of mind and want of intelligence, are abolished, and the jury are allowed to receive the evidence and weigh it, and give to it such consideration as in their judgment it deserves. But no witness can testify without being first sworn, unless by the consent of parties, and we think it was error to receive her statement without her having first been sworn. (Code, 251, sec. 699.)

The judgment of the circuit court will be reversed, and a new trial ordered.

B. HAMBURGER, RESPONDENT, v. PETER AND BRIDGET GRANT, APPELLANTS.

FRAUDULENT CONVEYANCE.—Where the amount of a creditor's claim was only three dollars and fifty cents: *Held*, that a court of equity would not interfere to set aside a conveyance, alleged to be fraudulent, at the suit of such creditor.

APPEAL from Clatsop County.

The appellants are husband and wife. The respondent alleges, that on the thirteenth day of July, 1878, he recovered judgment against the appellant, Peter Grant, for

seventy-seven dollars and twenty-seven cents, upon which an execution was issued on the twenty-fifth of the same month, and returned unsatisfied except as to four dollars; that on July 10, 1877, Grant entered into a contract with one Armstrong for the purchase of the property in question; that thereafter, on the eighteenth of July, 1877, and after the greater portion of the debt recovered upon had been contracted, the appellants, for the purpose of defrauding their creditors, and to prevent the respondent from collecting his claim, caused the property bargained for by Peter Grant to be conveyed by Armstrong to Bridget, Peter's wife, without consideration. The appellants deny that the indebtedness in question was contracted prior to the conveyance complained of, or that there was any indebtedness by Peter Grant to Hamburger, at that time, or that the conveyance was fraudulent, and it is alleged that the property described was purchased by money which constituted a part of Bridget's separate estate.

The referee found that at the time the conveyance was made, Peter Grant was only indebted to Hamburger in the sum of three dollars and fifty cents. The court below found that the conveyance from Armstrong to Bridget Grant was made in contemplation of future, as well as of existing debts, and was fraudulent, and decreed that it be set aside.

J. Q. A. Bowlby, and O. F. Bell, for appellants.

J. W. Robb and C. W. Fulton, for respondent.

By the Court, KELLY, C. J.:

We think that the weight of testimony in this case shows that the contract made on the tenth of July, 1877, for the purchase of the house and leasehold interest was made with Armstrong by Bridget Grant and not by her husband Peter, the defendant; and that she paid for the property out of her own money, and on the eighteenth of July, 1877, took the conveyance from Armstrong in her own name.

The referee found that on that day Peter Grant was indebted to the plaintiff in the sum of three dollars and fifty

cents. We think the evidence fails to establish the fact that the conveyance was taken in the name of Bridget Grant to defraud the plaintiff out of this small sum of money. Moreover, the interposition of a court of equity ought not to be asked to set aside a deed on the ground of fraud for such a small sum of money. For these reasons the decree of the court below will be reversed and the complaint dismissed.

Decree reversed.

C. L. PARKER, RESPONDENT, v. MOSES ROGERS, APPELLANT.

TIDE LANDS—GRANTEE OF RIPARIAN OWNER.—A person who has purchased tide land of a riparian proprietor has the exclusive right to a deed from the state to such tide land, if he makes his application to purchase in the time allowed by the statute.

DONATION LAW—BOND FOR DEED.—A bond for a deed to land, made prior to September 27, 1850, can be enforced against the obligee after he obtains a patent from the United States under the act of September 27, 1850.

WHARF RIGHTS—RESERVATION OF PRIVILEGES.—Where, in a conveyance of a lot bounded on tide water, the grantor reserves all privileges around said lot, it is a reservation of the right of wharfing.

THIS is a suit brought to have the appellant, Moses Rogers, decreed to be a trustee for the respondent, Parker, of whatever title he acquired under and by virtue of a deed executed by the board of tide land commissioners to said Rogers, lot 3, in block 8, in McClure's addition to the city of Astoria. The facts are as follows:

One John McClure, prior to the twentieth day of April, A. D. 1850, was a white male citizen of the United States, a resident of Oregon, and a married man, and was a settler and residing upon, and cultivating, that part of the public domain in Oregon afterwards known as McClure's Donation Claim, upon which a portion of the town of Astoria now stands, and which claim embraced so much of lot six in block eight as lies above ordinary high-water mark of the Columbia river. After the passage of the act of congress of September 27, 1850, commonly known as the donation law, John McClure notified upon and continued his residence upon and cultivation of said donation claim, and in

all respects complied with the conditions and provisions of said act, so as to become entitled to said donation and to a patent; and on or about the twenty-seventh day of March, A. D. 1866, a patent was duly issued to said McClure and Louisa, his wife.

Prior to the twentieth day of April, 1850, McClure had laid off a portion of said donation land claim as a town site into lots and blocks—the blocks numbered from one to eight and over—and made a map thereof. Block eight on said map, as laid out, was situated partly below and partly above ordinary high-water mark of the Columbia river—that is to say, ordinary high-water mark of the river crosses lot 6 in block 8, several feet south of the north end of said lot; and ordinary low-water mark crosses lot 3 in block 8 several feet north of the south line of lot 3—lot 3 lies immediately north of and adjoining said lot 6. On the twentieth of April, 1850, McClure delivered to one W. S. Keene his obligation under seal, and reciting that he had sold lot 6 in block 8, "being fifty feet front by one hundred in depth only, and bounded on one side by the Columbia river," and obligating himself and his heirs to make to Keene a deed in fee simple to the lot, "bounded as above described," "with a full reservation of all and every privilege around said lot."

About the fourth of February, 1858, McClure and wife conveyed all their interest in the donation claim to Cyrus Olney, including so much of block eight as was situated within the boundaries of the claim, and all the riparian rights appurtenant thereto. Olney took with notice of Keene's purchase. Thereafter, and on the nineteenth of September, 1865, Olney conveyed to the appellant said lot six in block eight. The deed contained a reservation in the following words: "Exclusive of any wharfing privileges." The appellant had already succeeded to the rights of Keene in said lot six, and was in possession of so much of it as lies above ordinary high water. Thereafter, and for a valuable consideration, Olney conveyed to the respondent, Parker, lot three in block eight.

The appellant, Rogers, on the third day of August, 1876,

procured from the board of commissioners for the sale of state lands, a deed from the state for the tide lands in front of lot number six, which covers, and under which he claims lot number three. Prior to the application by Rogers to purchase from the state board, Parker, the respondent, had erected a wharf and building.

Wm. Strong & Sons, for appellant:

The land, as described in the bond of McClure to Keene of the twentieth day of April, 1850, is bounded on one side by the Columbia river. To be sure, it says that is one hundred feet only in depth, but by the well-established rule of construction, if the one hundred feet line does not reach the Columbia river, it must be extended until it does; distances must yield to natural objects. There is this reservation in the deed, viz.: "With a full reservation of every privilege around said lot." This, we contend, is not sufficiently certain in description to reserve anything. The property reserved must be described with the same accuracy as in a deed. (3 Washb. on Real Prop. 377.)

If the reservation was good, it is to McClure alone, the word assign nowhere being used. "A reservation being equal to a grant, there must be proper words of limitation and inheritance if the grantor intends to secure it to himself and his heirs, or to extend the enjoyment beyond his own life." (3 Washb. on Real Prop. 377, sec. 67; 9 Johns. 73.)

It is admitted that Rogers has succeeded to all the rights of Keene, under the bond of April 20, 1850. It is said that Rogers took a deed from Olney, September 19, 1865, containing this clause: "Exclusive of any wharfing privileges." If this is anything, it is an exception out of a grant; something which did not belong to the party who made the grant; the wharfing rights were all outside of the donation land claim of McClure. And it is neither a principle of law nor equity, that where a party taxes a quitclaim deed for a portion of a tract of land he claims, he is thereby estopped from claiming the remainder of the tract.

Our title to the property in controversy rests upon the

state deed, which stands unimpeached by the testimony. There was no mistake or inadvertence. The board intended to give the deed to Rogers, and that intention was carried out. There is not the slightest testimony going to show any fraud in act or design upon the part of Rogers in applying to purchase tide lands in front of and abutting upon land that he did own. There is nothing to justify any fraud or mistake of fact upon the state board. And it seems not altogether decorous in a state court of justice—in the supreme court of the state—that private litigants should be heard without proof, or sufficient foundation in fact to raise even a suspicion, to charge fraud upon state officials in the exercise of their quasi-judicial functions for the purpose of gaining advantage in a suit in which they alone are interested.

We also rest upon our title through the bond of McClure to Keene, and the law of this land which gives the tide land to him who owns the river bank upon which it fronts, unless some one else shall show that he is entitled to purchase under some provisions of law, and has purchased. Until he has purchased, what right has he except to present his proofs to the board and ask the proper courts for a mandamus to compel them to make a deed? The title or claim of Parker, the respondent, must come either from the deed made to him by Cyrus Olney on the eighteenth of November, 1870, or it must come through proceedings before the state board of commissioners for the sale of state lands.

Now as to the claim of title by the deed: To hold that McClure could convey this to Olney and Olney to Parker, and thus give him a good title to the same on the ground that McClure acquired such title under his donation patent, would be to hold that all patents of land that fronts on tide water embrace the tide lands in front of them, and that the state is not the owner of such tide lands. Did he acquire any rights under the state tide land laws? The land claimed by the respondent is tide land, and there is other tide land between it and the bank above high water. The statute provides that the owner of land abutting or fronting on the river has the absolute right to purchase all the tide land in

front of the land so owned, subject to the following proviso. Provided, that if valuable improvements have been made upon any of the tide lands of this state before the title to the land on the shore shall have passed from the United States, the owner of such improvements shall have the exclusive right to purchase the lands so improved, extending to low-water mark, for the period of three years from the approval of the act to which this is amendatory. (Act approved October, 1874. The act to which it was amendatory was approved October 28, 1872.)

Parker is clearly not entitled to claim the patent from the state, because he does not own the bank upon which it fronts. He is clearly not entitled under the proviso; for, as has been before shown, the title passed from the United States on the twenty-seventh day of March, 1866, and Parker made no improvements, valuable or otherwise, and none were made on said land by any one else prior to the time when Parker bought this property of Olney, November 18, 1870.

Dolph, Bronaugh, Dolph & Simon, for respondent:

A grant of land adjacent to a navigable stream extends only to meander lines of ordinary high water. (*Hinman v. Warren*, 6 Or. 408; *R. R. Co. v. Schurmeir*, 7 Wall. 272; *Kraust v. Crawford*, 18 Iowa, 549.) The owner of the shore, by virtue of such ownership, has a right to construct wharves, bridges, piers, and landing places below low-water mark, if he conforms to the regulations of the state, and does not obstruct the paramount right of navigation. (*Dalton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Lockwood v. N. Y. & New Haven Railroad Co.*, 37 Conn. 387; *Yates v. Milwaukee*, 10 Wall. 497; *Grant v. Davenport*, 18 Iowa, 179; Angel on Tide Waters, 171, 234; *Bowman's Devisees v. Watham*, 2 McLean, 376; *Austin v. Carter*, 1 Mass. 231.) This right may be transferred without the shore, or may be reserved upon sale of the shore. (*Goodsell v. Lawson*, 42 Md. 348; *Elizabeth Phillips v. Jacob Rhodes*, 7 Met. 322; *Emuns v. Turnbull*, 2 Johns. 322; *Welch et al. v. Taylor et al.*, *ante*.)

Tide lands belong to the state by virtue of its sovereignty,

and do not pass by United States patent. (*Hinman v. Warren*, 6 Or. 408; *Welch et al. v. Taylor et al.*, *ante*.) Prior to the conveyance from Cyrus Olney to the appellant, April 19, 1865, Olney had a right under the act of October 17, 1862, to wharf out in front of lot 6, and this right he reserved. (General Laws, 787.) Application to purchase tide lands confers a right to be lost only by the fault of the applicant. (43 Cal. 56.) Parker was entitled to purchase under the amendatory act of 1864, and Rogers was not entitled to purchase under either act. (General Laws of Oregon, sec. 69, p. 644; Laws of 1874, 76.) A party obtaining a grant or patent from the state to lands which equitably belong to another, will hold the legal title in trust for that other. (33 Cal. 262, 263; 20 Ark. 664; 38 Cal. 90; 30 Cal. 306, and cases cited; 6 Or. 26.)

By the Court, BOISE, J.:

From the admitted facts, Rogers, before he received the deed from Olney, was the owner in equity of lot 6 in block 8 in the city of Astoria under the bond executed by McClure to Keene, for it has been uniformly held that a contract for the sale of a donation claim by one in possession under the provisional government of Oregon made prior to September 27, 1850, the date of the donation law, so called, can be inferred against the obligee, who afterwards obtains a patent under such act, or his assignees, who buy with notice. (*Lamb v. Davenport*, 1 Sawyer, 609.) The words in said bond, "with a full reservation of all and every privilege around said lot," were undoubtedly intended to operate as a reservation of the right to build a wharf. The language being general and reserving, all privileges would include everything appurtenant to said lot, and is more comprehensive than the reservation in the deed by Olney to Rogers, when wharfing privileges alone are reserved to the grantor; so that the deed from Olney to Rogers granted to him all the interest in the lots which he was equitably entitled to under the bond from McClure to Keene. Such being the situation of the parties, Olney and Rogers, in reference to the title to lot 6, we will now consider what rights were con-

ferred on them, or on either of them, by the law of 1862, granting the right of building wharves to persons owning lands on tide waters. Section 1 of that act provides, "that the owner of any land in this state, lying upon any navigable stream or other like water within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark, so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other water."

At the time this law was enacted, Astoria was an incorporated town, and as the evidence shows, had been laid out into blocks and lots, and some of these lots were situated entirely below high-water mark; such lots as were below high-water and above low-water were the property of the state, and no law had then been enacted providing for the sale of tide lands. When, therefore, a franchise was granted to the owner of any land lying on tide water to construct a wharf on his said land and extend it beyond the line of low water, such franchise necessarily included the right to build the wharf over the land between high and low water. Why the statute makes no mention of the tide lands over which the wharf must necessarily be extended is not now apparent, and it may be that it was then thought that these lands were private property and the subject of sale, as they were then claimed as such property, being sold like the lands above high water. The legislature seems to have assumed that these tide lands were the subjects of sale by the owner of the adjacent land above high water in the act of 1874, where it is provided that the purchaser of any tide land from the owner of the land adjacent to such tide land shall have the right to purchase the same from the state. By this act the legislature recognizes the rights of purchasers from adjacent owners. It is a clear rule that any franchise which is the subject of sale may also be the subject of reservation.

We are aware that it is a general rule that what is appur-

tenant to land, passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tide land, and it is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it. The legislature has established the right of the adjacent owners to sell the right of wharfing on the adjoining tide lands, by recognizing such sales and giving the owners thereof the preference to purchase.

There is no other construction that will harmonize these statutes and carry out the evident intention of the legislature to secure these lands to those who have purchased them from the owners of the adjacent lands and made improvements on them. It seems to have been the uniform purpose of the legislature to protect those who had purchased these lands from riparian proprietors or who in good faith had made valuable improvements on them. For the act of 1872 (General Laws, 644) provides for the protection of those who had made such improvement on the tide lands prior to the issuance of a patent to the adjacent lands. This act being deemed insufficient, the act of 1874 was passed, which has extended the provisions of the act of 1872, and provides for protection of those who have purchased tide lands from the proprietor of the adjacent land. Though the state was under no legal obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands, still the legislature, considering the fact that these lands had been dealt with as private property and improved sometimes by the erection of expensive structures which were a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids to commerce.

We think the admitted facts in this case show that Parker was a purchaser of the former adjacent proprietor, who had reserved the right of wharfing, and that that right, under the laws of the state, did not belong to Rogers. At the time the application for purchase of the land in controversy was

made to the state board, Parker had the exclusive right to purchase the land from the state, and the deed from the state should have been given to him and not to Rogers.

The decree of the circuit court will be affirmed.

JOHN McCULLOUGH, APPELLANT, v. M. S. HELLMAN AND W. H. CLARK, RESPONDENTS.

SURETY, NOT DISCHARGED BY JUDGMENT AGAINST PRINCIPAL.—The recovery of a judgment against a principal debtor on a note given by him, is no bar to an action against him and another on a note given as collateral security for the debt of the principal unless such judgment has been satisfied.

APPEAL from Grant County. The facts are stated in the opinion.

Shattuck & Killen, for appellant:

In the absence of any express agreement on the subject, the holder of a claim as collateral security may sue on it and hold the money when collected in place of the collateral instrument. (*Nelson v. Edwards*, 40 Barb. 279; *Jones v. Hawkins*, 17 Ind. 550; *Dix v. Tally*, 14 La. An. 456.) A collateral security is not extinguished by a recovery of judgment for the principal debt. (*Bank of Chenango v. Hyde*, 4 Cowen, 567.) Though the note representing the principal debt may be merged into a judgment thereon, yet the collateral securities therefor, whether upon real or personal property, should be allowed to stand; such securities are to be canceled only by a satisfaction of the principal debt, or by voluntary surrender. (*Butler v. Miller*, 1 N. Y. 500; 13 Johns. 240.)

A creditor who holds bonds as collateral security does not lose his right to hold the bonds by suing the principal and imprisoning him on getting judgment. (*Smith v. Strout*, 63 Me. 205; Brandt on Suretyship, 214.) Judgment against the principal is no bar to suit against the surety. (Brandt on Suretyship, 340; *White v. Smith*, 33 Pa. St. 186; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147.) A note

pledged as collateral security for a debt due the plaintiff from the pledgor continues valid and effectual until the principal debt is paid, notwithstanding the evidence of such principal debt has been changed from a promissory note to a judgment. (*Fisher v. Fisher*, 98 Mass. 303.)

There was no appearance for the respondent.

By the Court, KELLY, C. J.:

The complaint states in substance that on the eighth day of September, 1876, the respondent, M. S. Hellman, executed and delivered his promissory note to the appellant, John McCullough, for the sum of two thousand and five hundred dollars, payable six months after date; that at the same time Hellman delivered to appellant two warrants drawn by the state treasurer in favor of S. C. Hillis, amounting to one thousand eight hundred and twenty-five dollars, and payable to him or order. These warrants were delivered to the appellant to be held by him as collateral security for the payment of the two thousand and five hundred dollar note, and they were so held by him until the twentieth day of July, 1877. On that day, in consideration that the appellant should deliver the warrants to them, the respondents agreed to execute and did execute and deliver to the appellant their joint and several promissory note payable to him or order one day after date for one thousand dollars. This note was delivered by respondents to the appellant in lieu of the two warrants, and held by him as collateral security for the payment of Hellman's note for two thousand and five hundred dollars.

An action was commenced on this latter note and a judgment obtained thereon on the eighteenth day of September, 1878, for two thousand two hundred and nine dollars and ninety cents against Hellman, and on this judgment there is still due the sum of one thousand nine hundred and seventy-six dollars and twenty-eight cents. The appellant, although he has used all diligence to collect the same, has been unable to do so, and said Hellman has no property liable to execution. The appellant (plaintiff below) then alleges in his complaint that he is the owner and holder of

the note for one thousand dollars, made and delivered to him by the respondents (defendants below) on the thirtieth day of July, 1877, that the whole amount and interest thereon is due to him from the respondents and he demands a judgment for that sum.

The respondents demurred to the complaint, and assigned as grounds of demurrer that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and rendered a judgment for the respondents. In this we hold there was error.

This action was brought upon the one thousand dollar note which was given as collateral security for the payment of the two thousand five hundred dollar note of Hellman, and it is not a legal defense to show that appellant brought an action and recovered a judgment upon the two thousand five hundred dollar note, and that, therefore, the whole indebtedness of respondents was merged in that judgment. The recovery of a judgment upon a simple contract debt without satisfaction thereof will not discharge a note pledged as collateral security for the debt. (*Fisher v. Fisher*, 98 Mass. 303.) The recovery of a judgment against a principal is no bar to an action against him and another on a contract of guaranty executed by both of them jointly. (*White v. Smith*, 33 Penn. St. 186; Brandt on Suretyship, 340.)

The judgment of the court below is reversed and this cause remanded for further proceedings.

MONTGOMERY WINKLE, APPELLANT, *v.* LUCINDA WINKLE, RESPONDENT.

ADMINISTRATION—JURISDICTION OF COUNTY COURT—DISTRIBUTION OF PERSONAL PROPERTY.—The county court has exclusive jurisdiction over the distribution of the personal property of deceased persons, and if there be an antenuptial contract which affects such property it should be proved before such court and the rights of the parties thereunder determined by such county court.

IBID—ORDERS FINAL, WHEN.—If parties interested in the estate do not appeal from orders of the county court duly made, such orders become final and can not be inquired into in a court of equity.

THIS is a suit to establish a trust. It is alleged in the complaint that on the sixth of June, 1873, one Isaac Winkle and the respondent, in contemplation of marriage, entered into an agreement as follows: "That for and in consideration of marriage between Isaac W. Winkle, of Benton county, Oregon, and Lucinda Bryan, of Lane county, Oregon, the said Lucinda Bryan hereby covenants and agrees to and with the said Isaac W. Winkle and his heirs at law, to release and abandon all claim of dower in and to all the real estate of the said Isaac W. Winkle, to which she would be entitled in the law by reason of said marriage, and waives all right, both at law and equity, to any dower in said real estate of said Isaac W. Winkle, and transfers all her right of dower which she may obtain by reason of said marriage, to said heirs. And the said Isaac W. Winkle hereby agrees to and with the said Lucinda Bryan that she shall have, possess, and enjoy of his property an equal share with his heirs; that at his death his real and personal estate shall be sold and converted into money, and that the proceeds thereof shall be divided equally between said Lucinda Bryan and any other heirs. This instrument to be void in case said marriage is not consummated."

That said Isaac Winkle and the respondent afterwards intermarried; that after said marriage, said Isaac Winkle died possessed of the property described in the complaint; that after his death, and about the month of September, 1876, administration of his estate was duly granted to one John S. Baker, who duly qualified and proceeded to discharge the duties of his trust; that the respondent applied to the county court and had set apart to her, under section 1095 of the code, all of the property in dispute in this case, except two beds and bedding; that the appellant, and some other children of the deceased, were about to take steps to have the legality of said order tested, but the respondent gave assurances that she did not desire said allowance, and then the appellant gave up the idea of appealing from said order; that the respondent had also obtained possession of two beds and bedding, of the value of one hundred dollars, since the death of said Isaac Winkle, which belonged to

said estate, and that she wrongfully and fraudulently refuses to allow the same to be distributed among said heirs; that said administration has been duly closed and said administrator discharged, and that the appellant had purchased the interest of the other heirs of said property.

The circuit court, on the motion of respondent, struck out of the complaint all the allegations of ownership or claim to the property set apart to her under section 1095 of the code.

The respondent answered, denying the execution of the agreement referred to; that a distribution of any property had been made under the terms of such agreement; that she obtained possession of the beds and bedding as alleged in the complaint, and she alleges that such bedding is exempt from execution and was so during the administration of the estate; that the administrator failed to include such property in his inventory; that it has never been administered upon; that the estate has been settled and the admintrator discharged; that Isaac Winkle was a resident and householder in Benton county, and that the property was kept by him for the use of the family; that the respondent is his widow and is entitled to it.

Upon the issues presented and the evidence taken, the court rendered a decree in favor of the respondent, dismissing the appellant's bill. From that decree this appeal is taken.

F. A. Chenoweth, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

A number of questions have been discussed in this case, and among them the jurisdiction of a court of equity to declare and enforce a trust in a case like this. It is claimed by the respondent that the appellant can only obtain a title to the property in dispute by an order of the probate or county court. We think that this position is correct, for it is a fundamental principle of the common law of this country that the personal property of deceased persons goes by

operation of law to the administrator when the deceased leaves no will. Under our statute he must distribute it or the proceeds of it under the orders of the county court. (Statutes of Oregon, p. 328, sec. 1109; p. 548, sec. 2.)

The title to the personal property of a deceased person must be derived from the administrator through the orders of the court, and the orders of said court, and the distribution made under them of personal property, are binding on all persons who are interested in the estate, provided such orders are regular and in due form of law. The antenuptial contract set out in this case should have been proven in the probate court, and the rights of the parties affected by it there determined, and if the parties were not satisfied with the proceedings there had, then neither could have appealed to the circuit court. If they neglected to appeal, the decree of the probate court became final, and is not subject to be reviewed in a court of equity. It is claimed that the two beds named in the complaint were not disposed of by the administrator. If these beds or any other property were not administered on by the administrator, and the administration was closed and the administrator discharged from his trust, then the appellant, if he claims an interest in it by virtue of being an heir, must apply to the county court to have an administrator *de bonis non* appointed to administer upon it. For the statute has conferred on the county court exclusive jurisdiction in all matters pertaining to the transfer of the title to personal property of deceased persons. A court of equity has no jurisdiction over it.

The circuit court had no jurisdiction to grant the relief prayed for, and the bill should be dismissed.

This view of the case renders it unnecessary to consider the other questions argued in the case.

MARGARET A. McCOY, APPELLANT, *v.* JAMES R. BAYLEY, RESPONDENT.

MISTAKE IN DEED MUST BE MUTUAL.—A mistake in a deed or written instrument will not be corrected and reformed, unless the mistake is shown to be mutual and clearly proven by satisfactory evidence.

Appeal from Benton County. The facts are stated in the opinion.

F. A. Chenoweth, for appellant.

John Burnett and John Kelsay, for respondent.

By the Court, Prim, J.:

This is a suit in equity, the complaint being in the nature of a cross bill, and having for its object the correction of an alleged mistake in a deed and for the purpose of obtaining a perpetual injunction against the respondent from prosecuting an action at law for damages based upon said deed.

The amended complaint alleges in substance that on the twenty-third day of May, 1870, John H. Kendoll, now deceased, and Fanny, his wife, executed and delivered to the defendant, James R. Bayley, a deed to lot one, in block eleven, in the city of Corvallis, Benton county, Oregon (a copy of which is annexed to the complaint), and that by mistake, the deed above mentioned used the word "lot," when it was intended to use the words "south half of lot one, in block eleven, in the city of Corvallis, Benton county, Oregon." The answer admits the execution of the deed mentioned in the complaint; admits that the copy annexed to the complaint is a correct copy of the deed executed by Kendoll and wife to him on the twenty-third day of May, 1870, but denies that there was any mistake in the deed whatever, and alleges that at the time mentioned in the complaint he purchased of said Kendoll lot number one, in block number eleven, in the city of Corvallis, Benton county, Oregon, and paid therefor the sum of fourteen hundred dollars, and received the deed mentioned and set out in the complaint. This allegation is denied in the reply.

The only question presented in this case by the pleadings is one of fact, whether or not there was a mistake in the deed from Randall and wife to Bayley, executed on May 23, 1870. The allegations of the complaint being denied by the answer, it devolves upon the appellant to prove the mistake. It has already been decided by this court in

several cases that in order to reform a written instrument, the mistake must be material, and plainly and clearly made out by satisfactory proofs. (*Evarts v. Steiger*, 5 Or. 151; *Stephens v. Murton*, 6 Id. 193; *Remillard v. Prescott*, decided at this term of court.)

After a careful examination of the evidence in this case, we find that it fails to show any mistake in the deed mentioned in the complaint. We are, therefore, of opinion that the decree of the court below dismissing the bill with costs should be affirmed.

MOLLIE LAHEY, RESPONDENT, *v.* JOSEPH KNOTT, APPELLANT.

COMPLAINT—CAUSE OF ACTION—DAMAGES FOR BREACH OF MARRIAGE CONTRACT.—Where it is averred in the complaint that the respondent, at the request of the appellant, promised to marry him at such time as she should come from Washington City to Portland, Oregon, at his request, and that she did so come about the fifteenth day of April, 1878, and on that day the appellant again promised to marry her about the twentieth of May, 1878, but instead thereof, on the third day of June, 1878, married a Mrs. Harvey, although he had notice all of said time that respondent was ready and willing to comply with her said agreement: *Held*, that the complaint alleged facts sufficient to constitute a cause of action.

INSTRUCTIONS MUST APPEAR TO HAVE BEEN PERTINENT.—The refusal of the circuit court to allow certain questions propounded to a witness to be answered will not be held error, unless it can be ascertained from the bill of exceptions, and other portions of the record, that they were pertinent and relevant.

MARRIAGE CONTRACT—REQUEST TO MARRY.—If appellant agreed with and offered to marry respondent in Washington, and afterwards, by mutual consent, it was arranged between them that she come to Oregon, at which place the marriage should be consummated, and with that understanding respondent did come to Oregon, and was then ready and willing to marry him, married a third person, then the respondent was entitled to recover without first showing any request to offer to marry appellant.

APPEAL from Multnomah County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Simon, for appellant.

Caples & Mulkey and O. P. Mason, for respondent.

By the Court, PRIM, J.:

This is an action to recover damages for an alleged breach of promise of marriage.

For cause of action it is alleged: "That on or about the first day of December, 1877, in consideration that the plaintiff, who was then sole and unmarried, at the request of the defendant, had then promised the said defendant to marry him; the said defendant, at said Washington City, promised to marry the said plaintiff at such time as she, the plaintiff, at defendant's request, should come from Washington City to the city of Portland, in Oregon. That in pursuance of such agreement to marry, the said plaintiff did, on or about the fifteenth of April, 1878, at the request of the defendant, come from said Washington City to Portland, Oregon, and that said defendant, at said last-named city, on or about the day last named, again promised and agreed to marry said plaintiff, on the twentieth day of May, 1878; and plaintiff avers that she, confiding in the promises of the said defendant, hath always from thence hitherto remained, and still is sole and unmarried, and has been for and during all the time aforesaid, to wit, since the fifteenth day of April, 1878, until the marriage of the defendant hereinafter named, ready and willing to marry the said defendant, whereof the said defendant has always had notice; yet that the said defendant, not regarding his said promise, did, after the making of said promise, on or about the third day of June, 1878, wrongfully marry one Mrs. Harvey (whose name is not more fully known to plaintiff), contrary to his said promise, whereby the plaintiff, as she avers, has sustained and is damaged in the sum of twenty-five thousand dollars."

Each material allegation of the complaint is denied in the answer, except the intermarriage of the appellant with Mrs. Harvey. A verdict and judgment was obtained against the appellant in the sum of two thousand dollars, from which an appeal has been taken to this court.

The first ground of error relied upon is that the complaint does not state facts sufficient to constitute a cause of action. It will be seen that it is averred in the complaint

that the respondent, at the request of the appellant, promised to marry him at such time as she should come from Washington City to Portland, Oregon; that she did come to Oregon, at the request of appellant, about the fifteenth day of April, 1878, and that on that day the appellant again promised to marry the respondent about the twentieth of May, 1878, but instead thereof, intermarried with Mrs. Harvey about the third day of June, 1878. That respondent was willing and ready all of said times to comply with her said agreement, of which the said appellant had notice. The complaint in our opinion does contain facts sufficient to constitute a cause of action, and this ground of error should be overruled.

The next ground of error relied upon is that the court erred in refusing to permit a witness for the appellant to answer certain questions propounded to him by the appellant. It appears from the bill of exceptions that the respondent was introduced as a witness on her own behalf, and swore that during the winter of 1877-78, at Washington City, she and appellant entered into a contract of marriage; that the appellant desired to consummate the marriage then and there, but that she declined on the ground of undue haste, and other grounds there specified; that the appellant then returned to Oregon upon the understanding that the respondent should soon thereafter be furnished with money by the appellant to defray her expenses to Oregon, and that upon her arrival here such marriage should be consummated.

After the evidence of the respondent was closed, Hon. Richard Williams, member of congress for Oregon, was called as a witness by the appellant, and testified: "That during last winter, and while the appellant was in Washington City, the respondent, in company with one Charles Newell, had an interview with him (the witness), in which she stated that she was very poor and out of employment, and could get nothing to do there to earn a support, and wished to come to Oregon to seek employment, and was desirous of having the appellant aid her by furnishing her the money to defray the expenses of the trip to Oregon, and

requested the witness to see appellant and use his influence with him to induce him to assist her by furnishing her with money to come to Oregon; that witness did have an interview with appellant as requested, and told him what the respondent had requested of him, as stated above." Witness also testified that after the appellant had returned to Oregon the respondent and Crandall came to him with a letter from appellant, and that witness in conversation with her at that time said to her: "If you are going to Oregon to get employment you had better go on an emigrant train, for you will save a month's wages every day of the trip; but if you are going out there to marry old man Knott, you had better go first class."

This witness was then asked the following questions: "State what the appellant said to you in reply to what you thus communicated to him?" "State what you said to the appellant and what he said to you in reply, when you communicated to him this conversation and request of the respondent as you have testified?" The same questions were put to the appellant while he was upon the stand testifying in his own behalf. These questions were not allowed to be answered, upon the ground that the respondent was not shown to be present, and that the testimony sought to be elicited was irrelevant.

If these communications occurred prior to the alleged engagement of marriage between the appellant and respondent, the replies of the appellant thereto were irrelevant and not admissible; but on the other hand, if it had been made to appear that they occurred subsequent to said engagement, they would have been relevant and should have been admitted. The bill of exceptions failing to disclose when this occurred, whether before or after the engagement, we must presume that it occurred prior to said engagement. Error is never presumed, but must be made to appear.

It is further claimed that the court erred in giving to the jury certain instructions asked by counsel for respondent, which were as follows:

1. "If you find from the evidence that the contract of marriage was entered into between plaintiff and defendant,

and that before the commencement of the action defendant married another person, and by so doing placed himself in such a condition that he could not comply with his contract, then no offer on the part of plaintiff was necessary."

2. "If the jury believe that there was a contract made and entered into between these parties, and that defendant has broken off that contract, and refused to comply with it, then the plaintiff is entitled, as a matter of course, to damages, as a necessary consequence following from the breach of the same."

3. "If the jury believe that there was a contract to marry plaintiff in Washington, and that the defendant offered to marry plaintiff there, and that afterward, by mutual consent, they concluded that she should come to Oregon, and that the marriage should then be consummated; and that, with that understanding, the plaintiff did come to Oregon, and was ready and willing, or offered to marry defendant; and if defendant, while plaintiff was so ready and willing, did some act which incapacitated him from marrying plaintiff, or which had the effect to dispense with an offer by plaintiff, then the plaintiff is entitled to recover without first showing such offer or request by her to defendant."

We think there was no error in either of these instructions. (42 N. Y. 246.)

Counsel for the appellant asked the following instruction: "If the jury believed from the evidence that an agreement or contract for marriage was entered into between plaintiff and defendant, and that defendant afterward, several times, offered and proposed to marry plaintiff, and such offer was declined on her part without reasonable ground for so doing, then the jury should find for the defendant."

Which instruction the court gave, and added thereto the further instruction: "But if you find that such offer was at any time made, and was so declined, not because plaintiff objected generally to marrying defendant, but because she objected to so doing at that particular time, and you find that such objection was reasonable, or was acquiesced in by the defendant, then the fact of such refusal should not be

treated so as to discharge defendant from his obligation to marry plaintiff, if he was under such obligation."

It is claimed on behalf of appellant that the additional instruction of the court qualifying the one asked by the appellant was erroneous and should not have been given. To this we can not assent, as we are of opinion it contains a clear statement of the law upon that proposition.

The appellant also asked the court to give the following instructions which were refused: "The plaintiff alleges in her complaint that defendant, at Washington City, promised to marry plaintiff, at such time as she, the plaintiff, at defendant's request, should come from Washington City to the city of Portland, Oregon. If, therefore, the jury believe from the evidence that after plaintiff arrived in Oregon, the defendant at a reasonable time offered to marry her, and she refused or declined to marry him, then plaintiff can not recover in this action."

"If the jury believe from the evidence that defendant offered to marry plaintiff in Washington City, and she declined on the ground of the marriage then being too hasty; and that afterward, at San Francisco, plaintiff offered to marry the defendant, and that she then again declined on the ground that she was unwilling to marry plaintiff until she reached Oregon and saw the house she was to occupy, and that the next day after reaching Oregon the plaintiff again declined to marry defendant on the ground that she was too tired then; and three weeks thereafter, defendant offered to marry plaintiff, and she declined on the ground that she was then sick, the jury should find for the defendant."

The refusal of these instructions is also assigned as error.

If these instructions were admissible under the pleadings, they are objectionable upon the ground that they withdraw entirely from the consideration of the jury the question as to whether the excuses of the respondent were reasonable and sufficient to exonerate her from a breach of contract.

There being no substantial error in the record, the judgment is affirmed.

JANUARY TERM, 1880.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JANUARY TERM. 1880.

THE STATE OF OREGON, EX REL. J. H. MAHONEY, RESPONDENT, *v.* J. D. MCKINMORE ET AL., APPELLANT.

APPEAL—MOTION TO PERFECT, WHEN FILED.—A motion to perfect an appeal by filing a new undertaking must be filed before a motion to dismiss the appeal is brought on for hearing.

IDEM—AFFIDAVITS OF SURETIES, WHEN FILED.—Affidavits showing the qualifications of sureties to an undertaking must be filed contemporaneously with the undertaking.

IDEM—AMOUNT OF UNDERTAKING.—An undertaking on appeal must not be limited in amount.

APPEAL from Douglas County.

In this cause the respondent moves to dismiss the appeal: 1. For the reason that the undertaking is limited in amount to the sum of two hundred dollars. 2. Because no affidavits are filed, undertaking as to the qualifications of the sureties thereto. After this motion was called for argument and the counsel for respondent had opened the case, and while he was making his argument upon the motion, the counsel for appellants filed a cross-motion asking leave to file a new and sufficient undertaking.

By the Court, BOISE, J.:

In the case of *Cross v. Chichester*, 4 Or. 114, it was held by this court that it is too late to apply to the court to perfect the appeal by filing a new undertaking "after the motion to dismiss is brought on for hearing," and such has been the rule of practice since that decision; and we think

the rule laid down in that case is decisive of this point in this case, and that the appellant was too late in filing his motion to perfect the appeal by filing a new undertaking. In the case of *Holcomb v. Teal*, 4 Or. 352, it was held that the affidavits of the sureties in an undertaking on appeal as to their qualifications must be filed contemporaneously with the filing of the undertaking, and as there are no affidavits as to the qualifications of the sureties filed in this case, we must hold this undertaking insufficient unless we disregard the authority of that case, which we do not think we would be warranted in doing. It is also urged that this undertaking is not sufficient, for the reason that the obligation of the sureties is limited to the sum of two hundred dollars. The statute regulating appeals, page 219, sec. 528, provides that "the undertaking of the appellant shall be given with one or more sureties to the effect that the appellant will pay all damages, costs, and disbursements, which may be awarded against him on the appeal, but such undertaking does not stay proceedings unless the undertaking further provides to the effect following." * * * In order to perfect the appeal the appellant must comply with the statute, and give to the respondent all the security which the statute guarantees to him. It is not possible to ascertain before the appeal is tried the amount of the damages, costs, and disbursements that will be awarded to the respondent if the appeal is determined in his favor. If the appellant can limit the liability of his sureties to two hundred dollars, he may to any less sum. The law has limited the liability of the sureties to the damages, costs, and disbursements, and the respondent has a right to insist that the undertaking be not otherwise limited in amount. And it is a general rule that statutory bonds and undertakings, to be valid and binding as such, must in substance conform to the requirements of the statute. It is a statutory remedy that the appellant is seeking by his appeal, and in order to avail himself of it he must comply with the requirements of the statute.

We think that the undertaking is defective in binding the liability of the sureties.

The appeal will be dismissed.

B. F. DRAKE, RESPONDENT, v. JAS. K. SEARS, APPELLANT.

MEASURE OF DAMAGES—WARRANTY OF ENGINE.—In case of a breach of warranty in the sale of an engine to be used in elevating grain at a warehouse, the warrantee is entitled to recover of the warrantor such damages as naturally, according to the usual course of things, would result from the breach, and the necessary expense incurred by the warrantee in putting up said engine would be such natural damages. So, also, the expense incurred by the warrantee in handling and storing grain while trying to work the engine which proved a failure.

ITEM—PROFITS OF BUSINESS.—As a rule, the loss of the profits of a business which has been interrupted by a breach of warranty can not be claimed, unless the parties are shown to have contemplated, or can reasonably be presumed to have contemplated, such loss at the time the contract was made.

APPEAL from Polk County. The facts are stated in the opinion.

B. Hayden, W. H. Holmes, and X. N. Steeves, for appellant.

Magers & Lawson and Daly & Gaby, for respondent.

By the Court, BOISE, J.:

This is an action to recover the price of an engine, boiler, and appurtenances, alleged by the respondent to have been by him sold and delivered to the appellant at the agreed price of seven hundred and fifty dollars; also to recover the sum of four hundred and fifty-three dollars and twenty-one cents for materials and machinery sold and delivered to the appellant by the respondent on a book account, both claims aggregating the sum of one thousand two hundred and three dollars and twenty-one cents.

The defendant, in his answer, denied the absolute sale of the engine, and denies that the materials and other machinery, contained in plaintiff's second cause of action, were worth more than the sum of three hundred and sixty-two dollars and eighty-eight cents, and alleges that the same were purchased by defendant at the agreed price of said three hundred and sixty-two dollars and eight-eight cents between the plaintiff and defendant, and admits that they were worth that price; so that the only controversy as

to these articles named in said count of the complaint is as to the price.

As to the engine named in the first count of the complaint, the defendant, after denying the sale and indebtedness therefor as alleged in the complaint, alleges, by way of a separate and further answer, that he purchased the same to be used in his warehouse at McCoy, in Polk County, in elevating and cleaning grain; that the plaintiff warranted the engine to be perfect, and capable of doing the work of elevating and cleaning the grain at his said warehouse in a complete and satisfactory manner, and that it was a good and capable engine for said purposes, and that the defendant was not to pay for the engine until it was proved to be capable; that the engine was received by the defendant at the earnest request of plaintiff, and on his express warranty that it was sufficient for said purposes; that the plaintiff selected a man, by the name of J. F. Leach, to set up the engine to give it a fair trial, for whose services the defendant was to pay three dollars and a half per day; that said J. F. Leach did set up said engine in said warehouse, but that it could not be made to do the work, and that the same proved worthless, and that the defendant notified the plaintiff of that fact, and that he would not accept said engine; that said Leach was employed on said engine, in putting up and trying to operate the same, eleven days, between the twentieth day of August, 1879, and the fifth day of September of the same year, and that defendant has paid said J. F. Leach eighteen dollars on said work.

Defendant claims that there has been a breach of said warranty by the plaintiff, and claims damages therefor in the following allegations in his answer:

"Defendant alleges that under the contract aforesaid the plaintiff was to deliver said machine on or before the sixteenth day of July, 1879, but the same was not delivered until some days later, to wit: about the twenty-first of August, 1879. Defendant alleges that by reason of the aforesaid representation and warranty of the plaintiff, the defendant paid for hire of teams and men, and for materials used in trying to operate said engine—amounting to two hundred

and twenty-one dollars and fifty cents, to his damage in that amount. And defendant further alleges, that by reason of the worthlessness of said engine and the failure of the same to do the work as warranted, the defendant was unable to properly store and care for the grain received at his said warehouse, and was compelled, in consequence thereof, and the contracts of defendant with other parties, to receive and store large quantities thereof, to wit, about ten thousand bushels of wheat, out of doors, where the same was exposed to the storms, and the defendant was thereby compelled to expend large sums of money in handling and removing said wheat, to wit, one hundred dollars, and two hundred bushels was rendered unmarketable in consequence thereof, and the defendant was thereby damaged in the sum of one hundred dollars.

"And the defendant further alleges that, by reason of the failure of said engine to do the work as warranted, as aforesaid, the defendant was compelled to secure the services of another engine, at great trouble and expense, to his damage in the further sum of one hundred dollars. And the defendant further alleges that, by reason of the said worthless character of said engine, and the failure of the plaintiff to make the same work, as warranted, in driving the cleaning and elevating machinery of the defendant aforesaid, sundry and divers persons, with whom the defendant had entered into contract to receive and store their grain for the year 1879, at said warehouse of the defendant, and who had then sacks belonging to the defendant for the purpose of sacking such grain for the purpose of hauling the same to the warehouse of the defendant, refused to deliver their sacks of wheat to the defendant, and the defendant thereby lost all of such contracts. And, defendant further alleges, that in consequence of the failure of said engine to do the aforesaid work, as warranted aforesaid, the defendant was unavoidably prevented from putting large quantities of said wheat, so received by him at his said warehouse, in the bins of said warehouse, and was thereby compelled to, and did, purchase sacks to sack the same, to wit: Six thousand sacks, to the further damage of the defendant in the sum of two hundred and forty dollars.

"Defendant alleges that he did not and could not, with reasonable diligence and skill, ascertain the fact of the useless character of said engine until about the seventh day of September, 1879, when he immediately notified plaintiff, as hereinbefore stated. Defendant alleges that he is damaged, in consequence of the breach of the aforesaid warranty of plaintiff, in the aggregate over and above the lawful demands of the plaintiff of three hundred and sixty-two dollars and eighty-eight cents, in the full and just sum of seven hundred and fifty-five dollars and thirty-seven cents. Wherefore defendant demands judgment against plaintiff for the sum of seven hundred and fifty-five dollars and thirty-seven cents and costs and disbursements herein sustained and expended."

The plaintiff demurred to these several defenses, for the reason that they did not state facts sufficient to constitute a cause of action for a breach of the warranty.

If the plaintiff warranted the engine to have capacity to do the work of elevating and cleaning the grain at the defendant's warehouse, and by such warranty the defendant was, as he alleges, induced to take the same and set it up, and the engine proved a failure without the negligence or fault of the defendant, then there was a breach of the warranty, and the defendant would be entitled to recover for such breach such damages as naturally, according to the usual course of things, would result from such breach, which was the failure of the engine to do the work. The expense which the defendant incurred in employing men and teams to work, and furnishing materials to be used in putting up the engine, would, we think, be such natural damages, and such are the damages claimed in the first special answer, to which the demurrer was sustained. Such answer is not very full and specific, but no objection is made to it on that account, and we think the matter contained in it is pertinent and proper to be claimed for a breach of such warranty. So, also, the damage claimed as resulting from the failure of the engine to elevate grain, so that the defendant was unable to properly store or care for grain that came to his warehouse, and was compelled to leave ten thousand bushels out doors, where it was damaged by the elements,

was, we think, the natural result of the failure of the engine to work, and such as the parties, when they made the contract of sale and warranty, might reasonably contemplate would result from such failure. (3 Pars. Con. 183, note.)

The next special answer or counter claim is simply an allegation that the defendant was, by reason of said failure, compelled to secure another engine. Whether he hired it or bought it, does not appear, or how he was damaged. We think there is no sufficient statement of a counter claim stated in this allegation.

The next separate counter claim is that defendant lost his customers who had taken sacks, and, as he alleges, would have stored wheat with him. He alleges that he lost business, but does not allege what profit he could have made on these contracts. He states what he was to have for storing and caring for the grain; but for all that appears the expense of storing, work, and losses attending it might be more than he was to receive. And we think, if such profits could be legitimately claimed, that no case is stated in this separate answer. As a rule, the loss of the profits of a business that has been interrupted by a breach of warranty can not be claimed unless the parties are shown to have contemplated, or can reasonably be presumed to have contemplated such loss at the time the contract was made, for the breach of which the action is brought. (3 Pars. 183; 5 Barb. 424; 4 Id. 261.) So we think the demurrer to this part of the answer was properly sustained.

So, too, the defendant in the next separate answer, where he alleges that he was compelled to purchase six thousand sacks, to his damage two hundred and forty dollars, does not show how the damage resulted, and the allegation is not sufficient to state a counter claim, and the demurrer to this allegation was properly sustained.

We think, for the reasons stated, that the court erred in sustaining the demurrer to the several answers which we have sufficiently pointed out in this opinion. The judgment of the circuit court will therefore be reversed and a new trial ordered.

STATE OF OREGON, RESPONDENT, v. AH LEE, APPELLANT.

HOMICIDE—VIEW OF PREMISES BY JURY—PRESENCE OF DEFENDANT—WAIVER.—Where, on a trial for murder in the first degree, the court, upon the application of the state, directed a view of the place of the alleged killing by the jury: *Held*, that the omission by the court to provide for the presence of the defendant or his counsel at the view, no application therefor having been made by the defendant or his counsel at the time the view was ordered, was not error.

DYING DECLARATIONS—BELIEF IN THE CHRISTIAN RELIGION.—In order to render dying declarations admissible, it is not requisite that the deceased should have been a believer in the Christian religion at the time the declarations were made.

JURY MAY CONSIDER PROBABILITIES.—In determining the credibility of a witness, the jury may judge whether the statements made by the witness accord with their own experience in life, and their own knowledge of the motives, and interests, and passions which ordinarily influence men under such circumstances as those which surround the witness.

DELIBERATION AND PREMEDITATION—INFERENCE FROM FACTS.—Direct proof of deliberation and premeditation is not required, but may be inferred from proven facts. Three men, all armed with deadly weapons, made a simultaneous attack upon a third, in a Chinese Joss-house, and killed him—one having approached the deceased from behind, and without saying a word, struck him a deadly blow on the head with a hatchet, while the others fired two shots into his body in rapid succession: *Held*, that these facts warranted the jury in concluding that the killing was preconcerted, and that the design to take the life of the deceased was formed in cool blood.

APPEAL from Multnomah County.

On the twenty-fifth day of October, 1878, the appellant was jointly indicted with Lee Jong and Charlie Lee Quong for the murder of Chin Sue Ying. Lee Jong was never arrested. The others, the appellant, and Charlie Lee Quong, were tried together, and convicted of murder in the first degree, and sentenced to be hanged on the seventh day of February, 1879. They appealed from the judgment to the supreme court at the January term, 1879. The judgment of the circuit court was reversed, and the case remanded for a new trial. The defendants then severed in their trials, and on the tenth day of July, 1879, the appellant was again tried and convicted of murder in the first degree, and sen-

tenced to be hanged, from which judgment he again appealed to this court.

The evidence offered on behalf of the state tended to prove that on October 2, the day preceding the homicide, Charlie Lee Quong, one of the accused, complained to a policeman that the deceased had poured some offensively smelling liquid on the floor of the Joss room, and that he would have him arrested for it on the morrow. That the next day in the afternoon, while a number of Chinese were in the Joss-house, the deceased was standing on the floor with his back toward the appellant, when the latter raised a hatchet and struck the deceased a blow on the head with it. Deceased suddenly turned with his face toward the appellant, and while turning, he was shot twice by the other defendants, Lee Jong and Charlie Lee Quong, and immediately fell on the floor. The deceased had three wounds on the head, inflicted with a hatchet, and two in the body, made by pistol shots, either of which was regarded as necessarily fatal. From the effect of these wounds he died two days afterwards. There was also evidence tending to show that the appellant was seen to walk rapidly away from the Joss-house soon after the assault was made, and that he had apparently something concealed in his sleeve. The deceased became unconscious from the effect of the wounds, and remained so until the next day, when consciousness returned, and he was then questioned as to who inflicted the wounds upon him. He replied, through a Chinese interpreter, to the effect that the appellant cut him and Charlie Lee Quong shot him. These statements were given when deceased believed he would die from the effect of the wounds, and were afterwards, during the trial, received in evidence as his dying declarations.

In his defense, the appellant offered evidence tending to prove that he was at home, sick in bed, at the time deceased was wounded; also the testimony of several Chinese witnesses to the effect that the deceased had come into the Joss-house having a piece of raw meat in his hand, which he was about to throw on the Joss, when Lee Jong, one of the persons named in the indictment (not arrested), ob-

serving the action of the deceased, sprang at him and caught his arm, drew the hatchet from under his clothing and struck deceased with it, and then drew a pistol and shot him twice; but that neither the appellant nor Charlie Lee Quong participated in the killing of the deceased. There was no evidence offered or received on the trial as to whether the deceased believed in a future state of rewards and punishments, or to show whether he had any religious convictions whatever on the subject. It was proved that the deceased, and the witnesses who testified on behalf of the state that they saw the appellant strike him, were Chinese, and had attended the Chinese mission school in Portland; while all those accused in the indictment were worshippers of Joss.

After the evidence for the state was closed, on motion of the district attorney, an order was made by the court allowing the jury, accompanied by a bailiff having them in charge, to visit and view the premises and the Joss-house, where the wounding of the deceased took place. The order made did not direct or provide for the presence of the appellant or his counsel at the view, and neither of them asked that they might be permitted to be present, and neither did the order exclude them from being present at the view if they had desired it.

Dolph, Bronaugh, Dolph & Simon, and Whalley & Fechheimer, for appellant.

John F. Caples, District Attorney, and M. F. Mulkey, for the state.

By the Court, KELLY, C. J.:

After the evidence on behalf of the state was closed, the court, at the request of the district attorney, made an order directing a bailiff to conduct the jury to the Joss-house for the purpose of viewing the place where the homicide occurred. The appellant and his counsel were present when the order was made, but did not object to it. The section of the statute under which the court ordered the view is as follows: "Whenever, in the opinion of the court, it is

proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge or by a person appointed by the court for that purpose. While the jury are thus absent no person except the judge or the person so appointed shall speak to them on any subject connected with the trial." (Code, p. 145, sec. 195.)

It is now claimed by the counsel for appellant that the court erred in permitting the jury to visit the premises where the homicide took place in the absence of the appellant; that in making their view the jury necessarily received evidence from inanimate objects which might be prejudicial to the rights of the deceased, and it is urged that his failure to object to the making of the order for the view was no waiver of his right to be present. The decisions of the courts in the different states are in direct conflict with each other on these points; but we consider the better doctrine to be that the failure of the accused to be present when the jury were making their view, is no ground of error. We are unable to see what good his presence would do, as he could neither ask nor answer any questions, nor in any way interfere with the acts, observations, or conclusions of the jury. He would have been only a mute spectator while he was there.

It appears from the records that when the district attorney moved the court for a view by the jury, the counsel for the accused stated that they were about to make the same motion. The appellant, if he desired to be present at the view, should then have made application for that purpose. If he had desired to see the place where the homicide took place, in order to be better prepared to make his defense, doubtless the court would have permitted him to accompany the jury in the custody of an officer. But failing to make known any desire to be present at the view, he must be deemed to have waived any privilege which he had in this respect. It was so decided in a well-considered case by the supreme court of Kansas, and to the principles laid down

there we assent. (*The State v. Adams*, 20 Kansas, 311; *People v. Bonney*, 19 Cal. 426.)

The next objection urged is that the court erred in admitting the dying declarations of the deceased to go as evidence to the jury against the accused, and in support of this objection it is urged that as the deceased was shown to be a Chinaman, it must be presumed that he was a worshiper of Joss, and had the heathenish religion of his race, and that there was no evidence that he had any convictions in regard to a future life, or a moral accountability to a supreme being after death, or that he had any fear of future punishment in another world for false dying declarations made in this. Mr. Greenleaf in regard to dying declarations says: "The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath. It follows therefore that where the declarant, if living, would have been incompetent to testify by reason of infamy or the like, his dying declarations are inadmissible. And as an oath derives the value of its sanction from the religious sense of the party's accountability to his Maker and the deep impression that the declarant was incapable of this religious sense of accountability, whether from infidelity, imbecility of mind, or tender age, the declarations are alike inadmissible." (1 Greenleaf, sec. 157.)

Under the common law, one who does not believe in the existence of a Supreme Being, who will punish false swearing in a future world, is incompetent to testify, and consequently the dying declarations of such a one would not be admissible in evidence under the common law. But the common law rule has been abrogated in this state: "No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony." (Article 1, sec. 6, constitution of Oregon.) As the deceased, under our laws, would have been a competent witness to testify in

a court of justice, it follows that his dying declarations were admissible. (*People v. Sanford*, 43 Cal. 29.)

But as a matter of fact it does not appear from the evidence that the deceased was destitute of religious belief, and of a belief in future accountability. The record shows that he had been for some time attending a missionary school in Portland, and it may therefore reasonably be presumed that he had been taught the doctrines of the Christian religion, and that he was a believer in the Christian faith. Indeed, the evidence on the part of the accused tends strongly to prove that the fatal assault was made upon him because he had treated the Joss-house with disrespect and contempt. Under the common law, therefore, we consider that his dying declarations would have been admissible in evidence. We therefore consider that the court did not err in admitting them.

There was also an exception taken to the following sentence in the charge of the court: "You may consider the surroundings of the witness, you may consider the probability of the facts he narrates; whether or not those facts accord with the facts previously known or believed by you; that is to say, whether or not they accord with your experience, or knowledge, or previous belief, or, in other words, with the probabilities of the case."

It is claimed by the appellant that this instruction gave to the jury the right to determine the credibility of a witness by comparing his testimony with any knowledge or information which the jurors themselves may have had concerning the homicide, or opinions which they may have formed in regard to it before they were impaneled to try the case. We do not regard it as open to this construction. Taken altogether, we think that the court intended to convey to the jury the idea that in determining the credibility of a witness, they were to judge whether the statements made by him accorded with their own experience in life, and their own knowledge of the motives and interests and passions which govern or influence men under such circumstances as those which surrounded the witness. We do not consider this instruction of the court open to the objection made against it.

We now come to the principal point relied on by the appellant to reverse the judgment, and which has been most strongly pressed upon the consideration of the court. It is contended "that according to law and the evidence as certified in the bill of exceptions, the appellant is not guilty of murder in the first degree, but in the second degree, conceding that he did participate in committing the homicide as testified by the witnesses for the state." The appellant's counsel, in support of this proposition, claim that there was no evidence whatever tending to show deliberation or premeditation on part of the accused, and that in order to convict, both deliberation and premeditation in the commission of the crime should have been proved beyond a reasonable doubt.

The crime of murder is defined in sections 506 and 507, page 406, of the code as follows:

"Sec. 506. If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree.

"Sec. 507. If any person shall purposely or maliciously but without deliberation and premeditation, or in the commission or attempt to commit any felony, other than rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the second degree."

Section 519, page 407, of the code, further provides how the different degrees in the crime of murder shall be proven:

"Sec. 519. There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed in cold blood and not hastily upon the occasion."

Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done. Premeditation is where the intention to do an

act has been formed before the attempt to execute it. It implies a prior intention to do the act in question; and it is claimed by appellant's counsel that there is no proof whatever that there was any deliberation or premeditation on part of the accused to take the life of the deceased; that his first connection with the crime, so far as the evidence discloses it, begins with the uplifted hatchet when he was in the act of striking the deceased; and that the intention to kill might have been formed at that instant upon a sudden heat of passion caused by an indignity offered to the idol which was the object of his worship.

Direct proof of deliberation and premeditation is not required under our statute, but may be inferred from proven facts; and in the case under consideration we think the evidence of a predetermination to take the life of deceased is very strong. The fact that in a house of worship, heathen though it was, two or three men should be armed with deadly weapons, is a very unusual thing. This was followed, as the evidence of the state tended to prove, by the appellant raising his hatchet behind the back of the deceased, and striking him a blow without saying a word. Simultaneous with this assault two shots were fired in rapid succession by the other defendants. Under these circumstances, we think the jury were warranted in coming to the conclusion that there was not only a preconcerted design to take the life of the deceased, but that this design was formed in cold blood. If the appellant was guilty at all, we can hardly see how they could have come to any other conclusion than that he was guilty of murder in the first degree.

While giving the charge to the jury, the court, in explaining to them what was required to show a premeditated design, said: "If a man, without uttering a word, should strike another in the head with an ax, it must be deemed a premeditated violence," and an exception was taken to this remark. This paragraph must be taken in connection with the surrounding circumstances of the case as they were disclosed to the jury by the evidence, and it must be viewed in the light of the facts as they appear in the bill of exceptions. The court doubtless intended to convey to the jury

this idea, that if they believed the accused came up behind the deceased, and without uttering a word, struck him a deadly blow with an ax or hatchet, it would be presumed to have been done with premeditated violence. It was merely a mode of illustration to show what was required to constitute premeditation, and, we think, could not in any way have misled the jury.

Taken altogether, we find no error in the proceedings or the charge of the court, and it is ordered that the cause be remanded to the circuit court for further proceedings to carry the sentence of the court into effect.

E. CORPE, RESPONDENT, v. QUINCY A. BROOKS, APPELLANT.

SCHOOL BOARD—CO-ORDINATE DEPARTMENT—DECISIONS NOT REVIEWABLE.—The decisions of the board of commissioners for the sale of school and university lands, etc., are not the subject of review by the courts. The board is not an inferior court or tribunal over which the circuit courts have a supervisory control, but a co-ordinate department of the state government, whose discretion and decisions the courts can not control.

APPEAL from Marion County. The facts are stated in the opinion.

W. W. Thayer, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

The appellant, Brooks, on the sixteenth day of January, 1872, filed his application to purchase the land in controversy as swamp lands of the state, under the act of October 26, 1870. He afterwards paid tweny per cent. of the purchase price at one dollar per acre, to wit, twenty cents per acre, and on the fourth day of April, 1872, received of the board of commissioners a certificate of purchase for the lands which are lots 4, 5, 6, 7, 8, 9, 10, 15, and 16, in section 16, T. 40 S., R. 8 E., and are in Lake county. Said

lands had been selected as swamp lands, and the selection was afterwards approved by the surveyor general.

On the twenty-sixth of September, 1876, Corpe, the respondent, filed an application with said board to purchase these same lots of land as school lands, claiming that these lands are school lands and not subject to be sold as swamp lands. This application the board rejected, on the ground that the land was in fact swamp, and that the state had already sold it as such to Brooks. On the fourteenth of December, 1877, the attorneys of Corpe instituted a contest before the board to obtain a deed for this land as school land. At the hearing of the contest on the fifteenth of January, 1878, the parties were heard by their attorneys, and the matter taken under advisement by the board, who on the sixth of March, 1878, rendered their decision in favor of Brooks.

Afterwards, upon the petition of Corpe to the circuit court of Marion county, a writ of review was granted to said board, and the decision of said board brought before said circuit court to be reviewed for alleged errors. And said court entertained the proceedings under said writ and reviewed said decision and reversed the same, and ordered that said board, upon payment by said Corpe of the appraised value of said land in controversy, execute a patent for said land to said Corpe. From this decision of the circuit court the appellant, Brooks, appeals to this court. Several questions have been presented by the counsel in the argument, which it will not be necessary to notice in this opinion, for the reason that we think a writ of review does not lie from the circuit court to bring before it for review the proceedings of the board of commissioners for the sale of school and university lands, etc.

This board was created by the state constitution and by it invested with the power to dispose of these state lands, and its powers and duties are such as are provided by law. It is composed of the governor, secretary of state, and state treasurer, and is a part of the administrative department of the government, and exercises its powers independent of the judiciary department, and its decisions are not subject

to be reversed by the court. It occupies in this state the same relation to the state judiciary as the land department of the United States does to the United States courts, and their decisions have not been the subject of review by the United States courts. It was held in the case of *Joseph Pin et al. v. James Morris*, that our late territorial courts could not revise the decisions of the surveyor general, and in that case Williams, C. J., says: "Congress has ordained a land department of the government, whose business it is made to determine those questions which arise out of the disposal of the public lands, and the courts of the country can not interfere to regulate or control that business without introducing uncertainty and confusion into the whole system." See also the case of *Board of Supervisors v. The Auditor General*, 27 Miss. 165. The board is the land department of this state, and their decisions as to who shall receive a patent to land is conclusive on the courts. But the courts may, on a proper showing, decree that the patentee holds the land as the trustee of one having a better right in equity. This board is not in any sense an inferior court or tribunal over which the circuit courts have a supervisory control, but a co-ordinate department of the state government, whose discretion and decisions the courts can not control.

The decision of the circuit court will be reversed and the writ of review dismissed with costs.

MARY J. ATTEBERRY, APPELLANT, v. THOMAS F. ATTEBERRY, RESPONDENT.

DIVORCE—CONDONED CRUELTY REVIVED.—While acts of cruelty will be presumed to be condoned by the continued cohabitation of the parties, they will be revived by the subsequent commission of acts of the same nature.

IDEM.—Any conduct which, after reconciliation of the parties in a case of cruelty, creates reasonable apprehension of personal violence, will revive the condoned cruelty.

MARRIED WOMAN—SEPARATE EARNINGS.—Under the law, as it now stands in this state, the wife is entitled to own and hold any property acquired with the proceeds of her own personal labor, and the husband has no right to compel her to turn it over to him.

APPEAL from Douglas County. The facts are stated in the opinion.

John Kelsay and Hermann & Ball, for appellant.

Wm. R. Willis, for respondent.

By the Court, PRIM, J.:

This suit was brought by the appellant for a dissolution of the marriage contract. In her complaint she charges cruel and inhuman treatment and personal indignities, rendering her life burdensome, and alleges that the defendant has frequently since their marriage threatened the plaintiff with violence, and at divers times struck and beat the plaintiff in a cruel and inhuman manner, and has continuously used threatening and abusive language toward the plaintiff, and kept her in constant fear for her personal safety. And that he did, on the thirteenth day of April, 1874, in Douglas county, Oregon, push the plaintiff in a rude and angry manner, and ordered her to leave their home, and threatened that he would burn the house down over her head if she did not leave, and compelled her to leave and seek shelter for the night at one of their neighbors. And that plaintiff has frequently within the year threatened that he would take the children of the marriage and remove them without the country, where the plaintiff could not see or hear from them. And that she was, on account of the indolence of the defendant, compelled to work and earn the support for the family.

The defendant answers, and denies the cruelty and the threats, or that he has struck or beaten the plaintiff, except in 1867 he struck her with a small switch, and in 1875 he slapped her in the face with his open hand, which he alleges were forgiven in January, 1878, and that the action was not commenced within the statutory time. The answer also denies that he threatened to remove the children from without the country, as alleged in the complaint, but admits that he told plaintiff if he had to give up all his property to her, he would take the children and leave the country.

The plaintiff's reply denies that she forgave the acts of cruelty admitted by the defendant in his answer, and assigns that her reason for living with him after those acts was on account of the tender years of their children, and with the hope and desire that he would reform his conduct toward her, and cease to treat her in a cruel and inhuman manner.

The court decided against the plaintiff, and gave judgment dismissing her bill, and a judgment for costs and disbursements in favor of the defendant, from which the plaintiff appeals.

From the evidence and pleadings it appears that the plaintiff and defendant were married to each other in the year 1865, in the state of Illinois, where they resided for several years, and until they moved to Oregon. There are three children, two sons and one daughter, the issue of said marriage. The boys are thirteen and ten years of age, respectively, and the daughter seven. That in a short time after their marriage, the cruel treatment of defendant was commenced by slapping the plaintiff in the face with his open hand, and by threatening to boot her; and at another time, after their removal to Oregon, about the year 1873, by slapping her in the face without any apparent provocation. These parties continued to cohabit together as husband and wife until the thirteenth of April, 1879, at which time a final separation took place, since which time they have remained apart.

The causes which led to the separation appear to be as follows: She was the owner of some property, consisting of horses and cattle, about seventeen head in all. The property had been purchased with money earned by her own personal labor in the manufacturing and sale of gloves, in washing clothes, in sewing, and in the making of butter for sale, etc. The place upon which they were residing was a piece of government land, the improvements upon which had been paid for with money earned also by her personal labor. That the money to pay for this land had also been furnished by her, but the defendant had managed in some way to procure it from the land office and spend it. That on the morning of the thirteenth of April, 1879, he in-

formed the plaintiff that she must turn over all the stock to him, and allow him to have the full control of the same, or neither she nor the stock could remain on the place any longer. That if she refused to comply with his request in this respect, he would make it hot for her, and threatened to burn the house over her head.

The plaintiff feeling aggrieved at the injustice of this demand of the defendant, and not being fully advised as to her rights in the premises, saddled a horse and went off to consult a neighbor in relation to the matter. Returning in the afternoon about four o'clock, she unsaddled the horse and turned it into the pasture, when the defendant, in order to make an exhibition of his authority and carry out his threat, undertook to turn the animal out of the pasture. The plaintiff went to the gate and undertook to prevent him from so doing, when the defendant shoved her away in a rude and angry manner, saying that neither she nor the animal could remain on the place. The plaintiff then went away and never returned to him again. A Mrs. Butler, who was residing at the house with them, testifies that on another occasion, in April, 1879, she was present when the defendant drew a chair upon the plaintiff in a threatening manner and was prevented from striking plaintiff by her stepping in between them and begging him not to strike her.

It also appears that after the commencement of this suit the defendant went to Canyonville, where plaintiff had their daughter for the purpose of attending school, and took her away from her by force, and because the plaintiff caught him by the coat and thus endeavored to prevent him from taking the child off where she could never see her again, he knocked her down. This assault, having been made since the commencement of the suit, can not be considered as one of the grounds for the divorce. Two of the acts of cruelty specially charged in the complaint as having been committed in the years 1867 and 1875, respectively, are admitted by the defendant, but it is claimed by him that these acts were specially forgiven by the plaintiff about June, 1878.

Plaintiff, however, denies that those acts were specially forgiven by her, and assigns as a reason for living with him

after the commission of those acts the tender years of their children and the hope that he would reform his conduct toward her and cease to beat her in such a cruel and inhuman manner. There being no special condonation proved, none existed, except such as must be implied from continued cohabitation of the parties after the commission of said acts. But while the acts were condoned by the continued cohabitation of the wife, they were revived by the subsequent commission of acts of the same nature. "Any conduct which, after reconcilation of the parties in a case of cruelty, creates reasonable apprehension of personal violence, will revive the condoned cruelty; in fact, it is cruelty itself." (2 Bish. Mar. and Div. 58; *Gardner v. Gardner*, 2 Gray, 434.)

"To revive condoned cruelty there must be something of the same kind as would have supported a suit originally for cruelty, such as violence or threats of violence; but the acts need not be of the same stringent kind; something short will be sufficient, provided it be shown that the husband continues in the same state of mind, and is incapable of controlling himself, as when he actually committed the former acts of cruelty." (*Davis v. Davis*, 55 Barb. 55.) Legal cruelty is defined by Mr. Bishop to be "such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duty." (1 Bish. Mar. and Div. 715.)

We think the charge of cruel and inhuman treatment is fully sustained by the evidence, when all the acts of cruelty are considered together, and that plaintiff is entitled to a divorce.

It is, therefore, ordered that a decree be entered dissolving the bonds of matrimony existing between plaintiff and defendant; that plaintiff have the care and custody of their infant daughter, Marie Catherine Atterberry, and costs and disbursements.

Decree of the court below reversed.

STATE OF OREGON, RESPONDENT, v. H. C. DALE, APPELLANT.

INDICTMENT—DISTINCT CRIMINAL ACTS.—Where the statute makes the commission of different acts a crime, and uses the word *or* connecting these acts, an indictment is good which charges the defendant with the commission of more than one of such acts, using the conjunction *and* to connect them in the indictment.

JUROR—OBJECTION TO PANEL.—Where an objection to a juror is that he is drawn from a particular panel, and not that the juror is personally disqualified or improperly summoned, such objection is a challenge to the panel.

SHERIFF—CONVERTING MONEY—PROOF OF SUMS COLLECTED.—In a prosecution of a sheriff for converting money collected by him as taxes, it is competent to show that he received sums of money from different individual taxpayers.

IBID—CONVERSION OF PUBLIC MONEY IS LARCENY.—Money collected by a sheriff for taxes is the property of the county in the hands of the sheriff, and he may be guilty of larceny by converting the same to his own use.

APPEAL from Yamhill County.

The defendant was sheriff and tax collector of Yamhill county from July 1, 1876, to July 1, 1878. He was indicted by the grand jury of said county at the March term of the circuit court of said county for 1879, for larceny of public money.

The crime charged is described in the indictment as follows: "As such sheriff and tax collector of said Yamhill county, said H. C. Dale had received and had in his possession in said Yamhill county on the seventh day of August, A. D. 1878, the sum of three thousand dollars in gold and silver coin of the United States of America, belonging to and being the property of said county of Yamhill, which said money he had received and collected between the fifteenth day of September, A. D. 1877, and the seventh day of August, A. D. 1878, as taxes, assessed and duly levied by the county court of said county, and that the said H. C. Dale on the said seventh day of August, A. D. 1878, in said Yamhill county, state of Oregon, then and there being, and having in his possession said sum of three thousand dollars, which belonged to, and was the personal property of said

Yamhill county, Oregon, and which he had collected and received as taxes as aforesaid, did then and there fraudulently and feloniously, take, steal, make away with, embezzle and convert to his, H. C. Dale's, own use, the said three thousand dollars, and then and there neglected and refused to pay over, and does still neglect and refuse to pay over to said county of Yamhill, said three thousand dollars, or any part thereof, as by law directed and required; said county of Yamhill being all of said time a public corporation in the said state of Oregon, and the grand jury being unable to give or ascertain a more definite description of said money than that above given. Contrary to the statute," etc.

Upon the trial the jury returned the following verdict: "We, the jury in the above-entitled action, find the defendant guilty as charged in the indictment, and find that the amount of money converted was the sum of twenty-five hundred dollars."

The defendant was fined five thousand dollars and sentenced to five years' imprisonment.

The indictment is based upon section 559, page 414, of the criminal code, which is as follows: "If any person shall receive any money whatever for this state, or for any county, town, or other municipal corporation therein, or shall have in his possession any money whatever belonging to such state, county, town, or other corporation, or in which such state, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof, as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of larceny," etc.

The appellant claims that this section does not include the acts of the tax collector, and that the appellant was liable only under section 65, p. 763, of the General Laws, which is in the following words: "The sheriff shall pay over all moneys collected by him, on any tax list in his hands, to the treasurer of the county at least once a month, taking a duplicate receipt for the same, which he shall file with the

clerk of the county court of his county immediately thereafter; and any sheriff failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor," etc.

The appellant further claims that the court erred in permitting the prosecution to show the receipt by the appellant of more than one sum of money from different persons; that if the appellant was guilty, the receipt of different sums from different persons on the conversion constituted distinct offenses triable by separate indictments.

An exception was taken to the ruling of the court, upon a challenge to one of the jurors. The facts which explain this exception are stated in the opinion.

R. Williams and McCain & Fenton, for appellant.

J. J. Whitney, District Attorney, and W. M. Ramsey, for the state.

By the Court, BOISE, J.:

The appellant claims that the indictment in this case does not charge a crime. There was no demurrer filed to the indictment in the circuit court, and the appellant has, in the argument, failed to point out any defect in the indictment except this: It is claimed that it charges the defendant with converting the money and also with having failed to pay it over. Either of these acts would be a crime, and as he is charged with larceny by converting the money and failing to pay it over, we think a charge in this conjunctive form is good; if these acts had been charged in the disjunctive form, that he either converted or failed to pay over the money, the indictment would have been bad. In the case of *The State v. Carr*, 6 Or. 133, it is decided that "when a statute makes the commission of different acts a crime, and such acts are stated disjunctively in the statute, the indictment may, as a general rule, embrace the whole of such acts in a single count, but it must use the conjunctive *and* in the indictment when *or* occurs in the statute. The rule laid down in that case is applicable in this case, and tried by that rule this indictment is not bad for duplicity.

The next point argued as error is that the jury was improperly drawn. It appears from the bill of exceptions that on the eighth day of October, 1879, the day the cause came on to be heard, the court made an order as follows:

"Order for thirty jurors, October 8, 1879.

"It appearing to the court that the number of jurors required by the code to attend the court have not attended, and that the panel is not full, it is ordered that the sheriff of this county summon forthwith, from the body of the county, thirty good and lawful men, having the qualifications of jurors, to serve during the term."

It also appears that these thirty jurors were summoned pursuant to said order and their names placed in the jury box, "there being in said box at the time, the names of twenty jurors of the required panel, who were in attendance to serve and who were serving as jurors. The defendant, by his attorneys, objected to a jury for the trial of said cause being drawn from said box, and objected to each and every one of said jurors so drawn; but the court overruled the objection and the jury was drawn and impaneled from said box, to which ruling the defendant excepted."

The jurors whose names were in the jury box constituted the panel. (Stat. p. 142, secs. 178, 179.) The objection was made to this panel as being illegally made, and the objection to each individual juror was made on the ground that he was drawn from this panel, and not on the ground that he was personally disqualified, or that he was biased. We think the objections made to the jurors were challenges to the panel and not to the individual jurors. If, when a juror was drawn, the counsel had objected to him for the reason that he was not one of the jurors on the regular panel, it would present a different question, and we might then be called on to decide whether the court had the authority to call jurors before those on the regular panel were exhausted. There is nothing in the record showing whether the persons who were drawn as jurors were of the regular jurors or of those summoned by the order of the court. We think that, in order to raise this question, the objection should have been made to the individual juror that he was improperly and

illegally drawn or summoned, for it may be that all the jurors who were drawn were of the regular panel. It is claimed that these names being placed in the jury box made the whole panel illegal, and was such an irregularity as will vitiate the verdict.

By the statute, when, for any reason, there is not a full panel, the court may order the sheriff to summon forthwith, from the body of the county, persons having the qualifications of jurors, to serve during the term. It appears in this case that the number of jurors required by the code did not attend, for there were but twenty regular jurors on the panel. So the court had the power, in part, to make up the panel. This power has, we think, generally been confined in the circuit courts to making orders to fill up the panel to twenty-four trial jurors, the number provided for in the code

But the statute does not limit the order to that number in express words. Still, it would seem that the object of the statute was to enable the court to supply the panel with the number of jurors provided in the code to make a full panel. When, however, this power is exercised by the court, it is for the purpose of making the panel of jurors and the jurors added by the order of the court as much a part of the panel as those who have been regularly drawn from the jury list, and if there be irregularity in making up this panel, still the panel is not the subject of challenge, for challenges to the panel have been abolished. (*State v. Fitzhugh*, 2 Or. 272.) If the order was void by reason of having directed the summoning of thirty instead of four jurymen, we think that matter could only be taken advantage of by an objection to the individual juror, that he was not summoned as a juror and had no authority to sit.

We think that under section 178 of the code, the court may direct the sheriff to summon any number of jurors from the body of the county for the trial of a particular case, to be used when the regular panel is exhausted, and though we think there was an irregularity in this case, still it does not appear that a substantial right of the defendant was

affected by it, for it does not appear but what he was tried by jurors from the regular panel drawn from the jury lists.

After the jury was impaneled the prosecution offered record evidence to show that the defendant was, at the time he converted the money, the sheriff of Yamhill county. This was objected to by the defendant's counsel for the reason that it was incompetent. We think this evidence was competent to show in what capacity the defendant received and had the money. So, also, we think it was competent for the prosecution to prove the delinquent tax list filed by the sheriff, for this was an exhibit in his favor to show that he had not received all the taxes charged to him, and to charge him with the amounts which he by his entries thereon had charged himself with having collected. We think it was competent to prove, by any competent evidence, what sums the defendant had received at various times as sheriff, in order to show how much money belonging to the county came into his hands. He may have received sums with the intention to account for them and pay them over to the county treasurer. It was proper for the prosecution to show, by items received by him, the amount that came into his hands, and then show how much he paid over, to show the amount of his default; for if he returned a large sum of money belonging to the county, and refused to pay it over according to law, it was some evidence that he had converted it to his own use.

If an agent is accused of embezzling the funds of his employer, it would be competent to show that he received a sum from A. at one time and from B. at another, and that he had at another time converted both sums to his own use. The receipts would be lawful, and the crime consists in the unlawful commission, which may be one act. That is, an agent may be months in collecting the funds of his principal, and when he has a large amount collected, convert the aggregate to his own use at once.

Again, it is claimed by the appellant's counsel, that taxes, while in the hands of the sheriff, are not the property of the county. We think this position is not tenable. The sheriff is the agent of the county, and when he receives the

taxes and receipts for them, such taxes are the property of his principal, for it is a general rule that where an agent collects money for his principal, the money vests in the principal when received by the agent, according to the maxim, that what one does by his agent he does himself. The state tax due from each county, when paid to the state treasurer by the county treasurer, is the money of the county until paid to the state treasurer; and if destroyed by fire or act of God before being paid over, would be lost by the county; the property in money paid for taxes passes to the county when it is paid by the taxpayer to the sheriff, who is the officer and agent of the county.

It is further contended by the counsel for the appellant that as he collected the money as tax collector and sheriff, and failed to pay it over, he could only have been indebted under section 732 of the statute, which provides that "any sheriff who shall neglect or refuse to pay over all moneys by him collected for taxes, or shall refuse or neglect to make a return of the delinquent taxes of his county as required, * * * shall be liable to be indicted therefor, and upon conviction, may be punished by fine not less than one hundred nor more than one thousand dollars, or by imprisonment not less than six months nor more than six years." * * * This statute provides for punishing criminal negligence in the sheriff, and appellant might have been indicted under that section for failing to pay over the money by him collected as tax collector, although there was no conversion of the funds and no felonious intent.

Section 559 defines a higher and more heinous offense, and as both statutes were passed by the same session of the legislature, the presumption is that it was the intention of the legislature that both sections should stand. Section 559 defines a crime not mentioned in section 732, when it uses the words: "And shall in any way convert to his own use." * * * This makes the conversion of the public funds a crime, and this is the crime charged in the indictment, and for this the appellant could not be punished under section 732. It is true the section makes neglect or refusal to pay over, a crime of equal magnitude as conver-

sion, and uses the same language in defining it as in section 559. If section 732 was held to repeal that part of section 559 which makes a neglect or refusal to pay over a crime, it would leave the remaining portion of the section standing, and that remaining portion which provides against conversion would support this indictment. We think it was the intention of the legislature that both these sections should stand, and that they are in force, and that a sheriff is embraced in section 559 as much as any other officer, for he is included in the words "any person."

The points above discussed embrace all the important questions raised in the case, and as there is no substantial error, the judgment of the court below should be affirmed.

THE STATE OF OREGON, RESPONDENT, v. JAMES McCORMACK, APPELLANT.

LARCENY OF DIFFERENT ARTICLES, ONE OFFENSE.—Where a person is charged with the larceny of a horse, saddle and bridle, taken at the same time and place, and from the same person, the whole transaction constitutes but *one crime*, and but *one* indictment can be sustained for such taking, and if the prosecution see proper to split up the transaction into two offenses, by causing two indictments against such person for that which is but one crime, a conviction or acquittal on one may be pleaded as a bar to a subsequent prosecution on the other.

IDEM.—When a man has done a criminal act the prosecutor may carve as large an offense out of the transaction as he can, yet he must cut only once.

APPEAL from Douglas County. The facts are stated in the opinion.

Bonham & Holman, for appellant.

There was no appearance for the state.

By the Court, PRIM, J.:

The appellant was indicted by the grand jury of Douglas county for the crime of larceny of a saddle and bridle, alleged to have been stolen from one James Doolin, on November 1, 1879, to which indictment he pleaded guilty as therein

charged, and for which he was duly sentenced. At the same term of court, the appellant was also indicted for the crime of larceny of a horse alleged to have been stolen from said James Doolin, at the same time and place as in the indictment above mentioned. To this second indictment the appellant pleaded not guilty, together with a plea of former conviction for the same offense. The evidence, as reported in the bill of exceptions, shows that the horse, saddle, and bridle were taken by the appellant at the same time and place, and from the same person. The indictment and judgment of conviction on the charge of larceny of the saddle and bridle were admitted in evidence without objection. The appellant was convicted and sentenced for the larceny of the horse as charged in the second indictment, and from this judgment an appeal has been taken to this court.

The circuit court, among other things, instructed the jury as follows: "That a former conviction and judgment against the appellant of the crime of larceny of a saddle and bridle, taken at the same time and place from the same person, in the same transaction as the horse, for which he has been indicted, and is now being tried, is not a bar to the prosecution for the larceny of the horse, and will not sustain the plea of a former conviction entered by the appellant in bar of this prosecution."

To the giving of this instruction, appellant, by his counsel, then and there excepted, and assigns it here as error. This raises a very important question to be for the first time passed upon by this court, and it is therefore to be regretted that the state was not represented by counsel upon the argument.

It is stated, however, by counsel for appellant, that it was necessary to bring two indictments, because the larceny of the horse would be punishable under section 555 of the criminal code, while the larceny of the saddle and bridle would be punishable under section 552. The former of these two sections provides that if any person shall be convicted of stealing a horse, etc., he shall be punished by imprisonment in the penitentiary from one to fifteen years;

while under the latter, he can be imprisoned in the penitentiary not less than one nor more than ten years, if the goods or chattels stolen shall exceed in value thirty-five dollars; but if the property stolen shall not exceed the value of thirty-five dollars, he shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars.

This proposition may be answered in the words of Mr. Chief Justice Shaw, as follows: "It is not necessary in an indictment upon a statute to indicate the particular section or even particular statute upon which it is founded. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also when the indictment was found. And if the facts, properly laid in the indictment and found by the verdict, show that the act done was a crime punishable by statute, it is sufficient to warrant the courts in rendering judgment. (*Commonwealth v. Griffin*, 21 Pick. 525; *Commonwealth v. Squire*, 1 Met. 261; *Fisher v. Commonwealth*, 1 Bush. Ky. 216.) In the last case above referred to, the prosecution undertook to draw the same distinction in regard to the difference between the offense designated as horse-stealing and that of simple larceny, but was overruled by the court as being a distinction not well taken. "This plea of a former conviction, like that of a former acquittal, is founded upon that great principle and fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offense. This is one of the ancient and well-established principles of the common law, sanctioned and enforced in different forms of words in most of the constitutions of the several states, and in that of the United States. In the latter it is thus expressed: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'"

This clause having been adopted in our constitution as a fundamental principle, may be considered as equivalent to a declaration of the common law principle, that no person shall be twice tried for the same offense. But in the appli-

cation of this maxim, it must be considered in each particular case in which it is relied upon as a bar, whether as a matter of fact the party seeking to avail himself of it has before been put in jeopardy, and if so, whether it can be said to be for the *same offense*. If these circumstances should be found not to concur, the maxim will not apply to the case. It now remains to apply this maxim to the case under consideration.

This is a case where the appellant is charged with the larceny of a horse, saddle, and bridle, taken at the same time and place, and from the same person, and in our opinion the whole transaction constitutes but one crime, and but one indictment can be sustained for such taking, and the prosecution having seen proper to split up the transaction into two offenses by causing two indictments to be preferred against such person for that which is but one crime, a conviction or acquittal on one may be successfully pleaded as a bar to a subsequent prosecution on the other. In 1 Bishop's Criminal Law, sec. 1060, it is said, "that although when a man has done a criminal thing the prosecutor may carve an offense out of the transaction as he can, yet, he must cut only once." The same author, in referring to offenses embraced in the same transaction or included one within the other, says: "Some apparent authority, therefore, English and American, that a jeopardy for the less is no bar to an indictment for the greater, we must regard as not being good law, while the doctrine that it is a bar is best sustained by the adjudications, as well as by reason." (1 Bishop's Crim. Law, sec. 1057.)

The case of *Fisher v. The Commonwealth*, reported in 1 Bush. 211, is a case precisely in point. In that case, Fisher, by the same act and with the same intent, took a horse, wagon, and harness, the property of the same person. Two indictments were found against him, one for stealing the horse, the other for stealing the wagon and harness. On the trial for stealing the horse, Fisher pleaded not guilty and was acquitted. This acquittal was held to be a good plea in bar against the indictment for stealing the wagon and harness. In *Roberts v. The State*, 14 Georgia, 8, the

same principle was fully recognized. (*Hinkle v. The Commonwealth*, 4 Davis, 518; *The State v. Chaffin*, 2 Swan, Tenn. 493; *Lamphen v. The State*, 14 Ind. 327.)

Being of the opinion that the court erred in giving the instruction complained of, the judgment is reversed and the cause remanded to the court below for a new trial.

Judgment reversed.

M. ROSENDORF AND H. HIRSCHBERG, APPELLANTS, *v.* J. A. BAKER, RESPONDENT.

EVIDENCE—COPY OF LOST INSTRUMENT—QUESTIONS FOR JURY.—Where an instrument in writing is pleaded as a defense in an answer, and the making of the instrument is denied in the replication and on the trial, the original having been proven to be lost, a pretended copy produced and sworn to by two witnesses as a true copy, and the plaintiffs offer evidence tending to prove that no contract was executed, it is a question for the jury whether the paper produced is a copy of the lost paper, and whether it was executed between the parties.

CHATTEL, TITLE IN VENDOR AFTER DELIVERY.—When a chattel is delivered to one who has bargained for the purchase thereof, and agreed to pay therefor at a future day under an express contract that no title is to vest in him until payment, the property of the vendor is not divested, and the purchaser takes, at most, only a right by implication to the use of the chattel until default in the stipulated payment.

INSTRUCTIONS MUST BE PERTINENT.—The court may refuse to give instructions asked for when they are not pertinent.

APPEAL from Marion County.

This is an action for the conversion of an organ. The appellants claimed title to the organ through a purchase from D. L. Hedges, in September, 1878; the respondent, to defeat the claim, introduced testimony tending to show that Hedges never owned the organ; that he held it under a written agreement between himself and S. A. Nichols, executed in September, 1877, by the terms of which said organ was to be the property of Nichols until paid for, and that it had not been paid for; the pretended agreement was lost, and it is claimed that the following is a copy, excepting that it contains no signature by Hedges and no date, to wit:

"Received from S. A. Nichols, one Burdett organ, of the

value of one hundred and forty dollars, for which I executed and delivered to said S. A. Nichols my promissory note bearing date of September 1, 1877. Now, therefore, if I fail to pay according to the terms of the said note, I do hereby agree to pay to said S. A. Nichols the sum of five dollars per month rent for the organ, and to relinquish all claim on the organ and to return the same to said S. A. Nichols at my own expense; and it is further agreed that the said organ shall belong to and be the property of the said S. A. Nichols until the said sum of money is all paid. When this sum of one hundred and forty dollars, the value of the organ, is all paid, the said organ, together with this contract, shall belong to and be delivered to David Hedges. (Signed,) S. A. NICHOLS."

Hedges testified that he never executed said pretended agreement; that he purchased said organ from Nichols by an absolute parol sale, and gave his promissory note therefor, which matured about September 1, 1878. The testimony and the answer of the defendant showed that Nichols, in October, 1878, obtained in said circuit court judgment on said notes, and compelled the defendant, as sheriff, to sell said organ, as the property of Hedges, on an execution to enforce said judgment.

Among other things the court charged the jury as follows, to wit: "The defendant offers in evidence a copy of said written agreement. And this paper (holding in his hand the pretended copy above referred to) having been proved to be copy, and admitted in evidence, it becomes my duty to construe it." Also the following: "Whether it was wise, or unwise, for Hedges to make such a contract is not for us to determine. We are to take it as it is and give to it its legal effect." Also, the following: "Unless you find that Hedges obtained a title otherwise than by or under this instrument, of which this is a copy, he did not own the organ."

The jury found for the respondent and he had judgment, from which this appeal is taken.

B. Hayden and W. M. Ramsey, for appellant.

John Kelsay, for respondent.

By the Court, BOISE, J.:

It is claimed by the appellants that the court erred in instructing the jury that the copy of the written instrument, set out in the answer, was proved to be a true copy of the lost paper. That the fact as to whether it was a copy or not was a fact for the jury and not for the court. The paper being lost and a pretended copy being produced, this being secondary evidence, it was necessary for the party producing it to show that the orginal was lost and could not be produced. The question of the loss was for the court. This being determined in the affirmative, then it was necessary to prove the copy. It seems from the report of the case that what was claimed to be a copy, except the date and signatures, was produced and sworn to by two witnesses, who said the original had been signed. The copy so sworn to was admitted in evidence without objection on the part of the plaintiffs, who afterwards called as a witness Hedges, who testified that he did not sign this contract or any other contract in writing. The defendants had produced their copy, and the only material question was, whether or not Hedges had signed the original; that is to say, one precisely like the one produced. If it varied in substance or form from the original, Hedges could truthfully swear that he had not executed such a contract. There was no question before the jury as to whether or not there had been some other contract executed by the parties. The question was, therefore, necessarily confined to the copy produced by the defendant.

Counsel for the plaintiffs claim that two questions were raised for the jury: 1. Was the paper produced a copy of the instrument between the parties; 2. Was it executed by the parties. We think there was but one question, and that was, Was an instrument like the one produced signed by the parties? and this question was left to the jury, and there was no error on this point.

Again, it is claimed that the court erred in construing the writing. In this case the organ by the terms of the contract was to remain the property of Mrs. Nichols until

paid for. There can be no mistaking the understanding of the parties, and it was binding on them, and subject to be enforced according to its true meaning and intent, unless it contravened some legal principle; and the organ became the property of Hedges by virtue of the delivery only.

In the head note to the case of *Henry v. Hoppock*, 15 N. Y. 409, it is declared that "when a chattel is delivered to one who has bargained for the purchase thereof, and agreed to pay therefor at a future day, under an express contract that no title shall vest in him until payment, the property of the vendor is not diverted, and the purchaser takes, at most, only a right by implication to the use of the chattel until default in the stipulated payments." That case is like this in principle, and we think such is the law as generally settled. (See Benjamin on Sales, secs. 320, 411, 412, and *Forbs v. Marsh et al.* 15 Conn. 384.)

Again, it is claimed that the court erred in not giving the following instruction, which was requested to be given to the jury by the counsel for the appellants: "If the jury believe from the evidence that Mrs. Nichols had the organ in question sold as the property of Hedges, under the judgment which she obtained against Hedges on the notes for the organ, that she is estopped to claim that the title to the property was in her at the time; that is, at the time she had it sold." This question, we think, was not pertinent to the case, or any issue in the evidence.

The plaintiffs claimed the organ by virtue of a sale to them made in September, 1878. Mrs. Nichols did not levy on the property until October, 1878. We have already held that Hedges did not have the title by virtue of the written contract, under which it is claimed by defendant. He was claiming it at the time he sold to the plaintiffs, and it might be that Mrs. Nichols was the owner at that time and claimed the organ as her property; and if the jury found that the written contract was executed as claimed, then she was the owner at the time of the sale to the plaintiffs. She might afterwards, on making a demand for its delivery, or regarding Hedges as having forfeited his obligation by not paying the notes, or having tried to sell and thereby convert

the property, have concluded to treat him as the owner, and she would not be estopped from claiming that she was the owner until she did some act that was inconsistent with such ownership, and there is no evidence that she did such act until she levied on the organ as the property of Hedges, which was on the fourth of October, 1878, and after the sale to plaintiff by Hedges. To make this act of her's an estoppel in favor of the plaintiffs, it must appear that the act creating the estoppel transpired before the sale by Hedges to plaintiffs. So that this act of her's, being after the sale to Hedges, could not operate as an estoppel in this case. And as to whether such an act would be an estoppel, provided it had occurred before the sale by Hedges to plaintiffs, we do not decide. It is enough that we hold that the levy is not an estoppel in this case.

We have found no error in this case, and think the judgment of the court below should be affirmed.

H. H. HAYDEN, APPELLANT, v. SAMUEL LONG, RESPONDENT.

JUROR—REVIEW OF RULING ON CHALLENGE.—The court will not review the ruling of the court below, on a challenge for actual bias in a juror, unless all the evidence upon which that court acted is reported to this court.

WATER RIGHTS—DIVERTING STREAM—INSTRUCTIONS MUST BE PERTINENT.—H. is the owner of the land through which a small stream of water runs, used by him for propelling machinery. L., not being the owner of any land adjoining said stream, went above the land of H. and diverted a portion thereof from its natural channel, and conducted it over and across the lands of other persons to where it was used for irrigation and other purposes, by means of which portions thereof were wasted. *Held*, that such diversion was unlawful, and while the instructions of the court contain a correct statement of the law as to the respective rights of riparian owners, they were inapplicable to the facts developed in this case, as the diversion was made in this case by a party who was not a riparian owner.

APPEAL from Polk County.

This is an action for the abatement of a nuisance and for damages, brought under section 330 of the code.

The complaint alleges that during all the time hereinafter mentioned, the appellant was the owner in fee simple and in the possession of certain real property on which is situated a machine shop, and reservoir, or pond of water, belonging to the appellant, and continually used by him as a water power in the manufacture of machinery, furniture, and wagons; which same pond of water and water power is fed by a small stream of water, which said stream of water the respondent wrongfully and unlawfully diverted from its natural and usual channel by wrongfully and unlawfully tapping the same above the land of the appellant, and conducting a large portion of it across the land of others by means of artificial ditches, by reason of which wrongful diversion large quantities of said water are constantly absorbed, and large quantities of earth are constantly washed and carried into appellant's said pond, to the nuisance of the said machine shop, water power, and land, and to his the defendant, compelled to work and earn the support for damage in the sum of seventy-five dollars.

The respondent had a verdict and judgment, from which this appeal is taken.

B. Hayden, W. H. Holmes, and X. N. Steeves, for appellant.

R. S. Strahan and John J. Daly, for respondent.

By the Court, PRIM, J.:

The first assignment of error is that the court erred in admitting S. B. Frazier to serve as a juror at the trial of said cause. The bill of exceptions discloses that upon said Frazier being challenged for actual bias, on behalf of the appellant, he was examined under oath, as follows:

1. Were you a juror in the case of *Brown v. Long*, tried here yesterday? Answer: "I was." 2. Have you formed any opinion, from the evidence in that case, relative to the diminution or absorption of water from the stream in question, in consequence of the diversion of a part of the same by defendant, Long? Answer: "I have." 3. Have you that opinion now? Answer: "I think I have."

The bill of exceptions does not purport to give all the

evidence given on the trial of this challenge. In the case of the *State v. Tom* (*ante*, 177), this court held that it would not receive the ruling of the court below, in a matter of this kind, unless all the evidence introduced in the court below is reported to this court.

The next error complained of is as to the instructions of the court. It appears from the bill of exceptions that there was evidence at the trial tending to show that, by the flow of water through the ditch dug by the respondent, portions thereof were wasted by absorption, evaporation, and percolation, and that the quantity of water in said stream was small, and all needed by the appellant in driving the machinery of his said factory. The court instructed the jury as follows: 1. "Every person through whose premises water naturally flows has a lawful right to the flowing of the water in its natural channel, and no person has a right to divert the stream or any part of it from its natural channel, unless he causes it to return again before it leaves his premises, so that it will not injure those below, and be lessened or diminished only by such quantity as may be necessarily used for domestic purposes and watering stock, and in some cases for irrigation; and also by evaporation, and natural and necessary wastage." 2. "Defendant had a right to take as much of the water in the stream in question as was necessary for domestic uses, and if his convenience required it he has a right to divert a portion of the stream from its natural channel; but he must return so much of it as he does not use for such purposes, or is lost by evaporation or unavoidable wastage, to the stream before it reaches plaintiff's premises." 3. "If he diverts the water and does not so return it, and thereby the plaintiff is damaged, then the diversion is wrongful, and the plaintiff is entitled to a verdict in some amount of damages to be fixed by you." * * * 4. "If, from the evidence, you find that the defendant did divert the water and did not return it before it reached the plaintiff's land, then the plaintiff is entitled to damages if sustained by him. But if, on the contrary, you find that he did not divert or turn the water, or if he did divert it and turned it all back to its natural channel above plaintiff's place without greater waste than was consistent with his

use of the water, as before stated, then you should find for the defendant."

While these instructions contain a correct statement of the law as to the respective rights of riparian owners, they were inapplicable to the facts developed by the pleadings in this case, and should not have been submitted to the consideration of the jury. They are based upon the theory that both parties are riparian owners of the land lying along and adjoining the stream in question, whereas it appears from the pleadings that respondent is not such owner. In fact, it fails to appear that he is the owner of any land anywhere; but it is admitted that he diverted a large portion of the water of the stream from its natural and usual channel, by tapping the same above the land of appellant in the public highway, and conducting it across the said road and over land owned by other men, by means of artificial ditches. If the respondent had been the owner of the land adjoining the stream where this diversion was made, then the instructions would have been applicable to the case. But the appellant, being a riparian owner, was entitled to have the water run through his place, undiminished by the use of any one, except such as own the land adjoining the stream above his land. We hold that the instructions complained of were improperly submitted to the consideration of the jury, and that the judgment be reversed, and the cause remanded to the court below for a new trial.

Judgment reversed.

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*W. R. FINDLEY, RESPONDENT, v. H. TAYLOR HILL AND M. SCRAFFORD, APPELLANTS.

CONSIDERATION—AGREEMENT TO EXTEND TIME FOR PAYMENT.—An agreement between the creditor and principal debtor, without the assent of the surety, to extend the time for the payment of a promissory note, due the second day of January, 1879, until after harvest, in consideration that the debtor would pay in wheat, is insufficient to extend the time of payment upon the note; such agreement is void for want of consideration to support it, for the reason that "after harvest," is an indefinite and uncertain time.

*See 34 Am. Rep. 578 and note.

SURETY—FAILURE TO PROCEED AGAINST PRINCIPAL.—When the debt becomes due, the request of the surety to sue the principal debtor, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety will not thereby be discharged.

APPEAL from Polk County.

This was an action on a promissory note, which is in the following words and figures, to wit:

"BUENA VISTA, February 20, 1878.

"On or before January 1, 1879, I promise to pay to W. R. Findley, or order, the sum of one hundred and nine dollars, with interest at one per cent. per month, from date until paid, for value received.

(Signed) "H. TAYLOR HILL,
"M. SCRAFFORD."

Hill failed to answer, and was defaulted. Scrafford answered, admitting the execution of the note, but pleads in avoidance of his liability to pay the same, that he signed said note as surety only of Hill, and that respondent, at the time of the execution of said note, had full knowledge of that fact, although the word "surety" was not appended to said Scrafford's signature. Scrafford further shows in his amended answer, that on or about the second day of January, 1879, when Hill was solvent, he (Scrafford) notified and requested respondent to proceed to collect said note without delay, which respondent failed and neglected to do until October 6, 1879, when Hill was, and ever since has been, insolvent.

And for a further and separate defense Scrafford alleges that on or about the first day of March, 1879, respondent did, without the assent of this appellant, and against his protest, enter into an agreement with Hill, by the terms of which said Hill should have an extension of time for the payment of said note until after the harvest of the year 1879, in consideration that said Hill should then pay the amount which should be due upon said note in wheat, when the same should be harvested by said Hill.

To the foregoing answer, respondent interposed a de-

murrer, which was sustained, and judgment rendered against Scrafford for one hundred and thirty-two dollars and thirty-nine cents. From this judgment Scrafford appeals.

W. G. Piper, *Bonham & Ramsey*, for appellant.

R. S. Strahan, *A. C. Sweet*, *and Daly & Gaby*, for respondent.

By the Court, PRIM, J.:

The defense set up in the separate answer of the appellant is, that he signed the note upon which the action is based, as surety only of the defendant Hill, and that the respondent had full knowledge of that fact at the time said note was executed, although the word "surety" was not appended to his signature. That the respondent, without the assent of the appellant and against his protest, entered into an agreement with the defendant Hill, by the terms of which the said Hill should have an extension of time for the payment of the note until after the harvest of 1879, in consideration that said Hill should then pay the amount due upon the note in wheat, when the same should be harvested. If this was a valid agreement it is quite clear that it operated as a discharge of the appellant, for it is well settled that where time is given to the principal debtor without the assent of the surety, by a valid agreement which ties up the hands of the creditor, the surety is discharged. (*Bangs v. Strong*, 7 Hill, 250.)

But in this case we think the agreement for the extension of time was invalid, for the reason that the time to which the payment was extended was indefinite and uncertain, and for the lack of any consideration to support it. In *Miller v. Sterne*, 2 Penn. St. 286, it was held that "to discharge a surety by extension of the time of payment, there must be not only a sufficient consideration, but the time must be definite; hence an agreement to delay for an uncertain period, as until some time in the summer, will not discharge him." (Chitty on Bills, 412, 414; 3 Penn. St. 440.) The agreement to pay in wheat after harvest was equivalent to

saying that if the creditor would wait until after harvest he would pay the amount due on the note; hence there was no consideration to support the promise, and until "after harvest" was indefinite and uncertain.

The other defense set up in the separate answer of the appellant was, that on or about the second day of January, 1879, when the said Hill was solvent, he (Scrafford) notified and requested respondent to proceed to collect said note without delay, which he neglected to do until October 6, 1879, at which time said Hill was, and ever since has been, insolvent. The legislatures of many of the United States have by statute provided that the surety may by notice require the creditor to proceed against the principal, but our legislature having failed to adopt any such provision, the rule of the common law prevails in this state. Mr. Brandt, in his work on suretyship (sec. 208), says: "The great majority of cases on the subject hold, in the absence of any statutory provision, that if after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal he may himself pay the debt and immediately sue the principal." (*Jenkins v. Clarkson*, 7 Ohio, 72; *Carr v. Howard*, 8 Blackf. Ind. 190; *Davis v. Higgins*, 3 New Hamp. 231; *Nichols v. McDowell*, 14 B. Monroe, Ky. 15; *Frye v. Barker*, 4 Pick. 382; *Gage v. Mechanics' National Bank of Chicago*, 79 Ill. 62; 5 Nebraska, 484; 30 Mich. 143; 9 Cal. 557.)

There being no error appearing in the record, the judgment of the court below is affirmed.

ELISHA PULSE, APPELLANT, v. JAMES HAMER, RESPONDENT.

PAROL AGREEMENT, POSSESSION OF LAND UNDER.—Where one man agrees by parol with another to lease land for a term of years, to begin in the future, and agrees to put such parol contract in writing, and no consideration passes between the parties, either party may disregard the parol contract, and if the lessee go on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus obtained will not give him any rights under such parol agreement.

APPEAL from Benton County.

This is an action to recover one thousand four hundred and eight dollars for the non-performance of a verbal contract for the leasing of certain premises. The terms of the contract are shown in the testimony recited in the opinion.

F. A. Chenoweth and F. M. Johnson, for appellant.

J. W. Rayburn, John Kelsay, and John Burnett, for respondent.

By the Court, BOISE, J.:

To prove the contract as set up by the plaintiff in his complaint, the plaintiff offers himself as a witness and testifies as follows:

Question 2. "State the terms of the contract between you and the defendant, Mr. Hamer, in regard to the lease of his ranch mentioned and described in your complaint."

Answer. "In the spring of 1877, or rather in the summer, I had been informed that Mr. Hamer had a place to lease, and I went to see him some time the first of July—do not recollect the day and date. Mr. Rust informed me that Mr. Hamer had this place to lease, and stock, and I went to see him and told him what Mr. Rust told me, and he asked me what it was. I told him I understood he had his place and stock there to lease. He said he did. I asked him on what terms he would lease it, or a something to that amount. He said that he would furnish twenty or twenty-five cows and calves—cows that would come in; he would furnish me

eight three-year-old heifers that fall that would have calves, and furnish feed to feed them on in case they should need it; that he thought they would give milk enough to keep the calves that winter, and he would in the spring following furnish me with gentle cows, or broke cows enough to make out twenty or twenty-five head; that if he didn't have cows enough to make out the twenty-five head he thought the probabilities were in the spring he would have enough of two-year-old heifers to make out the twenty-five head, and I was to give him half of the increase of the cows—the calves; also I was to give him half of the grass that grew on the meadow; that the place, with the exception of the meadow, I was to have all I made upon it, and I told him I thought I would take the contract—and went back home—and told him that if my wife was willing to go in there I would drop him a little note to let him know, which I did. I got no answer till up in August some time, as well as I recollect—till him and Mr. Conner came into the field where I was harvesting. Mr. Hamer said that he had got my note—didn't deem it necessary to answer it, as he was coming up himself. We talked the matter over, with other things, and I asked Mr. Hamer there at that time to tell me how many cows and calves he would furnish me to keep on the shares in case I went down there. I told him the cattle was all that induced me to go down there, and he said he didn't know just exactly how many he could or would have, but he would furnish eight three-year-old heifers, that was spoken of before, and in the spring he would furnish me gentle cattle, or broke cattle, enough to make me out twenty or twenty-five head, he thought, anyhow, and if there was not enough to make out the contract heretofore spoken of, he would have some nice young two-year-old heifers that would come in in the spring that could or would make out the number that he had agreed to. Mr. Hamer then turned to me and said, we will have it down in writings. I told him that that was the proper and right way to do business, as well as I recollect. He then asked me when I could move on the place. I told him probably I could move on to it by the first of October, and on the tenth of October of that

year I moved on the said ranch that's named in the complaint. When I went there Mr. Hamer was not about, and no one on the place. I moved into the house, and in a day or two, or a few days, Mr. Hamer came. It appeared like everything was satisfactory. He went away, and in about one or two weeks after that, he came back to gather up his stock, with his son, or two sons, rather son and son-in-law, Mr. Dixon."

George Pulse, the son of the plaintiff, testifies:

"Question 2. Please state what, if anything, was said by Mr. Hamer about reducing the contract to writing. Give as near as you can the words used by both parties.

"Answer. He was to have it down in writings. He said then he didn't have time to draw them there.

"Question 3. Which one of the parties was it that you mean by he, Mr. Hamer or Mr. Pulse?

"Answer. Mr. Hamer."

This is the proof of the contract and the agreement to put it in writing offered by Mr. Pulse. The time of making the contract was in August, 1877. There is no proof of any other contract or conversation between the parties on this subject until after Mr. Pulse went on the farm of Mr. Hamer, on October 10, 1877. So the contract stood in parol with no act or word of either party in relation to putting it in writing until after Mr. Pulse went on the place. There is no evidence tending to show that Mr. Hamer requested Mr. Pulse to go on the farm under the parol contract made in August. The parol contract was void, and unless it was partly performed by one of the parties at the request of the other, it could never create any obligation. If before Mr. Pulse went on the farm he had requested Mr. Hamer to put this contract in writing, and thereby make it legal and binding, and Mr. Hamer had refused to put it in writing, Mr. Pulse would have had no remedy for the contract was simply void and could be disregarded by either party. If Mr. Pulse, before he went on the farm, had requested Mr. Hamer to reduce the contract to writing, and Mr. Hamer had said to him, I am too busy now to do it, but you move on the farm and go on with your part of the

contract, and I will have it put in writing, and Mr. Pulse, in consideration of this promise, had gone on the place and made improvements and prepared to perform his part of the contract, it would present a different case. So, also, if after Mr. Pulse had gone on the place, Mr. Hamer had promised to put the contract in writing, and Mr. Pulse had in consideration thereof gone on and complied on his part with the contract. But in this case it does not appear from the testimony that Hamer requested Pulse to do any act under this contract, or even induced Pulse to incur any expense or loss in consideration that he would reduce this contract to writing.

We think that where one man agrees by parol to lease land to another for a term of years, to begin in the future, and agrees at the same time to put such parol contract in writing, and no consideration passes between the parties, either party may disregard the parol contract, and if the lessee go on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus obtained will not give him any rights under such parol contract.

This point being held for the respondent, all the other questions discussed by the counsel become immaterial, for there could be no specific performance of the contract.

The decree of the circuit court will be affirmed, with costs.

F. R. HILL, APPELLANT, v. J. T. COOPER, RESPONDENT.

REMEDY—RENTS AND PROFITS RECEIVED TO THE USE OF ANOTHER.—Where one holds the possession of land as the trustee of another and while so holding the possession receives to his own use the rents and profits which belong to his *cestui que trust*, the *cestui que trust* must resort to a suit in equity to recover such rents and profits of the trustee.

IDEM—RENTS AND PROFITS AND POSSESSION RECOVERED IN SAME ACTION. Where a *cestui que trust* prosecutes a suit in equity to compel his trustee to convey the legal title to him, he may in said suit recover of the trustee the rents and profits which the trustee has received to the use of the *cestui que trust* while the trustee was in possession of the land.

EJECTMENT—JUDGMENT CONCLUSIVE.—A judgment in ejectment is conclusive as to the legal title and right of possession as between the parties, and can not be collaterally impeached.

APPEAL from Douglas County.

The complaint alleges, in substance, that plaintiff on and before June 3, 1873, was, and ever since has been, the owner and entitled to the possession of the premises described; that on the third of June, 1873, defendant wrongfully entered upon and took possession of said premises, and wrongfully detained the same until the sixteenth day of February, 1878, to plaintiff's damage, one thousand five hundred dollars; that there was a crop on said premises of the value of two hundred and fifty dollars; that defendant took the same and converted it to his own use, to plaintiff's damage, two hundred and fifty dollars; that the rents and profits of said premises during said time were worth one thousand two hundred and fifty dollars exclusive of said crop; and demands judgment for one thousand five hundred dollars.

The answer denies the allegations of the complaint; admits the rents and profits worth three hundred dollars; and alleges that defendant was the legal owner of said premises up to the sixteenth of February, 1878, and entitled to the possession, and the rents and profits; that before this action was commenced, plaintiff commenced suit against defendant for a conveyance of this land, alleging that this defendant was the legal owner; that decree was rendered in favor of plaintiff; that the rents and profits should have been claimed in said suit, and sets up the pleadings in said suit.

Also alleges, that on the twenty-second of June, 1873, in the circuit court for Douglas county, Oregon, in an action brought by this defendant against this plaintiff, judgment was rendered; that this defendant was the owner in fee simple of the premises mentioned in defendant's answer herein, and entitled to the possession thereof, setting up a copy of said judgment; that said judgment was appealed to the supreme court, and affirmed by said court; that under and by virtue of said judgment defendant entered upon and occupied said premises until the sixteenth of February, 1878, since which time he has not had possession of said premises, and asks judgment for costs and disbursements.

The reply denies that the defendant was the owner in fee, or entitled to the possession of the said premises, or the rents or profits thereof.

This action was tried by the court without a jury, and judgment entered for defendant.

After the denials in the replication, as above stated, the plaintiff, by way of other and further replication, alleged as follows:

"Plaintiff avers that he did prosecute a suit to final determination against the defendant, but denies that it was only claimed in the complaint that plaintiff was merely the equitable owner of the premises described, but avers that said suit was prosecuted to recover the possession of said premises from the defendant, and to declare fraudulent and void a certain deed of April 8, 1872, from Sarah M. Stratton to the defendant, under which the defendant claimed to hold said real property, and that it was distinctly alleged in said complaint and finally determined in said suit; that on the twenty-second day of April, 1871, the plaintiff was the owner for a full valuable consideration and in possession of said land under and through a certain written deed or contract for the purchase of said land, executed by Riley E. Stratton and wife, Sarah M. Stratton, to James I. Patton, on the twentieth day of August, 1856; that thereafter, the defendant on the eighth day of April, 1872, with full knowledge of the equities of the plaintiff, by fraudulent representations and without consideration, obtained said quitclaim deed from Sarah M. Stratton to said premises. That said Sarah M. Stratton was at the time the widow, and was the sole heir of said R. E. Stratton.

"Plaintiff denies that the claim for rents and profits is an equitable demand or that any part of the claim therefor stated in the complaint was put in issue in said suit in equity or in any manner before the court in that suit, or determined therein, or that they should have been pleaded in said suit. Plaintiff avers that the question of the bare legal title to said premises was all that was before the court in the action at law prosecuted by the defendant against the plaintiff for the possession of said land, and was all that was described in

said judgment. That it was upon the deed of April 8, 1872, from Sarah M. Stratton to the defendant that he obtained said judgment. That the plaintiff thereafter prosecuted to final judgment in the circuit court of the state of Oregon for Marion county, a suit against the defendant, in which it was alleged in the complaint and determined in said suit, that the plaintiff was the owner for a full valuable consideration, and in the possession of said premises under and through a written deed for the sale and conveyance of said premises, executed by R. E. Stratton and S. M. Stratton to one James I. Patton; which deed was defective in this, that by mistake of said parties they failed to have said deed signed by the subscribing witness, which it was intended by the parties at the time to have done.

"That the defendant, with a full knowledge of said facts, by fraud and without consideration obtained his deed of April 8, 1872, from Sarah M. Stratton, and that as against the defendant the deed of R. E. Stratton and Sarah M. Stratton, to James I. Patton, was and is valid, and of binding force. That the defendant's said deed was fair upon its face, and it was the only evidence of title upon which the defendant recovered upon his action at law, and is the only evidence of title that the defendant ever claimed to said premises, and his insisting upon and claiming said title was and is a fraud, and the defendant ought not to be allowed to plead that he was entitled to any rents or profits by reason of said fraudulent deed, or by reason of any judgment through said deed."

That all the above reply, beginning with the words "Plaintiff avers," was stricken out by the court on motion of respondent's attorneys, on the ground that the same was "sham, frivolous, and redundant."

Thereafter the court found that the respondent was entitled to judgment for his costs and disbursements.

A. C. Gibbs, E. W. Bingham, and Herman & Ball, for appellant.

W. R. Willis, for respondent.

By the Court, BOISE, J.:

From this statement of the case, it appears that during the time for which the plaintiff claims the rents and profits of the land and damages, the defendant was in possession of the premises as the legal owner of the title, which had been adjudged to him by a judgment in an action by the defendant herein against the plaintiff; that afterwards, on the said sixteenth day of February, 1878, said plaintiff herein obtained a decree against the defendant, declaring plaintiff to be the owner in equity, and directing a conveyance of the title to the plaintiff by the defendant. That decree found that the defendant was the trustee of said title for the plaintiff, and if the said trustee had received the rents and profits of the land while he held it in trust, he could have been called on to account for the same in that suit in equity. (2 Story's Eq. sec. 794, 795; 1 Perry on Trusts, sec. 17; *Starr v. Stark*, decided by this court April 22, 1879.) Such was certainly the proper and most convenient remedy for the determination of the damages, and value of the rents and profits received by the trustee, which were incidental to the suit by the plaintiff to settle his rights to the title to the land.

It is claimed by the plaintiff that although he might have obtained the rents, profits, and damages for taking the growing crop in said suit in equity, he may now maintain this action. We think that the defendant, being the legal owner of the land at the time he received these rents and profits, had then the legal right to receive them. And as he was then the trustee of the plaintiff as to the title to the land, he received the rents and profits for the use of plaintiff as his (plaintiff's) trustee, and was liable to account to him for them. And as no account has been taken and stated of the amount of these rents and profits, it is still an open trust. (Perry on Trusts, sec. 843.) And no action at law can be maintained against a trustee by his *cestui que trust* before a final account is settled and a balance struck.

It is claimed by the plaintiff that an action can be maintained in this case because the entry on the land was

wrongful. To make the entry wrongful, it must have been unlawful. The judgment in favor of the defendant in the action for the possession of the land conclusively proves that his entry on the land was lawful, and he can not be treated as a trespasser. And the decree in the case in equity determines that he was the trustee of the legal title, and we do not think that we can now go into the question as to the manner in which he obtained the legal title, or the evidence by which he proves it, for his right thereto is conclusively established by the judgment which still stands unimpeached by the decree in *Starr v. Stark*, above cited.

That part of the replication which was stricken out seeks to put in issue the validity of the deed by which he proved his title in that case. This can not now be done, for it would be opening that case and trying it over again between the same parties. So we think there was no error in the ruling of the court in striking out this part of the replication.

It will not be necessary to go further into the questions discussed in this case, for, as we hold that the defendant was the trustee of the plaintiff, while he is charged with having held the premises, the plaintiff can not recover damages for withholding them in an action at law.

The judgment of the circuit court will be affirmed.

JAMES R. BAYLEY, RESPONDENT, v. MARGARET A. McCOY, ADMINISTRATRIX, ETC., APPELLANT.

ESTOPPEL—DEED, RECITALS, ADMISSIONS, OR COVENANTS IN.—Where it distinctly appears in a deed of conveyance of real estate, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive reciprocally a certain estate, they will be estopped from denying the operation of the deed according to this intent.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth and F. M. Johnson, for appellant.

John Burnett and John Kelsay, for respondent.

By the Court, PRIM, J.:

This was an action to recover damages for an alleged breach of certain covenants in a deed. On May 23, 1870, John H. Kendall and wife, for a valuable consideration, sold a certain lot in the town of Corvallis, Benton county, Oregon, to James R. Bayley, and then and there made, executed, and delivered to him their deed for the same, as follows: "That the party of the first part, for and in consideration of the sum of eight hundred dollars to them in hand paid, * * * have bargained, sold, and conveyed, unto the said party of the second part, the following described premises, to wit: All of their right, title, and interest in and to lot number one in block number eleven, in the city of Corvallis, Benton county, and state of Oregon, to have and to hold the said premises, with their appurtenances, unto the said James R. Bayley, his heirs and assigns forever. And the said John H. Kendall does hereby covenant to and with the said James R. Bayley, his heirs and assigns, that I am the owner in fee simple of said premises; that they are free from all incumbrances, and that I will warrant and defend the same from all lawful claims whatsoever." That at the time when said deed was made, the said Kendall was not the owner of any portion of said lot except the south half thereof, and neither he nor his heirs have warranted or defended the said premises to the said Bayley, but on the contrary, at the time when said deed was made and delivered to him, the north half of said lot was seised and possessed by the Corvallis Lodge, No. 14, Ancient Free and Accepted Masons, of Benton county, Oregon, by virtue of an older and better title. Said Kendall having died prior to the commencement of this action intestate, it was brought against appellant as the administratrix of his estate.

The answer of appellant, after denying certain allegations of the complaint, sets up as a separate defense: That at the time when said Kendall made the deed mentioned in the complaint in this cause, he did not sell or convey to the respondent all of said lot number one in block number eleven, but that he sold only the right, title, and interest he then had in said lot, which was the south half of said lot;

that at the time of making said deed, the said Kendall was the owner in fee simple of the south half of said lot. That said south half was all that said Kendall attempted to convey to respondent by said deed, and was all that had been bargained for by him at the time, and was all that said covenant of title related to, and was so understood at the time of said purchase. A demurrer was interposed to this part of the answer, which was sustained by the court, and judgment rendered against the appellant from which he appeals. The order and judgment of the court sustaining the demurrer to this portion of the answer is the principal and main ground of error complained of here.

It was claimed on the argument, that the deed only purports to convey such right, title, and interest as the grantor then had in said lot one, and no more, and the covenants, although more general, should be held to have reference only to such right and title as the grantor then had in said lot, whatever that might be. This doctrine appears to be maintained by the decisions of Massachusetts and one or two other states; but the modern decisions of the most of the state courts, and of the supreme court of the United States, maintain a contrary doctrine. They hold that "whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance." (*Van Rensselaer v. Kearney*, 11 How. 325; *Fairbanks v. Williamson*, 7 Greenl. 96; *Jackson ex dem. Munroe v. Parkhurst*, 9 Wend. 209.) In *Taggart v. Risley*, 4 Or. 235, this court adopted that doctrine, and that case we think is decisive of this one.

Mr. Rawle, in his work on covenants, in commenting on this subject, says: "When, however, it has distinctly ap-

peared in such conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive reciprocally a certain estate, they have been held to be estopped from denying the operation of the deed, according to this intent." (Rawle on Covenants, 388; *Jackson v. Waldron*, 8 Wend. 178.) By reference to the deed, it will be seen that Kendall and wife "bargained, sold, and conveyed * * * the following described premises, to wit: All their right, title, and interest in and to lot number one in block number eleven." And there it is asserted by way of covenant, "that he was owner in fee simple of said premises, and that he would warrant and defend the same from any lawful claims whatsoever." The word "premises" evidently refers to the whole of lot number one, described in the deed, and not to one-half of it, as is contended by the appellant. We think that the appellant is estopped by the recitals and covenants of this deed from averring and proving the matters sought to be set forth in the answer as a defense to this action.

There being no error in the record, the judgment of the court below is affirmed.

Mr. Chief Justice KELLY, dissenting:

I do not concur in the opinion of the court, and will briefly give the reasons for my dissent. It is conceded that the deed of J. H. Kendall and wife to J. R. Bayley conveyed to the latter only the right, title, and interest which they had in lot one in block eleven, and not the lot itself; but the court holds that the covenant of Kendall and wife that they were the owners in fee simple of the premises, is a covenant that they were the owners of the entire lot. I do not so understand it. The deed conveyed only the interest which the grantors then had in the lot. The *habendum* limits the estate then granted to the interest which they then had in the premises, and the warranty is that they were the owners of the premises. I do not consider that the word premises, as here expressed, means the entire lot, but only the interest which the grantors then sold. If they had covenanted that they were the owners of lot number one, then there

would have been no doubt of their liability in this action. I think this position is supported by the decision of the supreme court of Massachusetts in the case of *Sumner v. Williams*, 8 Mass. 162, and is not in conflict with the case of *Taggart v. Risley*, decided by this court in 4 Or. 235.

THE CANYONVILLE AND GALESVILLE ROAD COMPANY, RESPONDENTS, v. H. W. STEPHENSON ET AL., APPELLANTS.

TOLL ROAD—ROAD CORPORATION MAY USE PUBLIC HIGHWAY.—A corporation organized under the general incorporation law of this state to construct a plank or clay road, is authorized by law to appropriate and use any part of a public road which may be necessary and convenient in the location of such plank or clay road; but the corporation does not thereby acquire the right to exclude another corporation, subsequently formed for the same purpose, from appropriating and using the same part of the public road when it is necessary and convenient in the location of its road.

FRANCHISE—GRANT STRICTLY CONSTRUED.—The grant of a franchise is to be strictly construed against the grantee, and nothing passes by implication. It is not exclusive unless expressly made so by the grant itself.

APPEAL from Douglas County. The facts are stated in the opinion.

James F. Gazley and Hermann & Ball, for appellant.

W. R. Willis and R. S. Strahan, for respondents.

By the Court, KELLY, C. J.:

This was an action brought in the county court by respondent to recover damages from appellants for placing a toll-gate across a road which it claimed as belonging to itself. The appellants denied that it was the property of respondent, and alleged that it belonged to the Douglas County Road Company, a corporation formed for the purpose of locating and constructing a road through the canyon in the southern part of Douglas county, on substantially the same line as the road of respondent. They also allege in their answer that in erecting the toll-gate they acted as the officers and employes of the Douglas County Road Company

and in no other capacity. A judgment was rendered in favor of respondent, and the appellants took the case to the circuit court upon an appeal.

By agreement of the parties the action was tried by the court without a jury, and as matters of fact the court found that as early as 1853 Jesse Applegate, under the superintendence of Major Alvord, U. S. A., surveyed and laid out a military road through what is known as the canyon in the southern part of Douglas county. In 1858 it was changed in some respects and worked under the superintendence of Col. Joseph Hooker, acting under the authority of the United States government. Since that time the travel has been on the Hooker road. Before the incorporation of the respondent a corporation had been formed known as the canyon road company, to construct and maintain a road through the canyon. It was worked by that corporation, and in some places varies a short distance from the Hooker road. The canyon road company had for some years kept a toll-gate and collected tolls under an agreement with the county court of Douglas county. But by a judgment of the circuit court for Douglas county it was dissolved at the October term, 1873. Before the dissolution of the canyon road company the respondent was incorporated for the purpose of locating, constructing, and maintaining a road through the canyon. Prior to the first of October, 1873, the respondent surveyed and located its road the entire distance through the canyon, upon the line and route worked and occupied by the canyon road company.

On the twentieth day of December, 1873 (as appears by the pleadings), the Douglas County Road Company was incorporated for the purpose of locating and constructing a road through the said canyon; and at the April term, 1874, of the county court of Douglas county, that corporation desiring to appropriate a part of the public road running through the canyon, petitioned the county court to enter into an agreement upon the extent, terms, and conditions on which the same might be used by the corporation. The county court then and there entered into an agreement with the Douglas County Road Company upon the terms and

conditions on which it could appropriate and use the public road, and authorized that corporation to establish a toll gate and collect certain specified tolls from the traveling public in consideration of keeping the same in good repair. Afterwards, on the eighth day of February, 1875, the respondent made an agreement with the county court of Douglas county upon the extent, terms, and conditions on which the said public highway might be appropriated and used by it.

The court also found as a matter of fact that the Douglas County Road Company did not, before entering into the agreement with the county court, survey, locate, or adopt any line or definite location of its road, except that it surveyed and located a short route outside of the limits of the county road, about one-half mile in length and about five miles south of the toll gate, kept and maintained by the appellants as officers of the Douglas County Road Company and for its benefit.

Under this state of facts it is insisted by the respondent that inasmuch as it first surveyed and located its road through the canyon, neither the Douglas County Road Company nor any other corporation had a right to appropriate or use that part of the public road. We do not so construe the sections of the statute authorizing a corporation to make a public highway part of its corporate road. At the last term of this court, in the case of the *Douglas County Road Company v. The Canyonville and Galesville Road Company*, the court said: "The appellant (C. & G. R. Co.) had a right under the law in relation to corporations to enter upon any land between the *termini* of its road for the purpose of examining, surveying, and locating the line of it and to appropriate a strip of land not exceeding sixty feet in width for its road, where the land belonged to private individuals. And it had also the right, in case it could not agree with the owners thereof as to the compensation to be paid therefor, to maintain an action against such owners to have the value assessed and the land condemned and appropriated to its own exclusive use. And we think that if the appellant entered upon, surveyed, and selected any land

for its road which belonged to private persons, it had the exclusive right from the time of such survey and selection to appropriate the same, and that the respondent could not in any way interfere with such right, nor construct its road upon any such lands. But it does not follow that by surveying a public highway and making it a part of its corporate road the appellant thereby acquired the right to appropriate the same to its exclusive benefit, nor does it follow that the respondent (D. C. R. Co.) had no right to use such public road, or a part of its corporate road, in the same manner as appellant. The statute contemplates that in the construction of a road by a corporation it may sometimes be necessary or convenient to use part of a highway, as where it passes through a defile or canyon, or where it is difficult to construct a road alongside of the public highway, and in such cases it is provided that the public road, or so much as may be necessary and convenient, may be used, or in the words of the statute, "may be appropriated by the corporation." The word appropriated is not, however, to be here understood in the same sense as in the appropriation of lands belonging to private individuals where the corporation becomes entitled to the property. By the appropriation of part of a highway the corporation acquires no right except to use the public road in common with all others traveling upon it, unless it makes an agreement with the county court as provided in section 26, above quoted. This section of the statute does not provide that any part of a public road "may be appropriated or used and occupied" by only one corporation, nor that the first one which so uses and occupies it, or which first surveys it, shall have exclusive privilege over any other corporation which may subsequently be organized. And we think it would be unwise and impolitic to construe the statute so as to confer exclusive benefits and privileges upon one corporation, and exclude all other from the right to compete for the public travel on the public highways."

It is claimed by the respondent here, that because it surveyed and located the line of its road along the public highway leading through the canyon before the Douglas County

Road Company was incorporated, it, and it alone, had the right to appropriate the public road to its own use, to the exclusion of every other corporation. We do not so regard it. It is very certain that section thirty-six of the act relating to corporations (see Code, p. 530) confers no such exclusive privileges of this kind, either in express words, or even by implication. The great case of *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, has generally been relied on as a clear, if not binding authority in support of the doctrine that a grant of a franchise is to be specially construed against the grantee, and that it is not exclusive unless expressly made so by the grant itself. (*Bartram v. Central Turnpike*, 25 Cal. 283; *Fall v. Sutter County*, 21 Cal. 237; *Indian Canyon Road Co. v. Robinson*, 13 Cal. 519; *Bush v. Peru Bridge Co.*, 3 Indiana, 21.)

If the twenty-sixth section of the act referred to had provided that a corporation formed to construct a road might appropriate so much of a public highway as might be necessary and convenient in the location and construction of its road, and have the exclusive right to such appropriation and use, then the position taken by the respondent would undoubtedly be correct. As it is, under the existing law, both of the rival corporations have the same and an equal right to use and appropriate the portion of the public road leading through the canyon, as parts of their respective corporate roads. We are satisfied that it never was the intention of the legislative assembly to allow any corporation to obtain a complete monopoly of the trade and travel of the country by excluding rival corporations from the use of public highways where they lead through defiles and canyons, and the courts ought not to put such a construction on the act unless it is clearly susceptible of no other interpretation. When congress, by the act of March 3, 1875, granted the right of way through the public lands to railroad companies, it was deemed of so much importance to the people at large that free competition should exist for the trade and travel of the country, that it was then enacted: "That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes

through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile for the purposes of its road, in common with the road first located."

Our own law, which authorizes a corporation to appropriate to its own use a part of any public road, when it is necessary or convenient in the location of its corporate road, should be construed in the same spirit as the act of congress just referred to. But it is insisted by the respondent that the Douglas County Road Company did not, before making the agreement with the county court at the April term, 1874, survey, locate, or adopt any line, route, or definite location of its road, except that it surveyed and located a short route outside of the limits of the county road, the northern terminus of which was about five miles south of the toll gate in controversy, and therefore it had no right to appropriate or use that part of the public highway as a portion of its corporate road, nor erect the toll gate in controversy, across it. We do not consider it was necessary for that corporation to survey and locate any part of the line of its contemplated road between the *termini* thereof, except so much of it as was not on the county road. In other words, we hold that the Douglas County Road Company was not required by law to survey and locate that part of the public highway which it desired to appropriate to its own use. It had already been surveyed and marked out as a county road, and required no further designation to make it definite and certain. It could as well agree with the county court without as with a survey, as to the part of the public road to be appropriated by the corporation, and when the agreement was made between the county court and the Douglas County Road Company, the latter had a right to erect the toll gate upon any part of the public road so appropriated, and to use the same according to the terms and stipulations contained in the contract.

Both of these rival corporations having a right to appropriate and use the part of the public highway running through the canyon as a portion of their respective corporate roads, the county court of Douglas county was author-

ized by law to contract with either of them to keep the public road in repair and to agree on the terms and conditions upon which the same might be appropriated and used. But it was under no obligation to contract with either corporation. It, however, did enter into an agreement in writing with the Douglas County Road Company, at the April term, 1874, as the court below has found. The validity of this contract was determined by the supreme court, except as to the entry thereof upon the journal of the county court, which entry was enforced through the mandatory power of this court. (*Road Company v. Douglas County*, 5 Or. 406.) This agreement was and is valid and binding as well upon the county court as upon the corporation with which it was made. Neither has a right to violate it, and neither can revoke it without the consent of the other party to it.

In pursuance of this contract the Douglas County Road Company was authorized to erect the toll gate which is the subject of this litigation, and to collect tolls thereat. The appellants were acting in the capacity of officers and employes of the corporation in doing the acts complained of by the respondent, and were justified in their acts.

Upon the findings of fact in the circuit court the judgment of that court is reversed, and it is instructed to enter a judgment in favor of the appellants, with costs and disbursements.

Mr. Justice BOISE, dissenting:

I do not agree with the opinion expressed by the chief justice: 1. For the reason that the Douglas County Road Company never located any road over the county road through the canyon. That is to say, that the location by survey of one-half a mile of road in the canyon some miles from where the gate is kept, is not a location of the road in question. To entitle a corporation to take and use a county road as claimed in this case, the part of the county road so taken must be embraced in the line of the corporate road. 2. On the other point, that the Canyonville and Galesville Road Company, having located their road first, thereby ac-

quired the first right to appropriate this road, I fully expressed my views in my dissenting opinion filed in the case of the *Douglas County Road Company v. The Canyonville and Galesville Road Company*, and it will not be necessary to repeat them here.

J. B. TICHENOR, RESPONDENT, v. CLIFFORD COGGINS, APPELLANT.

ASSIGNMENT ACT OF 1878—ATTACHMENT DISCHARGED—INTERPLEADER.—Where the holder of a promissory note commenced an action on it against the maker, and attached his property, and afterwards the defendant assigned his property under the provisions of the assignment law of October 18, 1878, for the benefit of all his creditors, and the assignee, before judgment was obtained, filed a motion in the court for leave to interplead, in order to have the attachment dissolved, and the court denied such motion: *Held*, That under the code, the assignee was not authorized to interplead, and that it was not error in the court to deny the motion. *Held, further*, That in such case the attachment was discharged at the date of the assignment, by force of the assignment itself.

APPEAL from Curry County.

On the eighteenth day of November, 1878, the respondent commenced an action against Jason Springer & Co., on a promissory note executed and delivered by them, and made payable to the order of A. Crawford & Co., for one thousand one hundred and fifty dollars, which was duly indorsed and transferred to the respondent. Proceedings in attachment against the property of Jason Springer & Co. were commenced the same day, and on the twenty-first day of November, a large amount of real and personal property belonging to them was attached by the sheriff of Curry county, in which the action was pending. The defendants in the attachment being insolvent, made an assignment to the appellant, Clifford Coggins, of the greater portion of the property belonging to them which had been attached by the sheriff. The assignment was made for the benefit of all the creditors of the assignors, in pursuance of the act of the legislative assembly, entitled "An act to secure creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," approved October

18, 1878. It was recorded in Multnomah county, where the business in respect of which the assignment was made was carried on, March 1, and in Curry county, on March 22, 1879.

On June 2, after default, but before judgment was entered, Clifford Coggins, the appellant, filed a motion for leave to interplead in the action, for the purpose of moving to dissolve the attachment, for the reasons: 1. That the defendants in the attachment had made an assignment of their property for the benefit of all their creditors, etc. 2. That the affidavit for the attachment did not set forth sufficient grounds for an attachment, etc.

The court overruled the motion and refused to allow the appellant to interplead, and afterwards gave the respondent leave to amend the affidavit for attachment, etc. On the fourth day of June, 1879, judgment for want of an answer was rendered against the defendant, Jason Springer.

E. D. Shattuck, and Northup & Gilbert, for appellant.

E. W. McGraw, for respondent.

By the Court, KELLY, C. J.:

The first assignment of error by the appellant is: That the court erred in denying the motion of Clifford Coggins, assignee of the defendants, Jason Springer and others, under the act of the legislature, entitled "An act to secure creditors a just division of the estate of debtors who convey to assignees for the benefit of creditors," approved October 18, 1878, * * * for leave to interplead, and to move the court to dissolve the attachment issued in said cause on the nineteenth day of November, 1878. Section 40, page 112, of the civil code, provides that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court shall cause them to be brought in." Evidently this section of the code requires the issues between the original parties to an action to be determined as

they are presented for adjudication, unless by so doing the rights of others would thereby be prejudiced, and it is only when they can not be so determined that other parties can be brought in by the court. The object is to prevent, as much as possible, the multiplicity of issues to be tried in the same action, when it can be avoided without injury to others.

So, also, the right of persons, not parties to the action, to intervene, is circumscribed within very narrow limits, being confined to cases in which a bill of interpleader would have been permitted, under the former practice, to accomplish the same end, and, under our code, can only be exercised in actions for the recovery of specific real or personal property. While admitting that there is no special provision which would authorize the intervention of the appellant in this action, his counsel claim that under section 911, p. 289, of the civil code, the court in the exercise of its jurisdiction in relation to assignment for the benefit of creditors had authority, and ought to have allowed him to interplead in behalf of the creditors whose interests he represents. That section authorizes a court to use all the means necessary to carry into effect the jurisdiction conferred upon it by law. And where the mode of proceeding is not specifically pointed out, the court may adopt any suitable means conformable to the spirit of the code to accomplish that end. We do not, however, consider that the court was called upon to allow the appellant to interplead, in order to have the attachments dissolved, because none of his rights were prejudiced by the denial of the motion for permission to interplead. As the appellant was not a party to the action, nor allowed by the court to intervene in the proceedings to dissolve the attachment, he has lost none of his rights to the property which was attached by the respondent. Section 13 of the act approved October 18, 1878, empowers him to "sue for and recover, in the name of the assignee, everything belonging or appertaining to said estate." He can assert and maintain all his rights to the property attached. in a separate action or suit against all persons claiming it under the attachment adversely to him.

There is another reason why we consider there was no error of the court in refusing to allow the appellant to intervene for the purpose of filing a motion to dissolve the attachment. If the assignment of the property by the defendants to the appellant was legally made in accordance with the requirements of the act of October, 1878, no action or decision of the court was necessary to dissolve it, for it had already been discharged by operation of the assignment itself. The first section of the act declares that "such assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment." As the assignment in this case was made after the date of the attachment, and before judgment was taken, it discharged the attachment *proprio vigore*, by its own force, and it could not be revived by any subsequent action of the court. Interpleading, therefore, on part of the assignee, in order to protect the rights of the creditors, could have amounted to nothing and accomplished nothing.

We do not say whether the assignment was valid or invalid. We have not examined it, and that question is not before us. If the assignee shall hereafter bring an action to recover the property attached, or a suit to enjoin the sale of it, that matter will then properly come before the court for adjudication, and all parties interested in the controversy can be heard.

Having taken this view of the case, it becomes unimportant to examine any other assignment of error, and the decision of the court below is affirmed.

B. H. LEWIS AND H. P. LEWIS, RESPONDENTS, *v.* CHAS. McCLURE AND CHANCEY AIKEN, APPELLANTS.

CUSTOM—PROOF OF, WHEN REQUIRED.—Where a plaintiff alleges a right to appropriate water under a local custom, and such allegation is denied, the plaintiff must prove such custom and a compliance therewith. The court does not take judicial knowledge of local customs concerning water rights. To claim and hold water ap-

propriated under a local custom, such as is recognized by the act of congress of the twenty-sixth day of July, 1866, the claimant must allege and prove a custom such as is named in said act.

APPEAL from Union County. The facts are stated in the opinion.

L. O. Sterns, J. J. Balleray, and Knight & Lord, for appellants.

Baker & Eakin, and J. A. Stratton, for respondents.

By the Court, BOISE, J.:

From the pleadings in this case it appears that the plaintiffs (respondents) claim to have appropriated the water of a small stream flowing through their land for the purpose of using the water for domestic and stock purposes and for irrigation. They claim the land as pre-emptors on unsurveyed lands. The defendants (appellants) claim also as pre-emptors, and are on the land below the plaintiffs, through which the stream of water in question flows, in its natural channel. For aught that appears, both parties are lawfully possessed of the lands they claim, and would possess the rights of riparian owners as defined and limited by the common law, unless these rights have been modified by the local custom of the country, so as to give the plaintiffs the right to take this water under the customs and decisions recognized and legalized by the act of congress of the twenty-sixth of July, 1866, which provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." (United States Statutes, p. 432, sec. 2339.) In order that the plaintiffs may claim all this water as against the riparian proprietor below them, they must show that they first took the water according to the acknowledged local customs, etc. This they have alleged, and this allegation is denied by the defendants. There is some objection to the answer in this

behalf as referring the denial to the wrong count of the complaint; but we think the answer, though it does not name specially the ninth count of the complaint in which the custom is alleged, does contain a denial of the custom with sufficient certainty to put that allegation at issue.

The allegation of the custom in the complaint is, "that the appropriation and use of said water, as aforesaid, was at the date of said appropriation, and now is recognized and acknowledged by the local laws and customs of the country where appropriated, and by the decisions of the courts." The denial in the answer, after denying the eighth count, proceeds: "Or that the appropriation of and use of said water by the plaintiffs, in the manner in said count set forth, was, at the date of said appropriation, or that it now is recognized or acknowledged by the local laws or customs of the country where appropriated, or by the decisions of courts set forth, as by plaintiffs alleged. But, on the contrary, said alleged appropriation of said water was and is in conflict with said customs, laws, and decisions of courts." The words, "in the manner in said count set forth," are claimed to refer to the eighth count. But the eighth count contains no allegation as to custom, and this denial could not refer to it, but it does apply to, and deny in terms, the ninth count. So we think the complaint and answer taken together show what was intended to be denied, and what count was referred to, and there is no possibility of the plaintiffs being misled by the answer. And plaintiffs were by this answer put to the necessity of proving the custom which they had alleged, for of this the court could not take judicial knowledge.

We have examined the testimony as exhibited in the briefs, and find no evidence whatever tending to prove that such a custom existed in the county where this water was taken, and the plaintiffs must fail for want of proof, and the bill must be dismissed.

MARY LEONARD, APPELLANT, v. WILLIAM GRANT, ADMINISTRATOR OF THE ESTATE OF D. G. LEONARD, RESPONDENT.

DOWER—ADMINISTRATOR—POSSESSION OF ESTATE.—A widow is not entitled, immediately on the death of her husband, to receive one-third of the rents and profits of the lands of which he was the owner and died seised, in right of her dower interest therein, but the executor or administrator of the estate is entitled to the possession and control of the same, and to receive the rents and profits thereof, to be applied to the satisfaction of claims against the estate.

APPEAL from Wasco County.

D. G. Leonard died intestate on the sixteenth day of January, 1878, leaving the appellant his widow. At the time of his death, he was seised in fee of certain real estate in Wasco county, upon which was a bridge across John Day river. He was then largely indebted, and on the thirteenth of April, 1878, the respondent was appointed administrator of his estate. As such administrator, he sold the real estate for the purpose of paying the debts against it, and the sale was made, subject to the widow's right of dower. Between the time he was appointed administrator and the time when he sold the real estate, he received as such administrator the sum of one thousand eight hundred and seventy-three dollars, mainly from the crop of grain which the decedent had sown, and tolls received from persons passing over the bridge. The amount so received was applied by the respondent to the payment of the debts due by the decedent. The appellant now claims that one-third of this sum of one thousand eight hundred and seventy-three dollars, to wit, six hundred and twenty-four dollars, belongs to her in right of her dower interest in the said real estate, and this action was brought to recover that amount.

John Catlin, for appellant.

N. H. Gates, for respondent.

By the Court, KELLY, C. J.:

The appellant claims that in right of her dower interest

in the lands of the deceased husband, she is entitled to the one-third of the rents and profits thereof, which the respondent received from the time he became administrator until he sold the lands to pay the debts of the decedent. The respondent contests her claim, and alleges that he was entitled to receive such rents and profits in the due course of administration. The first section of the act of January 16, 1854, declares "that the widow of every deceased person shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during her marriage, unless she is lawfully barred thereof." In an action against the heirs of her husband to recover her dower, if the same has been withheld from her, she is entitled to recover damages for withholding such dower. "Such damage shall be one-third of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated, in a suit against the heirs of her husband, from the time of his death," etc. (Civil Code, sec. 25, p. 587.)

The act of October 11, 1862, provides that "the executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof, until the administration is completed, or the same is surrendered to the heirs or devisees by order of the court or judge thereof," etc. (Code, sec. 1088, p. 324.) The real property of the deceased is the property of those to whom it descends by law, or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as by this chapter provided." (Code, sec. 1160, p. 337.)

The counsel for appellant admits that the respondent was entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof, to be applied to the satisfaction of claims against the estate. But he contends that this does not include the widow's estate of dower in the lands of which her husband died seised; and that she was entitled

to the one-third of the rents and profits thereof, immediately after his death, in right of her dower interest therein. This is not our construction of the law. Before the assignment of dower the widow has no estate in the lands of her husband. Until that time her right is strictly a claim, a mere chose in action. She is not seised of any part of the lands on the death of her husband, by any right of dower until it is assigned to her. (*Lawrence v. Miller*, 2 Comstock, 245; 1 Washburne on Real Property, 222, 251, 254; Greenleaf's Cruise, vol. 1, tit. Dower, c. 3 and note.) As there was no assignment of dower to the appellant, she had no estate whatever in the lands of which her husband died seised, and was not entitled to the possession of any part of it; and necessarily, therefore, the respondent became entitled to the possession and control of all the lands which the decedent owned at and immediately preceding his death. And he was required by law to apply the rents and profits thereof to the payment of claims against the estate. The act of October 11, 1862, sections 1094 to 1097, p. 325 of the code, makes provision for the support of the widow and minor children, if any, of the deceased, out of the property which belongs to his estate, and which comes to the possession of the executor or administrator. We are of opinion that this provision to be supported out of the estate of the decedent, was intended by the legislature to be in lieu of dower to the widow, and that she is not entitled to an assignment of her dower in the lands of her husband until the administration is completed, or the same is surrendered to the heirs or devisees, by order of the probate court.

The judgment of the circuit court is therefore affirmed.

DAVID COFFMAN, RESPONDENT, *v.* THOMAS ROBBINS, APPELLANT.

WATER RIGHTS—PAROL AGREEMENT.—Where a stream of water which passes through the lands of different persons is divided by them by a parol agreement, and each party repairs ditches, and receives and cares for his share of such water, such agreement will be enforced in a court of equity.

IDEM—NOTICE.—Where one buys land, he is presumed to buy with notice of the water rights in use on the premises.

IDEM—LOWER OWNER ON STREAM.—When a stream of water flows through the lands of different persons in a well-defined channel, the lower owner on the stream has a right to have the water flow through his lands undiminished, except so far as the upper riparian owner may use the same for the use of his premises for domestic use, stock, and reasonable irrigation.

APPEAL from Umatilla County.

This is a suit by the respondent to enjoin the appellant from diverting any part of a certain stream of water from respondent's premises, and from preventing any more than one-third of such flowing upon the respondent's premises at the southeast corner of his farm, and for damages.

The respondent alleges that two springs rise on the lands of appellant, the waters of which unite and form a stream which runs through the lands of Daniel Simmons to a point distant about one hundred yards south of the north boundary of Simmons' farm, at which point the waters divide and form two separate channels, both of which channels run on to the premises of the appellant Robbins, in the said northwest quarter of section 6, near the southwest corner of said land, and from there, when unmolested, passed on to the northeast quarter of section one, of respondent's land, in several different channels, one of which channels passed on to said land at a distance of about two rods from the southeast corner of his farm, which channel carried about one-quarter of the water running from said springs. The second and principal channel flowing from said springs passed on to respondent's land at a distance of about twenty-six rods from his southeast corner, which channel carried about one-half of the water flowing from said springs; and two smaller channels formed by the waters of said springs passed on to his land near the center of his east line, which said two last-mentioned channels carried about one-quarter of the water flowing from said springs; and that all the water flowing from said springs passed on to respondent's land in said four channels, and from there flowed in a northerly direction in several different channels, until they reached the west half of his home farm, where they again united and formed one main channel, which passed off from his said

home farm on the west side thereof, from whence it ran on to some railroad land which is in the possession of respondent, and from thence to some land owned by one James M. Leezer. That said waters, before any ditches were dug, caused about sixty acres of respondent's land and about forty acres of appellant's land to be swampy, and to be grown over with tules.

That during the year 1864, two ditches were cut, distant about five feet apart in a north and south direction, on the line dividing the home farm of respondent from the northwest quarter, section six, of appellant, which said last-described land was then the property of one John McCoy, and that a wall of sod and dirt was built between said ditches, said wall being about five feet thick at the bottom, about four and a half feet high, and running up tapering to about the width of two feet at the top, and that said ditches were cut and wall erected for the purpose of forming a fence between the premises of respondent and the said John McCoy. That said wall prevented the water from said springs from flowing on to respondent's land in any of its natural channels, but that by mutual consent and agreement between himself and John McCoy, and other persons who afterwards owned said land adjoining on the east, he had the privilege of bringing all the water that he desired to make use of on to his premises through a ditch which runs on to his land at his south-east corner, and which ditch extended in an east direction from said south-east corner between the lands of appellant and Daniel Simmons.

That appellant acquired title to the land adjoining respondent on the east in 1873, and that at intervals since said time he has diverted about one half of the water flowing from said springs away from the lands of the respondent, and that said waters so diverted were never allowed to flow on to respondent's home farm, but passed around the same on other lands adjoining thereto, and that a large portion of said waters were flowed by appellant into a lane through which a country road had been located, and that respondent never consented to said diversion, but frequently objected thereto.

That in February, 1876, appellant diverted all the water flowing from said springs away from respondent's south-east corner, by means of ditches which he dug for that purpose and by deepening ditches which had already been dug, and caused it to flow into the most northerly of the channels formed by the spring branch, from whence it flowed on to respondent's land, through an aperture in the wall between the lands of respondent and appellant, which had been caused by a flood of the Umatilla river in the year 1876, and which aperture had never been filled with dirt, but across which a fence built of rails and poles had been constructed. That respondent has thereby been deprived of the use of said water for the purposes of irrigation and watering stock, and has been greatly damaged by means of the increased flow of water upon his premises in said northerly channel, etc.

Appellant, in his answer in substance, claims that the waters of the spring branch, prior to the digging of ditches, all reunited on his land and flowed on to respondent's land, through the most northerly of the channels described in the complaint, and that the water which flowed northerly on respondent's south-east corner came from a slough which has its source in Daniel Simmons' farm, and which does not naturally unite with the waters of the spring branch until after it passes on to respondent's land. That Daniel Simmons and respondent, acting together, have constructed ditches on Simmons' land, which have changed the natural flow of the waters of the spring branch, and that appellant has thereby been injured. That Simmons has built a dam across the spring branch, and backed up the water into appellant's cellar. That respondent, about two years ago, constructed an embankment across the north channel described in the complaint, by means of which the waters of the spring branch have been backed up on appellant's land and his meadow overflowed, to his damage, etc.

J. H. Turner, and Dolph, Bronaugh, Dolph & Simon, for appellant.

Lucien Everts, for respondent.

By the Court, BOISE, J.:

There are in this case no legal propositions which present any difficulty. If the stream of water in controversy was running in a well-defined channel through the lands of the respective parties, they would each have a right to have it continue to flow in its natural course without diminution, except so far as the same might be legally used by each riparian proprietor, while passing through his premises, for domestic use, stock, and reasonable irrigation. But, from the evidence, it appears that this stream, before its flow was disturbed by ditches, spread out on the lands of both parties into a swamp, with no fixed and definite channels, especially when the water was flush. It entered the lands of the appellant by two channels, and the evidence is conflicting and uncertain which carried the most water at the time the first ditch was made, which is marked on the map in the brief as ditch S. We think, however, that the evidence tends to show that prior to the making of this ditch, which was about the year 1861, some of the water flowed about the south-east corner of Coffman's land, and stood in stagnant sloughs during the dry season. This appears from the direct testimony of some of the early settlers, and from the testimony of the surveyor, F. E. Habersham, who shows from the elevations of the ground that the water could flow about said corner, and he traces old channels or swales leading around that point; and the undisputed fact that this stream spread out and made a swamp, which produced tules or rushes near this locality, shows that the water must have gone there and remained during the season. The testimony, however, tends to show that before ditch S was made, the surplus water flowed on in different channels across the lands of appellant, and most of it passed on to the land of respondent, at or about the point marked "levee" on the map.

But the evidence is very uncertain as to which channel then carried the most water. This ditch S was cut across the west channel and dammed it up, so that from that time on for many years the water ceased to flow down the west

channel, and consequently had a tendency to obliterate all the channels which formerly carried the water about respondent's southeast corner. It appears that the respondent soon after ditch S was dug extended it to his southeast corner and the water ran there for years. It was afterwards agreed between the respondent and Martin Robbins, who owned the land now owned by appellant, that respondent might divert a part of the water through ditch S to his southeast corner, and Martin Robbins might convey a part of the water to his barn, which was done by ditch E, he (Robbins) joining said ditch with Simmons at his line. This continued for some five years, when the parties quarreled about the water, each claiming a right to use it all; Coffman claiming a right to take it all to his southeast corner, and Robbins claiming the right to have it all flow through his land wherever he chose. It is claimed that if Coffman had been taking a part of the water to his southeast corner, it was by a license which was subject to be revoked by Robbins at any time. It is also claimed that if he had been taking the water by an agreement to divide the water which had been acted on by both parties for a number of years, such agreement is by parol and not binding, being void by the statute of frauds. And also, if it was binding so far as to be upheld by a court of equity, both parties having repudiated it when they quarreled, it became void by their acts.

We think that if the parties divided this water by mutual consent, and then, on pursuance of such agreement, Coffman dug ditches to receive one-half of it and dispose of it at his southeast corner, and Robbins did the like on his land, and each took and enjoyed the water for years under this agreement, such a contract should be upheld in equity, for the agreement was a legitimate and proper one, and as the consideration (which was the digging the ditches and taking care of the water) was paid and the possession given, the agreement could be enforced in equity; and if these equitable rights once attached they would not be destroyed by a mere quarrel between the parties, for neither gained or lost a right by this disagreement. Such dis-

agreement is only evidence tending to show that the agreement never existed, or had not been performed. And we think the evidence shows that the agreement was made and that the rights under it still exist, unless Thomas Robbins bought without notice. The evidence shows that when he purchased the land this water was running as divided in the ditches, and Coffman was in possession, taking his half to his southeast corner, and Robbins must be presumed to have purchased knowing this fact. We think, therefore, that these parties have each a right to one-half of this water, as decreed by the circuit court.

We think, also, that the evidence shows that both parties have been at fault in seeking to evade the agreement by which the water was divided; for it appears that the respondent claimed that he had a right to take all the water to his southeast corner and deprive Robbins of all the water, and that both parties have been injured by turning the water from the ditches and letting it flow at will. It seems to have been an unfortunate quarrel between neighbors, by which both have suffered. And we think that while the court is called on to settle the rights of the parties to the water, as neither party is without fault and both have been injured, neither should recover damages, and the decree will be modified in this respect; and appellant will be entitled to costs in this court, and respondent in the circuit court.

THE COYOTE GOLD AND SILVER MINING COMPANY, RESPONDENTS, v. WILLIAM RUBLE AND WALTER RUBLE, APPELLANTS.

CORPORATIONS—POWER OF DIRECTORS—FUTURE PROFITS.—In forming a corporation under the statutes of Oregon, it is the province of the corporators to perfect the corporation by opening stock books and obtaining subscribers to the capital stock. The corporators have no power to make regulations which shall bind the action of the directors in disposing of the future profits of the corporation, except so far as the same are regulated in the articles of incorporation.

IDEM—FUTURE CORPORATION—PROPERTY HELD FOR.—The corporators may receive and hold property for the use of the corporation to be formed by them.

IDEM—STOCKHOLDER.—A person may be a corporator who is not a stockholder.

IDEM—RECORDS ONLY EVIDENCE.—The proceedings of a corporation must be shown by its records.

IDEM—ASSESSMENT, LIABILITY FOR.—To make a stockholder liable to pay an assessment on his stock, the assessment must be made by the directors, which must be proved by the records of the corporation.

IDEM—STOCKHOLDERS' AGREEMENT.—Agreements made by the stockholders of a corporation before it is organized by electing directors to become binding must be adopted or agreed to by the corporation or the directors thereof after it is organized.

IDEM—STOCK MUST BE SUBSCRIBED.—The stock to a corporation necessary to its organization must be subscribed before the corporation can be legally organized.

IDEM—SUBSCRIPTIONS, HOW MADE—EXPRESS AUTHORITY.—To render a person liable as a stockholder to a corporation, he must sign his name to the subscription of stock, or authorize an agent to do it for him, and this authority must be express, and not implied.

IDEM—ORIGINAL STOCKHOLDERS—ESTOPPEL.—All original stockholders are only made liable on their subscriptions for stock by a writing, and are all equal before the law, and there is no estoppel between them.

IDEM—DIRECTORS.—Papers and agreements made by persons contemplating becoming stockholders to a corporation before an organization, and not intended to be subscriptions to stock, and relating to the future management of the corporation, do not give authority to the secretary of the corporation to place the names of the persons who subscribed such papers and agreements in the list of stockholders on the stock book.

IDEM—NOTICE TO STOCKHOLDERS—ESTOPPEL.—In an action by a corporation to recover a subscription to stock, the conditions of the subscription may be inquired into, for both parties are chargeable with notice of such conditions, and there is no estoppel.

IDEM—STOCKHOLDER REQUIRED TO CONVEY TO COMPANY, WHEN.—Where R. purchased with his own money certain mining claims, with the understanding that he would transfer the same to a company, of which he was one, which company was to own these claims, with other claims, which were to be worked together, it being necessary to so work them to secure water-rights to make the whole valuable; and R., after securing in his own name claims which if held by him in severalty would greatly injure the other claims of the company, may be required to convey to the company, on being tendered to him the money he paid for such claims.

APPEAL from Jackson County.

This is a suit to enforce a trust concerning real property, and for an injunction and damages against the appellants. The respondent corporation was incorporated for the pur-

pose of owning and working certain placer mining claims, with a capital stock of two hundred thousand dollars, in shares of the par value of one dollar each.

The complaint alleges that the claims and property in question were, at the date of the incorporation, to wit, August 27, 1878, owned by the several following named parties, each owning certain distinct parcels thereof: O. Jacobs and H. Kelly, Ash & McWilliams, P. H. O'Shea, Davis & Rathbon, John Robertson, and Daniel Mathews. That the appellant, Wm. Ruble, as a subscriber to the capital stock of the incorporation, obligated himself to, and promised and agreed to pay upon his subscription for fifty thousand shares of the capital stock, the sum of ten thousand dollars—seven thousand dollars thereof down, and three thousand dollars on or before the first day of November, 1878, and the further sum of twelve thousand five hundred dollars when realized out of one-half of the net proceeds of one-fourth interest of the said mines.

That Ruble agreed and promised to pay the said sum of money to the persons then owning the said mining claims, to apply upon the consideration to be paid therefor for the use and benefit of the corporation, and to take and receive from such of said owners, to whom such payment should be by him made, conveyances to the company for such portions of the said mining claims, lands, property, fixtures, and appurtenances as should be by him paid for.

That on or about the fourth day of September, 1878, Ruble did, in accordance with his promise, and in pursuance of the trust reposed in him, pay upon his subscription the sum of nine thousand five hundred and fifty dollars, and of other money belonging to the company the sum of seven hundred and fifty dollars, in the following amounts, to the following-named parties, to wit: Davis & Rathbon, two thousand dollars; Ash & McWilliams, four thousand dollars; P. H. O'Shea, three thousand three hundred dollars, and John Robertson, one thousand dollars.

That he, Ruble, took from such parties, conveyances of the property in question, to himself, instead of to the company, and that on the twenty-seventh of November, 1878,

he fraudulently conveyed to the appellant, Walter Ruble, the mining claims, ditches, water rights, and flumes, known as the Davis & Rathbon and John Robertson claims, which had been conveyed to Wm. Ruble as aforesaid; that Walter Ruble took with knowledge of the trust and without consideration.

Wm. Ruble answered and denied all the material allegations of the complaint except the existence of the corporation, which, it is alleged, was constituted on the sixth day of September, 1879, and alleges that he is damaged by reason of the injunction sued out in the sum of ten thousand dollars, and demands judgment accordingly. Walter answers by denying the allegation of the complaint and claiming damage by reason of the injunction in the sum of eight thousand dollars.

The circuit court decreed a conveyance of the property to the company and adjudged damages in its favor in the sum of four thousand dollars.

John Kelsay, J. F. Gazley, and Thayer & Williams, for appellants.

C. W. Kahler, A. C. Jones, R. Mallory, W. H. Holmes, and J. H. Reed, for respondent.

By the Court, BOISE, J.:

The issues of fact, presented by the pleadings, are: 1. Was William Ruble a stockholder in the corporation, of fifty thousand shares of the capital stock? 2. If he was such owner, did he become legally liable to pay the same to the corporation before he bought the land in question? 3. Was the money which Ruble paid for the land in question the property of the corporation? 4. If not the money of the corporation, was Ruble acting for the corporation as its agent in buying this land, and so related in his actions in buying the land that he now holds the same in trust for the corporation?

The respondent's claim is that Ruble is its trustee, holding this land for the benefit of the corporation.

To show the affirmative of these several propositions the counsel for the respondent offered in evidence, first, a writing, which is as follows:

"Know all men by these presents, that we, the undersigned subscribers to stock in a certain gravel mine situated on Coyote creek, in the counties of Jackson and Josephine, in the State of Oregon, agree to pay I. N. Muncy fifty per cent. of the capital value for each and every share set opposite our names, as follows: Twenty-five per cent. in hand, and twenty-five per cent. when taken out of the mine, over and above expenses. The said mine is to be divided into two hundred thousand (200,000) shares, of the par value of one dollar each, in gold coin of the United States. It being understood and agreed that each and every subscriber is to have one-half of the net proceeds of the mine, *pro rata*, to the whole amount of the capital stock, until his stock shall be paid in full in said coin, as above mentioned, then he is to receive the amount of stock for which he has subscribed, free from all incumbrance, and full dividends thereafter upon said stock. It being further agreed and understood that the said Muncy is to, at his own expense, extend the ditch known as the McWilliams & Co. ditch down the said creek to a point on the hill above a claim known as the Robertson claim, and to purchase and place upon said mine another pipe fifteen inches in diameter, and of sufficient length for the successful working of said mine, together with a giant and flume corresponding to the same:

Paid Jay Francis	330
Paid by note, Joseph F. Lindsay	5,000
Paid by note and horse, James Chenoweth	1,000
Paid 25, Jennette Webb	1'00'

It will appear by inspection of the record, as well as by the subsequent testimony, that the name of Wm. Ruble, together with the amount of stock by him subscribed, and the words, "as per arrangement," in the margin, are all in his own writing. This paper is not dated, but was signed by Ruble August 27, and which is the same date as the acknowledgment of the articles of incorporation.

Next after this paper the respondent offered in evidence

the articles of incorporation and another writing, which are as follows:

EXHIBIT 2.

Coyote Gold and Silver Mining Company, incorporated at Salem, Oregon, August 27, 1878, as follows:

Be it known that the following articles of incorporation are this day entered into by I. N. Muncy, J. L. Murphy, David Stump, and Wm. Ruble, for the purpose of mining in gold, silver, and other precious metals; to purchase placer mines of gold, or ledges of gold, silver, or other precious metals; construct or purchase and own water ditches, quartz mills, or any other thing necessary to the successful prosecution of the work of mining.

Article 1. The name of the company or corporation shall be known as the Coyote Gold and Silver Mining Company.

Art. 2. The duration of the company shall be indefinite.

Art. 3. The place of operation of this company shall be in Jackson and Josephine counties, in the state of Oregon.

Art. 4. The principal office of the company or corporation shall be at Leland, Jackson county, Oregon.

Art. 5. The amount of the capital stock of said company or corporation shall be two hundred thousand dollars, which shall be divided into two hundred thousand shares of one dollar each.

The above act of incorporation was executed in the city of Salem, in Marion county, Oregon, on the twenty-seventh day of August, 1878, signed by I. N. Muncy, J. L. Murphy, David Stump, and Wm. Ruble, incorporators, acknowledged before H. A. Johnson, justice of the peace in and for said county, and filed in the office of the secretary of state, September 2, 1878.

The incorporators named in the foregoing articles of incorporation agree and bind themselves severally to accept and to cause the directors of said company, when elected and organized, to ratify the contracts and purchases of certain bar and placer gold mines situated on Coyote creek, in Jackson and Josephine counties, Oregon, made by I. N. Muncy and Wm. Ruble.

And it is further agreed that stock books shall be opened,

and the sale of stock of said company be ordered to the amount of two hundred thousand shares (including any shares already subscribed), of the par value of one dollar each, in gold coin of the United States, upon the following terms, to wit, that each share shall be sold for fifty per cent. of its par value, the payment to be made as follows:

Twenty-five per cent. of the par value in cash at the time of subscribing, and twenty-five per cent. to be taken out of the net proceeds of the mines, it being understood and agreed that each subscriber shall be entitled to receive, as dividends, one-half of the net proceeds, according to the number of shares he holds, and that the other one-half shall be retained by the company until the sum so retained shall equal his indebtedness for stock. Thereafter he shall receive certificates of paid-up stock for all the shares he may hold clear of all incumbrance, so far as the company is concerned, and full dividends.

It is further understood and agreed that said incorporators shall, within a reasonable time, extend the ditch known as the Ash & McWilliams ditch down said Coyote creek to a point on the hill adjacent to a claim known as the Robertson claim, and that they will purchase and place on said mines, in addition to the hydraulic already there, another pipe of fifteen inches in diameter, and of sufficient length for the successful working of the mine, together with a giant and flume corresponding to the same.

It is further agreed that the one-half of the net proceeds to be retained by the company, as above specified, shall not remain as assets in the hands of the company, but shall be drawn out by the four incorporators as it accrues in the following ratio, viz.: Wm. Ruble, one-half ($\frac{1}{2}$), I. N. Muncy, three-eighths ($\frac{3}{8}$), J. L. Murphy, three-fortieths (3-40), and D. Stump, one-twentieth (1-20), said sums to aggregate twenty-five thousand dollars, and no more.

It is further agreed that after the payment of the purchase-money of said mining claims, the drawing of the twenty-five thousand by the four incorporators, as above specified, the payment of all costs and expenses of extending the ditch, purchasing and placing in position in work-

ing order the pipe, flume, and giant, together with implements and tools for working said mines, all sums accruing from the sale of any remaining stock of said company shall be paid to I. N. Muncy. And in consideration of the last named agreement, the said I. N. Muncy binds himself, his heirs and assigns, to put the said company in full possession, with right and title, to all mining claims on Coyote creek, beginning at the lower end of a mining claim formerly owned by Davis and Rathbon, and extending up said creek nearly three miles, including all the mining ground owned on said creek by Davis and Rathbon (*and Marshal*), H. Kelly, O. Jacobs, Robertson, O'Shea, Mathew, and Ash & Williams, together with all water rights, mining privileges and appurtenances thereunto belonging, to said company, to have the same in fee-simple, yet so as the net proceeds shall inure to the benefit of the stockholders upon the terms and conditions herein specified:

Subscribers' Names.	Sept. 14, 1878. Amount of Stock.	
David Stump	5,000	shares
J. L. Murphy	7,500	"
Wm. Ruble	50,000	"
J. F. Bewley	5,000	"
W. F. Lemon	100	"
Z. Davis, per I. N. Muncy	2,000	"
E. A. Chase, per I. N. Muncy	1,000	"
H. Kelly, per I. N. Muncy	1,000	"
T. S. Rodsbaugh, per I. N. Muncy	5,000	"
I. N. Muncy	50,000	"
G. W. Sloper	50	"
John Vernon	1,000	"
H. D. Ray	2,000	"
R. Doty	2,000	"

This last paper which is attached to the articles of incorporation, is dated on the fourteenth day of September, 1878; and it seems (from a comparison of dates with the records of the corporation) was executed the day that the stockholders met to organize the corporation, and from its terms indicates that it was executed before any organization was made, and was preliminary thereto, and with a view to securing an endowment to Monmouth College of twenty-five thousand dollars. In order that the provisions should

in any way become binding on the corporation, it was necessary that the corporation, after it was organized, should accept and approve of these provisions; and whether or not the corporation did so adopt and approve can only be shown by the records of the corporation. For neither the corporation nor others who contemplate taking stock can, before the corporation has been organized by electing directors, dispose of the future earnings of the corporation nor fix rules to control the action of the directors to be elected.

The statute, p. 525, secs. 5 and 6, provides for and fixes the powers and duties of corporations. Their office is to start the corporation and proceed to perfect its organization as provided for in section 7, and it is only after such organization that it is capable of carrying on the enterprises enumerated in the articles of incorporation. The acts which the incorporation are authorized to do are such as tend to promote the final organization by the election of directors, when the stock becomes liable to be assessed for the purpose of raising funds with which to prosecute its legitimate enterprises. It was not contemplated by the statute that the corporation should be empowered to make assessments and prosecute the business for which the corporation was created. The stock is not due and liable to assessment until after the organization by the election of directors; and it is provided in section 7 of the act, "that at the organization each stockholder shall be entitled to one vote for such share of capital stock subscribed by him; but after such first election of directors, no person shall vote on any share upon which any installments or portion thereof, is then due or unpaid." Section sixteen, also, provides "that if any such corporation does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of filing articles, etc., shall be divested of its corporate rights."

The stock is the capital of the corporation on which it is to do business, and it does not become available for that purpose until after directors are elected. All proceedings of the corporators (who need have no pecuniary interest in the corporation) which are prior to such election are steps

in the organization, and are not binding on the corporation except so far as they promote such organization, and the business for which the corporation was formed, as expressed in the articles. And, indeed, the whole spirit of the act indicates that in order to perfect a corporation for prosecuting its enterprises the election of directors is a condition precedent to its perfect organization for business purposes. We think a corporation may hold property necessary for its contemplated enterprises, before its organization is completed, and preserve such property for its future use, and that the corporation exists as a legal entity from the time of the filing of its articles. But the corporators who represent it prior to a meeting of the stockholders are its agents, to perfect its organization and put it in working order, rather than to carry on its business enterprises.

We think that the paper offered in evidence executed on the twenty-seventh of August, 1878, contains no stipulations or agreements which afterwards became binding on the corporation or any of the persons who signed it, for the reason that there is no competent evidence showing that the provisions contained in said agreement were ever adopted or agreed to by the corporation, and that such an agreement by the corporation can only be proved by the records of the corporation, and there is no such record in its proceedings. The same may be said of the other agreement made on the fourteenth of September, 1878. This contained stipulations which could not bind the corporation unless agreed to by the corporation, for it provided for the disposition of the profits of its future business, and it is a self-evident proposition that neither a person nor corporation is bound by a contract which was never agreed to by such person or corporation. We think that Ruble did not become a subscriber by signing these papers above referred to.

We do not, however, decide but what these documents may be competent as tending to show that he authorized his name to be put on the stock books and to explain his subsequent conduct. But suppose Ruble was a subscriber, when did he become such? Certainly not until he authorized his name to be subscribed to the capital stock, by his direct

act or conduct as a subscriber, and he did not act in that capacity until the organization on the fourteenth of September. What he did prior to that time for the corporation was as a corporator or agent of the corporation.

If he was a subscriber, when did he become liable to pay his subscription? We think that liability did not accrue under the corporation until after the directors were elected and an order made for a call for the stock, unless by the terms of the subscription the payment is to be made without a call. So this subscription could not in any event have been demanded before the fourteenth of September. Prior to that time the corporation had no secretary or treasurer, or capacity to demand subscriptions. So if this position be true, Ruble, at the time he purchased these claims was not owing the corporation the money he paid for the property, and it was his unless he voluntarily parted with it to the corporators, of which there is no evidence (except that the money was carried to the depot in the canteens of Muncy, which Ruble had borrowed), and he then had the legal right to invest the money on his own account, for it was still his money though he may then have instructed to pay it on his future subscription to the corporation, and if he did go to the mines to buy these claims for the corporation with his own money, and afterwards changed his mind, either from a good or bad motive, and took the deeds in his own name, there would be no such resulting trust to the corporation as could be enforced against him until the purchase money was refunded to him or he be placed in such a relation to the corporation as would be equivalent to a tender of the purchase money which he had paid. It is claimed that he owed the corporation this amount at the commencement of this suit. To put him in such a position he must be a subscriber to the stock of fifty thousand dollars. The records of the corporation must show that this amount is due and owing. To show this, it must be shown by the records of the corporation: 1. By the stock book signed by Ruble or evidence equivalent to such signing. 2. That one-half of the capital stock of the corporation has been subscribed. 3. That an assessment has been made on

all of such stock for cash for twenty-five per cent. of such stock.

None of these things appear from the records of the corporation, except that one-half of the capital stock appears in a list on the stock book to be subscribed. But all the names of the subscribers appear to be placed in this list by the secretary, William Ruble, except his own name, which is in the handwriting of W. F. Briggs, and without the consent of Ruble, who refused to sign the same, and this list was so made by the secretary after this suit was commenced. The undertaking to which these names are subscribed is as follows: "We, the undersigned, subscribers to the capital stock of the Coyote Gold and Silver Mining Company, do hereby bind ourselves to take the number of shares that we subscribe for, and to pay therefor in United States gold coin, as per conditions entered into by the incorporators and others, in the town of Monmouth, Polk county, Oregon, September 14, 1878, and recorded in the journal of said company, on pages 5, 6, and 7." "Names of original subscribers." Then follows the list of subscribers in the manner following:

Subscribers' names. P. O. Address.	Amount of stock.	Amount paid.	When paid.
David Stump, Monmouth, Polk Co.	5,000.	$2,500.	Jan. 17, 1879.

And other subscribers in like manner. These conditions referred to in the undertaking are contained in exhibit number two, above set out in this opinion. One of these conditions is, "that the incorporators agree and bind themselves severally, to accept, and to cause the directors of said company, when elected and organized, to ratify the contracts of and purchases of certain bar and placer gold mines, situate on Coyote creek, in Jackson and Josephine counties, Oregon, made by J. N. Muncy and William Ruble." Another condition is, "that said incorporators shall, within a reasonable time, extend the ditch known as the Ash and McWilliams ditch down said Coyote creek, to a point on the hill adjacent to a claim known as the Robertson claim, and that they will purchase and

place on said mines, in addition to the hydraulic already there, another pipe of fifteen inches in diameter, and of sufficient length for the successful working of the mine, together with a giant and flume corresponding with the same." This agreement was intended to limit and regulate the action of the corporation then to be organized, and which was organized on the same day this agreement was executed; and in order to make the subscribers liable for stock, it was incumbent on the corporation when organized, to perform and carry out the conditions of the contract which the subscribers had signed, and which was the foundation of their liability. They should have notified the contractors and purchasers of J. N. Muncy and Ruble, or attempted to do so by some resolution or proceeding of record; and also the incorporators should have extended the ditch and placed the pipe and a giant in the mine as agreed. And it should appear from the records of the corporation, that it had performed on its part, before it could compel individual stockholders to perform by paying subscriptions. The directors of this corporation show by their record no compliance or attempt to carry out these fundamental conditions above named. Nor is there anything said or done in said records as to any effort being made by the corporation to have J. N. Muncy put the company in the possession of the mining claim named in the last part of said agreement. Nor does said Muncy comply or attempt to comply with his part of said agreement.

It is evident from this agreement that the opening of stock books and the ordering of the sale of stock were proceedings to be had after the corporation was organized, and such orders should appear in the records of the corporation.

The corporation had no authority to make this order to reduce the stock to half price, for the statute limits their powers, section 4, page 525, when it says the articles shall specify "the amount of the capital stock," and "the amount of such shares of such stock." This must be the true, not the fictitious amount.

Thus section 6 provides that it shall be lawful to organize when one-half of such stock is subscribed, so that the

incorporators could not order that the stock should be paid in full on the payment of one-half. And it appears from the records of the corporation which are before us in evidence, that as yet no such proceedings have been had by this corporation as will enable them to enforce the payment of this stock against individual stockholders. And consequently the corporation shows no indebtedness due from Ruble to them, which is an equivalent of a tender to him of the money he had paid for this land.

It is claimed by the respondent that Ruble is estopped from disputing that he was a subscriber of fifty thousand dollars of the capital stock of this corporation, by his acting as secretary, and acting and voting as a subscriber, and serving as a director. The evidence shows that at the meeting of those who claimed to be stockholders and who elected the directors, each individual voted one vote without reference to the number of shares held by him, and that at that time no subscription had been made to the capital stock that would bind any subscriber to pay, unless he became so bound by having voted at this meeting, or acted as an officer. The list of stockholders whose names appear on the stock book, appear to have been placed there after this organization by the secretary, and would not be the subscriptions of these individuals unless authorized or assented to by them. These preliminary papers were not subscriptions, and did not authorize the secretary to subscribe the stock book for the persons who had subscribed these papers. (*Granger Market Co. v. Vinson*, 6 Or. 172.) If any of these persons whose names are on this stock book were sold for a call on the stock, he could answer that he had not subscribed; or, if he had subscribed, could set up any condition precedent to payment, to be performed by the corporation, and which had not been performed. As in this case, the conditions in the agreement of September 14, to be performed by the corporators, had been violated, for as between the corporation and its stockholders, the conditions of a subscription may be inquired into, for both parties are chargeable with notice of these conditions, and there is no estoppel. Any actions or declarations of

Ruble, made after the election of directors, that he was a subscriber, are evidence to show that his name was placed on the stock book with his assent, and if, in this case, one-half of the capital stock of this corporation had been actually subscribed, and the corporation duly organized by the election of directors, as pointed out by statute, and Ruble had accepted the position of director, supposing that his subscription to these preliminary papers amounted to a subscription, he might be held as a subscriber; and if sued for one assessment, could only make as a defense that the same was not due by the conditions of the subscription. But in this case, as has already been said, this corporation proceeded to organize before the stock was subscribed, and as the proceedings were fatally defective, any member might repudiate it as between his fellows, unless afterwards he subscribed the stock, or so far proceeded with his fellows in the business as to cure this defect, and there is no legal evidence that any new obligations were assumed. There is a large amount of testimony tending to show that Ruble was active in getting up this corporation, and inducing others to take an interest in it. But all these parties were bound to take notice of the condition of the corporation, for each had access to its original subscription, if any there was, the same as Ruble, and as all subscriptions must be in writing, all stockholders stand equal before the law.

When this corporation claims that Ruble owes it twelve thousand five hundred dollars, as one-fourth of his capital stock to the corporation by him subscribed, and he denies the subscription, it is necessary for the corporation to prove the subscription by producing the subscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription. And as has been already stated, we do not think these acts show that he was a subscriber, or that the proof shows that the other persons whose names are put down as subscribers in the stock book have subscribed in such a manner as would make them liable to an assessment for unpaid stock. (See 6 Or. 172.) But we think the evidence does show that Ruble purchased the property in

question, intending at the time that it should be for the use of the company, and that he took the title in his own name to secure himself for the money he paid, and that he continued to hold it with such intent until after the meeting at Monmouth on the fourteenth of September, 1878. For on that day, in the agreement of that date already set out, the incorporators, of whom Ruble was one, agreed to bind themselves severally to accept, and cause the directors of the corporation, when elected and organized, to ratify the contracts and purchases of certain bar and placer gold mines, situate on Coyote creek, in Jackson and Josephine counties, made by I. N. Muncy and Wm. Ruble. And the evidence establishes the fact that the mines referred to in this agreement as purchased by Ruble are the property in controversy. And as Ruble signed this agreement, we think he plainly signifies in it his intention to transfer this property to the corporation, and as the evidence shows, that it was the object of all the parties (including Ruble) to secure all these claims and the water to work them, because they would be much more valuable if owned and worked together than if owned severally. If for any reason Ruble saw fit to withdraw from the corporation and not subscribe to the capital stock, he should, on being paid the money he expended in securing these claims, transfer the same to the corporation, and it is not equitable in him to hold a part of those claims to the manifest injury of those who joined with him in trying to secure what they evidently thought a valuable mine when consolidated in one ownership.

But we do not think this court can make a corporation for the plaintiff from the evidence, with Ruble as member and stockholder, and declare him indebted to the corporation the sum of money he paid for this land. And if the corporation desires this property, and it is of the great value claimed by the plaintiff, no injustice would accrue to the plaintiff if Ruble should retire from this mining enterprise, and on the payment to him of his money, be required to transfer the property to the corporation; and the plaintiff can have no pecuniary interest in holding Ruble as a mem-

ber of the corporation, unless the land is worth less than he paid for it, or it be desirable for the plaintiff to return the money paid by Ruble as working capital. And as he purchased these mining claims with his own money, but under such representations to the incorporators as would make it inequitable for him to hold the same against the corporation (provided the corporation tenders him the purchase-money), because this land is so situated as to render valueless the other claims about which all these corporators were negotiating, and to work which the corporation was formed, it will be necessary for the corporation to first tender Ruble his money, or put him in a position of indebtedness to the company, which is equivalent to a tender, which has not been done. (Perry on Trusts, sec. 129.)

We think, therefore, that the plaintiffs have not proven the essential facts to maintain their complaint, and that the decree of the circuit court should be reversed and the plaintiff's bill dismissed.

Mr. Justice PRIM, dissenting:

Being unable to agree with the opinion of the majority of the court in this case, I feel compelled to dissent.*

Under the facts as developed by the evidence in this case, I hold that it was the duty of Ruble: 1. To have filed the third articles of incorporation in Jackson county; and, 2. To have bought the mining ground in dispute for and in the name of the corporation then being formed for that special purpose; not, as is claimed by him, with money of his own, which was to be returned to him, but with money which he, and others engaged in the enterprise, had agreed to advance for that purpose, and in consideration of which Ruble was to own and to have issued to him fifty thousand shares of the stock of the corporation, when the same was in a condition to make such issue.

But it is sought, on behalf of Ruble, to repudiate and avoid his agreement with the subscribers to the preliminary agreement and with his co-corporators, on the ground that

*A very full statement of facts embodied in the opinion is omitted.—REPORTER.

the corporation was not in existence at the time when the agreements were made and at the time the conveyances were taken, as at that time the third articles of incorporation were in the possession of Ruble, and not on the files in Jackson county, where, under his agreement, they should have been. This position appears extremely technical, and, in my judgment, should not be allowed to prevail. Ruble, being at the time a special agent and trustee for the purpose of filing these papers and securing these mines to the corporation plaintiff, ought not to be allowed, even in a court of law, much less in a court of equity, to take advantage of his own wrong and want of good faith, since equity always treats "that as done which of right and justice should have been done."

It is further claimed that Ruble was exonerated from compliance with his agreement on account of irregularity in the organization of the plaintiff corporation, as well as informality in its subsequent proceedings. In answer to this position, it may be suggested that it could have made no difference whatever with Ruble as to what was to have been done after he had complied with his agreement, inasmuch as he did not comply with it, whether the subsequent proceedings were regular or not. Thus it will be seen that subsequent informality could not exonerate him. And it will be further noticed, by closely observing the facts, that nothing would have gone wrong in the entire enterprise, except for Ruble's own dereliction and want of good faith. In the view which I have taken of this case, I regard it as immaterial whether Ruble, technically and in the strict sense of the term, became a stockholder in the plaintiff or not. There can be no doubt but that the preliminary subscription, gotten up by Muncy, related to the property in question, and that the plaintiff was incorporated for the purpose of absorbing this very preliminary association. It was understood between Ruble and his associates, after subscribing the Muncy papers, that he was to own one fourth of these mines, and that the others were to own interests therein in proportion to the amount subscribed. After signing the Muncy papers, Ruble took a lively inter-

est in the enterprise, and assumed nearly the entire management thereof, suggesting the propriety of incorporating immediately, preparing the articles of incorporation, and causing them to be executed, acknowledged, and filed, as required by the statute in such cases.

In the organization of the incorporation the Muncy subscription was adopted as its subscription of stock, as is conclusively shown by the construction placed upon it by all parties concerned in the enterprise. All the subscribers, including Ruble, recognized and treated it as such. Ruble notified them, as subscribers of stock, to appear at Monmouth on September 14, 1878, for the purpose of organizing the corporation, by electing directors and other officers. All of the subscribers, in obedience to this notice, did appear either in person or by proxy, and the organization of the plaintiff, then and there accomplished, was based upon this subscription and none other. Ruble claimed to own fifty thousand shares in the stock by virtue of said subscription and the right to vote the same. As a matter of fact he was elected one of the directors of the corporation by virtue of this subscription, and he was also elected secretary of the corporation. Both of these offices he then and there accepted, and entered upon the discharge of these duties. As such secretary he transferred the preliminary subscription to the regular stock book of the company, with the exception of his own subscription, which he failed and refused, for some cause, to transfer. He also issued certificates of stock to all the subscribers except himself. Having thus taken the lead and principal management of this enterprise upon himself, he has succeeded in securing the title to the property in dispute in his own name; which virtually gives him control of the other mines not conveyed to him, as he has succeeded in securing those which control the water rights.

I claim that, under the facts in this case, Ruble is estopped in equity from denying that he is a stockholder in the plaintiff. (Thompson on Liability of Stockholders, secs. 105, 124, 162, 165, 166; 5 Otto, 667; *Dong v. Naper*, Supreme Court of Ill., 8 Reporter, 522.)

And while I concede that in equity Ruble may have been entitled to a lien upon the property in dispute, to secure him in whatever amount he may have advanced or paid on the property in excess of his proportion, and that while the court might and should have secured said lien by a proper decree, I am unable to assent to the proposition that he may "change his mind, either through good or bad motives," and wholly retire from the enterprise and hold the property in his sole right, unless his associates shall refund to him the whole amount advanced by him to pay for said property.

In my opinion the bill ought to be retained and the decree of the circuit court modified in accordance with the views herein expressed.

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*J. C. MORELAND, RESPONDENT, v. MATTHEW BRADY, APPELLANT, AND GEORGE A. BRADY, DEFENDANT.

WILL—EXTRANEOUS ORAL EVIDENCE ADMISSIBLE, WHEN.—While it is admitted to be the general rule that oral evidence is not admissible to explain or vary the words of a written instrument, there are exceptions and qualifications of the rule, where the force, operation, and construction of the written instrument are concerned. *Falsa demonstratio non nocet* has become a thoroughly established maxim of the law, the practical meaning of which is that however many errors there may be in the description either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show with reasonable certainty the intent of the devisor. Extraneous oral evidence is admissible to show the state and extent of the testator's property at the time the will was executed, in order that the court may be placed in the position of the testator at the time, and be able to read the will in the light of surrounding circumstances.

IBID—MISDESCRIPTION OF DEVISED PROPERTY.—Where a will devised to Margaret lot 2 in block 187, and to Esther lot 1 in block 187, and it appeared that the testator had no such lots as 1 and 2 in block 187, but did own lots 3 and 4 in said block: *Held*, that the erroneous part of the description might be rejected and that the remainder was sufficient to identify the property with reasonable certainty.

MARRIED WOMAN RESIDING OUT OF STATE MAY EXECUTE POWER TO CONVEY.—Where a married woman owns land in this state in her own right and she and her husband reside out of the state, she may, by joining in a power of attorney with her husband, empower another to convey such property.

*See 84 Am. Rep. 681.

APPEAL from Multnomah County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Simon, for appellant.

The plaintiff has shown no title to any interest which Esther Brennan might have had in the premises described in the complaint; Esther Brennan, being a married woman, could not convey real property by attorney. (General Laws of Oregon, 515, secs. 1 and 2; Hittell's Statutes of California, p. 103, secs. 643, 644; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 646; *Dentzel v. Waldie*, 30 Id. 138; *Maclay v. Love*, 25 Id. 367; *Matt v. Smith*, 16 Id. 533; *Morrison v. Wilson*, 13 Id. 494; 3 Washburn on Real Property, 233; *Earle v. Earle*, 1 Spence, 347; *Sumner v. Conant*, 10 Verm. 9; *Kearney v. Macomb*, 1 C. E. Green, 189; *Lewis v. Cox*, 5 Harring, 401; *Dawson v. Shirley*, 6 Blackf. 531; *Allen v. Hooper*, 50 Maine, 373; *Judson v. Sierra*, 20 Texas, 365, 371.) Nor does section 15, of title 1, of chapter 6, General Laws, authorize a married woman to convey real estate by power of attorney. This section only relates to the acknowledgement of the deed, and by the terms of the statute itself the wife must join the husband in the conveyance.

Another question is suggested for the consideration of the court: Can a married woman in this state convey the land of another as attorney in fact? Margaret McGill, the attorney in fact of Esther Brennan, was a married woman.

The circuit court in this case attempted what has never been done by any court before, to make a will for a deceased person, or what was just as legally impossible, to hold that the devisees could make a will for their testator, or by agreeing to a division of the testator's property between themselves make a good devise not described in the will, and in a case where the intention of the testator could not be ascertained.

The evidence upon this question may be stated as follows: A block in the city of Portland consists of eight lots numbered and situated as follows:

N.

8	1
7	2
6	3
5	4

Bernard Brady had an equitable title to lots 3 and 4 in block 187. He did not own lots 1 and 2 in block 187. He devised by his will lots 1 and 2 in block 187, one lot to his sister Esther and one to his sister Margaret. It may be reasonably supposed he intended to devise the lots he owned and not those he did not own.

Thus far the court can go with safety, and thus far the authorities go; and, if the two lots had been given to the two sisters jointly, the court could have corrected the will. But which lot did the testator intend to give Esther and which to Margaret? There is nothing in this case from which the least clue to the testator's intention can be obtained, and because there is not, the court can not correct the will. A court can only carry out the intention of the testator, as ascertained from the will, and the condition of the parties and property. We understand that the court, in this case, felt this difficulty and undertook to avoid it, by saying that as the devisees had appropriated each a lot, the court would correct the will to conform to their action, but the fallacy of the proposition is apparent. It substitutes the acts of the devisees for the intention of the testator. In fact, it would be far more reasonable to suppose that as lot 1 is a corner lot and lot 4 is also a corner lot, the intention was to give Esther lot 4, instead of lot 3.

While under the maxim *falsa demonstratio non nocet*, courts will receive evidence to explain a latent ambiguity

arising from facts *dehors* the will, yet the evidence must be such as to leave no doubt as to the intention of the testator. (Redfield on Wills, vol. 1, p. 573, 574, and note, 498, 499, 500, 571, 572, 576, and notes; 1 Greenl. Ev., sec. 290; *Miller v. Travers*, 21 Eng. C. L. 290; *Brown v. Saltonstall*, 3 Met. (Mass.) 423, 428; *Jackson v. Sill*, 11 Johns. 201; *Long v. Duvall*, 6 B. Mon. 219; 2 Iredell, 194; *Kurtz v. Hibner*, 55 Ill. 514; *Bishop v. Morgan*, 82 Id. 352; 36 Iowa, 674.) The only evidence admissible is such as tends to place the court in the same position as the testator, in regard to his property. Extrinsic evidence can not be received to show intention. (1 Redfield on Wills, 496, 497, 499, and note, 500, 539, 540, 621, 622; 1 Johnson Ch. 231; 7 Monroe, 624; 2 A. K. Marsh, 51; 8 Mo. 56; 7 Metcalf, 188; 1 Paige Ch. 291; 8 B. Monroe, 600.)

Wm. Strong & Sons, for respondents:

There is no patent ambiguity in this will; it is all plain upon its face. It is only when you come to apply its bequests to the property of the testator, and learn that he never owned, or claimed to own, lots 1 and 2 in block 187, that you are called upon to look over the estate he left to see whether there is among it any property of a similar description to fill the bequests. You then learn that he had in his possession and claimed to own at the time the will was executed, and at the time he died, two, and only two, lots in block 187, not numbered 1 and 2, but 3 and 4. These correspond in description with the property described in the will, in a sufficient number of particulars, to identify them as the property he intended to devise to his sisters. The lots belong to him (he had bought them less than a month before his death), they are in block 187 in the city of Portland, they are all the lots he has, or ever had, in that block, or elsewhere, so far as appears, and in his will he has nowhere disposed of them specifically, unless he intended to do so in the bequests to his two sisters. We are forced to conclude, therefore, that the testator intended Nos. 3 and 4, and you reject the numbers given in the will as an error of description.

There can be no doubt, in any candid mind, that he intended to devise Margaret McGill one of these lots, and Esther Brady (Brennan) the other; and that he did not intend any one else should have either of them, or that they should remain intestate for the heirs, or be left for the residuary legatees. There is nothing to show that he placed different values upon the lots, or that it would not equally satisfy his intention to give either one or the other to either sister.

Summing up what has preceded, the testator has given the two lots that he owned in block 187 to his two sisters. We reject the numbers 1 and 2, because they are a manifest error in description, and apply the devise to lots 3 and 4. He gives both of these lots to his two sisters, and does not intend any one else to have them, or either of them. He may have purposed to give to each a separate lot, but not having used language appropriate to that purpose—in the change which his mistake in the numbers has brought about—the will, which does not express this part of his intention, is the same as if he had not had any such intention, but it does clearly express his intention to give these two lots to his two sisters and to no one else, and, so far, his intention may and should be carried out. This can be done by making them tenants in common of both lots. This contravenes no provision of the will, is equitable, and wrongs no one. The only parties interested are the two sisters; but, as they have divided the property to their own satisfaction, the court will not disturb the division where the only effect will be to turn the property over to persons whom, it is certain, the testator never intended to have it.

Such construction seems allowable under the rule laid down in various works on construction of wills. 1 Red. on Law of Wills (sec. 30 c, subd. 15) gives the rule as follows: "There is no more clearly established rule of construction, than that words or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator. It is here said that words and limitations may be transposed, supplied, or rejected; but it must appear, either from the words of the

will, or extrinsic proof, admissible in aid of the construction of the words, that the transposition does really bring out the true intent of the testator, and thus render what was before obscure, clear." (10 Paige, 140.)

Apply this rule to this will, and excluding superfluous words, fill in that which is implied, viz., that the testator intended to describe what he owned, and put the two devises in juxtaposition, and we have this form:

"I give and bequeath a certain parcel of ground, or lots, which I own in the city of Portland, Oregon, viz., lots three and four in block one hundred and eighty-seven, as follows, namely: Lot — to Margaret McGill, and lot — to Esther Brady, my two sisters."

The foregoing can not but be admitted to be exactly according to the intention of the testator, so far as the same is definitely expressed in the will, the description of the lots having been corrected by extraneous evidence as to the state of his property. This amounts to precisely the same thing as if the testator had said, The lots three and four in block one hundred and eighty-seven, which I own, I give and devise, one to my sister Margaret, and one to my sister Esther; or, I give and devise to my two sisters, M. and E., the two lots down in block 187, one to each. If we eliminate from this proposition the words, "one to each," the devisees become tenants in common, owning by fee-simple title one undivided half of both the lots. This title either can at will convert into a separate estate. There is absolutely no difference in the quality of the title they acquire. There is nothing in the will to show that the lots differ materially in value, and the evident intention of the testator is fully carried out.

This mode of obtaining from the will the intention of the testator, seems favored by the doctrine laid down by the highest authority on the construction of wills. (1 Redfield, secs. 6, 32.) "The general rule in regard to repugnancy in the different portions of the will seems to have been established from a very early day, that where there is no fair and reasonable mode of reconciliation, the latest of the con-

tradictory provisions shall prevail. But this rule has not gained universal consent. The more rational, and perhaps more general opinion, at the present day, is, that where the same thing is given in the same will to different persons, they shall take jointly, either as joint tenants, or tenants in common, according to the terms of the devise or bequest. But, of two inconsistent limitations in a will, the latter must prevail." * * * "But the testator having given the same estate to two or more persons, in different portions of his will, it is the same as if all the names had been united in one gift of the same estate." * * * (Id. sec. 32.) "But courts will, if possible, adopt such a construction as will uphold all the provisions of the will. And in carrying this purpose into effect, it is permissible to resort to any reasonable intendment; and, if necessary, the relative order of devises or bequests will be reversed, as where an estate is first given to A., and then for life to B. The American courts seem generally to have adopted the rule, in the construction of wills, that where there is an irreconcilable repugnancy in different portions of the instrument, and the difficulty is not relieved by any of the other rules of construction applicable to the case, and both can not operate, the latest shall prevail over that which is earlier in time." * * * (Id. sec. 32, note 24, and authorities there cited.)

When two persons each have the right to either one of two specific things, it may perhaps be called a repugnancy; while if one person had the right to one of two specific things, it would create an ambiguity only. But in case one had the preference and selection by law, there could be no ambiguity. Upon this point we refer to a single case, which, though ancient, will commend itself to the court, for its brevity, at least: "It will here be noticed that when a testator gives to a legatee one or more out of several specific things, the legatee has an absolute right of selection." (2 Coll. 435, 441, quoted from 1 Roper on Legacies, 316.)

It is apparent that, in the case now before the court, one of these parties under this rule has the selection. It is not necessary for the court to determine which one, for the par-

ties have divided by agreement—and this division concerns no one but themselves. Neither can say that she has not made the selection. "When the general intent of the testator is clear, and it is impracticable to give effect to all the language of the instrument, expressive of some particular or special intent, the latter must yield to the former." * * * (1 Redfield on Wills, 433; 9 Paige, 187; 35 Penn. St. 393; 4 Jones Eq. 203; 5 Harring, 91; 8 Mass. 3; 11 Id. 528.

By the Court, BOISE, J.:

This appeal is taken from a decree rendered by the circuit court for the county of Multnomah, in favor of the respondent and against the appellants. The suit was brought to quiet the respondent's possession and title to lot number three in block one hundred and eighty-seven, in the city of Portland, against Matthew Brady and George Brady, who sues by his guardian, James Wilson. The appeal is taken alone by Matthew Brady. The parties all claim to derive title from one Bernard Brady, late of Multnomah county, deceased.

The facts established by the evidence are as follows:

1. That Bernard Brady made his will on the twenty-ninth day of October, 1862, and died at the city of Portland, Oregon, on the thirty-first day of October, 1862. It was admitted to probate in the county court of the county of Multnomah on the seventh day of November, 1862, and his estate has been duly administered upon.

2. The fourth clause of his will is, so far as is material, as follows: "As also a certain parcel of ground or lots in the city of Portland, and numbered as follows, to wit: No. block, 187, one hundred and eighty-seven, lot No. (2) two, I bequeath to Margaret McGill."

3. Sixth clause of will: "I also bequeath to my sister Esther Brady, that lot or parcel of ground, in the city of Portland, as here described, lot No. (1) one, in block (187) one hundred and eighty-seven—otherwise its value."

4. Twelfth clause of will: "The remainder of my estate and effects I bequeath to be equally divided between my

brother, Matthew Brady, and Margaret McGill, and George A. Brady, orphan child of John Brady, deceased."

5. That Bernard Brady did not, at the time he made his will or died, or ever, own, or claim to own, or have any interest in, lots 1 and 2 in block 187, or either of them, but did, at the time he made his will, and when he died, own lots 3 and 4 in the same block by an equitable title derived from Jasper W. Johnson, under an instrument in writing, dated October 4, 1862, executed and acknowledged by the said Johnson and his wife, and in all respects a perfect deed, except that no seals were affixed to the grantors' signatures.

6. That, on the nineteenth day of March, 1878—during the pendency of this suit—for a nominal consideration, and on purpose to correct the alleged error of the want of a seal in the preceding deed, and upon the representation of Matthew Brady, this defendant and appellant, that he, the said Matthew Brady, was the sole heir of the said Bernard Brady, and the *bona fide* owner of the premises, the said Johnson and his wife duly executed a good and sufficient confirmatory deed to the said Matthew Brady of said lots 3 and 4 in said block 187.

7. The respondent introduced in evidence a power of attorney, executed in Ireland by Esther Brennan and her husband, John Brennan, to Margaret McGill; and a deed from Esther Brennan and John Brennan, her husband, by Margaret McGill, attorney in fact to James N. Lyon, and a chain of conveyances from Lyon to respondent, and offered in evidence a certified copy of the will of Bernard Brady, and probate thereof.

One of the witnesses signs by making his mark. The signature of Bernard Brady and the attestation of the witnesses are as follows:

Witness	His
The signature,	BERNARD X BRADY.
PATRICK MACKEN.	Mark.

The above instrument of three pages was now here subscribed by Bernard Brady to be his last will and testament, and he then acknowledged to each of us that he had sub-

scribed the same, and we, at his request, signed our names hereto as attesting witnesses.

PATRICK BRADY,
Residing at Portland, Or.
His
DANIEL X MCGILL,
Mark.
Residing at Portland, Or.
Witness to this will and testament of Bernard Brady,
PATRICK MACKEN.

It is claimed by the appellant that the will of Bernard Brady is void, because it appears that he signed it by making his mark, and that some other person signed his name to the same without stating that he signed the testator's name at his request, and as a witness, as required by the statute of Oregon. The manner in which the will was signed by the testator, and attested by the subscribing witnesses, was in substantial compliance with the requirements of the statute in that respect, as was held by this court in *Pool v. Buffum* (3 Or., 438), to which we refer as decisive of this point.

But it is further claimed that the devise is void on account of a false description of the lots intended to be devised, and that no parol evidence is admissible in aid of its construction. While it is conceded to be the general rule, that oral evidence is not admissible to explain or vary the words of a written instrument, there are so many exceptions and qualifications of the rule, that no case is tried where the force, operation, and construction of a written instrument are concerned, that oral evidence is not received in aid of its construction. The rule excluding oral proof in explanation of written instruments, applies to the language of the instrument, and not to its import or construction. (1 Greenleaf Ev. sec. 277.) But the written instrument "may be read in the light of surrounding circumstances," in order to more perfectly understand its true meaning.

It is very common "to receive oral proof to show that language was used in a peculiar sense, or that one term was used for another; or that an essential term, to make the defi-

nition perfect, was wholly omitted or erroneously stated. These corrections are every day made by courts in fixing the construction of wills and other written instruments, by aid of extraneous evidence in regard to the state and condition of the subject-matter of the devise or of the devisee, in regard to one or the other."

Wills are frequently made during the last sickness of testators, and they too often depend wholly upon memory for description of their lands, and in consequence they are liable to great indefiniteness and occasional error. And on looking into the many cases decided, we find that courts have for a long period of years been compelled to deal with these descriptions in a very lenient manner, in order to reach the true intent of the testator "where that seemed practicable by the act of construction, and by the admission of oral evidence to remove latent ambiguities."

Mr. Redfield says: "One rule upon the subject is so thoroughly established as to have become a maxim in the law, *Falsa demonstratio non nocet.* The practical meaning of which is, that however many errors there may be in description, either of the legatee or of the *subject-matter* of the *devise*, it will not avoid the bequest, provided enough remains to show with reasonable certainty what was intended." (Redfield's American cases upon the law of Wills, 544; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. Sur. R. 144; *Jackson v. Sill*, 11 Johns. 201-218; 1 Redfield on Wills, 580.)

Then we apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2 in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected. The devise is the same as if the numbers of the lots had not been mentioned at all or

had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to wit: "A certain parcel of ground or lots in the city of Portland in block No. 187;" also "that lot or parcel of ground in the city of Portland in block 187." And by thus placing ourselves in the position of the testator, by oral evidence, at the time of the execution of his will, we find that there were two lots or parcels of ground in the city of Portland, and in block 187, belonging to the testator at that time and also at the time of his death. This renders the devise entirely certain from the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them. The testator could not have intended to devise lots to which he never had any title, but must have intended to devise those which did belong to him. He had two just such lots or pieces of land as he names, and every way described as these are, with the single exception of this one false particular, and this is the very kind of case to which the maxim *falsa demonstratio non nocet* applies. (*Allen v. Lyons*, 2 Wash. C. C. 475; *Winckley v. Kaine*, 32 N. H. 288; *Myers v. Riggs*, 20 Mo. 239; *The Domestic and Foreign Missionary Society's Appeal*, 30 Penn St. 425; *Button v. The American Tract Society*, 23 Vt. 336.) In *Winckley v. Kaine*, *supra*, the devise was of "thirty-six acres, more or less, of lot thirty-seven in the second division of Barnstead," and it appearing that there was no such lot in that division, but that the testator owned land in lot ninety-seven in that division, it was held to pass under the will. In *Allen v. Lyons*, *supra*, the devise was of a house and lot in Fourth street, Philadelphia. But it appeared on oral proof admitted by the court that the testator had no such property in Fourth street, but did own a house and lot in Third street, and it was held to pass under the devise.

While it is admitted that the court might go thus far in safety under the authorities, it is claimed that the devise can not be sustained because it can not be ascertained from the language of the will which lot the testator intended to

give to Esther, and which to Margaret. To this we answer that it does appear that he intended to give each one a lot, and the evidence disclosing that there was no particular difference in the situation and relative value of the lots, it may be presumed that they took them in common; that each was to have an interest in both lots. And the sisters having amicably arranged between themselves as to which lot each one would take, we are unable to see which interest the appellant had in that matter.

But it is further claimed that respondent has failed to show title to any interest which Esther Brennan might have had in the premises described in the complaint, for the reason that she, being a married woman, could not convey real property by an attorney in fact. It appears in evidence that a power of attorney was executed in Ireland by Esther Brennan and John Brennan, her husband, to Margaret McGill, fully authorizing her in their names to convey her title to the property in question. Said power of attorney being duly acknowledged by Esther Brennan and her husband before an officer with authority to take such acknowledgment, also a deed from Esther Brennan and John Brennan, her husband, executed in their names by the said Margaret McGill, their attorney in fact, to James N. Lyons, which deed constitutes a link in the chain of respondent's title. The question presented is that Esther Brennan, being a married woman, could not convey her interest in the property through an attorney, notwithstanding her husband joined with her in the execution of such power. Misc. Laws, p. 515, c. 6, tit. 1, sec. 2, provides that "a husband and wife may by their joint deed convey the real estate of the wife in like manner as she might do by her separate deed, if she were unmarried."

The California statute contains a section like this, and the courts there hold that a married woman can not invest another with power to convey any interest she may have in real estate in the absence of any statute to that effect. Section fifteen of our statute provides that "when any married woman, not residing in this state, shall join with her husband in any conveyance of real estate situated within this

state, the conveyance shall have the same effect as if she were *sole*, and the acknowledgment or proof of the execution of such conveyance by her may be the same as if she were *sole*, and the acknowledgment or proof of the execu-

Thus it will be seen that under this section Esther Brennan and her husband, residing out of the state, could have joined in the execution of a deed to the property in question, which would have been sufficient under the law to convey any right she had therein. In this state there is no statute prohibiting a married woman with investing another with power to convey any interest she may have in real estate; and we are unable to see any good reason why the section above referred to should be construed to have that effect; and especially when we take into consideration that the tendency of modern legislation and modern decisions is to remove the disabilities imposed by the common law upon married women.

Entertaining the views herein expressed, it follows that the decree of the court below should be affirmed.

S. D. NORTHCUT, S. T. NORTHCUT, AND WM. W. NORTHCUT, APPELLANTS, *v.* LOUIS LEMERY, RESPONDENT.

SUMMONS—SERVICE BY PUBLICATION—RECITALS IN DECREE.—Where the statute in divorce cases required a summons on a non-resident defendant to be published four weeks, as in the act of January 17, 1854, and a decree granting a divorce under it contained a recital in the following words, "And it further appearing that the defendant had been served by publication as required by law," jurisdiction over the person of the defendant will not be presumed, it appearing by the filing on the complaint that four weeks could not intervene between the time of such filing and the rendition of the decree.

RECORD MUST SHOW STRICT COMPLIANCE—SPECIAL POWER.—Where a court of general jurisdiction exercises a special power conferred upon it by statute, and not according to the course of the common law, it must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself.

APPEAL from Marion County.

On the twenty-third day of June, 1851, Hubert Petit and Emerance Petit, his wife, commenced to reside upon and cultivate a certain tract of land containing one hundred and ninety-five acres, and continued to reside thereon and cultivate the same for four years, as required by the donation land law of Oregon. The north half of the claim was set apart to the said Emerance, and the south half to the said Hubert Petit, and a patent was afterwards issued to them. On the second day of September, 1857, Hubert Petit filed a petition for a divorce from his wife, and at the September term, 1857, of the district court of the first judicial district of Oregon territory, a divorce was granted by that court, although the decree dissolving the marriage was not then entered of record. Afterwards, at the September term, 1859, the decree was entered on the journal of the court, *nunc pro tunc*, as follows:

"HUBERT PETIT *v.* EMERANCE PETIT—Divorce.

"Now on this day, it appearing that a decree had heretofore been rendered in this cause, at the September term thereof, 1857, and that said decree had not be entered, and it further appearing that defendant had been served by publication, as required by law; it is ordered that said decree be entered *nunc pro tunc;* and it is therefore ordered that the bonds of matrimony heretofore existing between the parties be dissolved, and that Hubert Petit have the exclusive custody of the two children, the issue of said marriage, named Delia and Josephine, and that the north half of the land claim of said parties, being the part of said claim set apart to the said defendant by the surveyor-general, be decreed to, and the right and title thereof be vested in the said children, and plaintiff pay costs."

On the trial, the appellants read in evidence the record in the foregoing divorce suit. They then read in evidence a certified copy of the proceedings in the probate court authorizing and directing a sale of the north half of said donation land claim by the guardian of the said children, Delia and Josephine, and the sale of the same by said guardian to

S. T. Northcut, one of the appellants. They then read in evidence a quitclaim deed dated the fourteenth day of October, 1875, whereby Hubert Petit conveyed all his right, title, and interest in the said donation land claim to the appellants, S. D. Northcut, S. T. Northcut, and W. W. Northcut. No other evidence of title was offered in evidence by the appellants.

The respondent then offered in evidence a transcript of the judgment roll in an action commenced in the circuit court for Marion county on the twenty-seventh day of July, 1871, by *Emerance Groslouis v. S. T. Northcut*, one of the appellants, for the recovery of the land described in the complaint, wherein the said Emerance was adjudged to be the owner of the land in controversy. They also offered parol evidence to prove that Emerance Groslouis was formerly the wife of Hubert Petit, from whom he obtained a divorce, and that by a deed from her the title became vested in the respondent.

Knight and Lord, for appellants.

B. F. Bonham, W. W. Thayer, and G. W. Lawson, for respondent.

By the Court, KELLY, C. J.:

This is an action of ejectment brought to recover a tract of land known as the north half of the donation claim of Hubert Petit and Emerance Petit, his wife, being that portion of it set apart by the surveyor-general of Oregon, to the said Emerance, to whom a patent was issued by the United States. S. T. Northcut, one of the appellants, formerly claimed the land, deriving his title under a decree of divorce made at the September term, 1857, of the district court of Oregon territory for Marion county, wherein the court decreed that the north half of the said land claim, which belonged to Emerance Petit, should be vested in Delia and Josephine, the minor children of the parties in the divorce suit; and a subsequent sale of the same land to him by the guardian of said minor children. Under the guardian's sale he obtained possession of the land.

In 1871 an action of ejectment was commenced in the circuit court for Marion county, by Emerance Groslouis (formerly Emerance Petit), against S. T. Northcut, to recover this land, and it was adjudged by the court that she was the owner of it. (*Groslouis v. Northcut*, 3 Or. 394.) The court held in that case, that inasmuch as the pleadings in the divorce made no reference to the property of Emerance Petit, the territorial district court could not, by its decree, transfer the title to the land from her to her children, under the eighth section of the act of January 17, 1854, relating to divorce and alimony. (Or. Stat. 540.) This judgment was afterwards affirmed by the supreme court at the January term, 1873. On the fourteenth of October, 1875, the appellants obtained a quitclaim deed from Hubert Petit, conveying to them his right, title, and interest in the said donation land claim.

The position now taken by the appellants is, that inasmuch as the court decided in the case of *Groslouis v. Northcut* that the decree of divorce in *Petit v. Petit* did not dispose of the property of Emerance Petit, the legal effect of the decree was to vest the title to the same in her husband, because the wife was the guilty party in the divorce suit. In support of this position appellant's counsel refer to a clause in the eighth section of the act of January 17, 1854, as follows: "And all property and pecuniary rights and interest, and all rights touching the children, their custody and guardianship, not otherwise disposed of or regulated by the order of the court, shall, by such divorce, be divested out of the guilty party and vested in the party at whose instance the divorce was granted." They contend that by operation of the statute just quoted, Hubert Petit, became the owner of his divorced wife's property, including the land in controversy, and that by his deed to them they now have the legal title to it.

The case was tried in the court below without the intervention of a jury, and wholly upon record testimony, which is now before us. And without going into an examination, or giving an opinion upon the many intricate and important questions presented in the argument of counsel on both

sides, it is sufficient for us to say that the appellants must recover in this action, if at all, upon the strength of their own title. And this title, by the very records adduced to support it, is shown, we think, to be fatally defective. As one of the muniments of their title they produce in evidence and rely upon the decree of divorce granted by the district court at the September term in 1857, in the case of *Hubert Petit v. Emerance Petit.* The decree was made at that term of the court, but through some inadvertence it was not then entered of record, and not until the September term, 1859, two years afterwards, when it was entered *nunc pro tunc* as of September term, 1857.

A certified copy of the entire record shows that the petition for a divorce sworn to on the second day of September, 1857, and filed on that day, and the decree entered *nunc pro tunc* are all and the only records in the case. There is no evidence of the service of a summons upon the defendant, Emerance Petit, other than the recital in the decree itself, which is as follows: "And it further appearing that defendant had been served by publication as required by law." The law then in force governing the mode of service of a summons in cases of divorce was as follows:

"Sec. 6. If the defendant is not a resident of the territory, or can not for any cause be personally summoned, the court or judge in vacation may order notice of the pendency of the suit to be given, in such manner and during such time as shall appear most likely to convey a knowledge thereof to the defendant, without undue expense or delay; and if no such order be made, it shall be sufficient to publish such notice in a weekly newspaper printed in or nearest to the county in which the suit is pending, four weeks in succession, and if the defendant fail to appear and make defense, at the first term after such notice, or after ten days' personal service of summons, the evidence may be heard, and the cause decided at that term, or compulsory process may be had to obtain an appearance or answer, if it be necessary to the disposition of property or of children."

It will be perceived that there were two ways of serving notice of the pendency of a suit for divorce upon a non-

resident defendant, or one upon whom personal service could not be made. One was by an order of the court or judge, that the notice should be given in such manner as would most likely convey a knowledge of the pending suit to the defendant, and save the parties from any unnecessary expense of publication. The other mode of service, when no such order existed, was by publication in a weekly newspaper printed in or near the county in which the suit was pending, for four weeks in succession.

In the case of *Petit v. Petit*, the record recites the manner in which service was made, that is, "by publication as required by law," and there is, therefore, no presumption raised that it was made in pursuance of any order of the court or judge. Where the record discloses a particular mode adopted to acquire jurisdiction over the person of a defendant, if that is not sufficient to confer the jurisdiction, it will not be presumed that any other mode was adopted, or that jurisdiction was acquired in any other way, unless there is something further in the record on which to base such presumption. It may be conceded that where the record is silent as to the mode of acquiring jurisdiction, it will be presumed. But where the record shows the mode resorted to, there is nothing either in authority or reason that will warrant the presumption that another mode was resorted to. That would be presuming against the plain implication of the record. (*Ely v. Tallman*, 14 Wis. 30.)

There having been no other mode of service in the divorce case than the alleged publication, was that a sufficient compliance with the requirements of the law to give the court jurisdiction over the person of the defendant? The statute required four weeks' publication. The petition for a divorce was filed on the second day of September, 1857, and only four weeks of that month remained. Even if the first publication had been made on the day the petition was filed (and it could not have been before), the service would not have been complete before the first day of October. Section 6 of the act before quoted, provides that "if the defendant fail to appear and make defense at the first term

after such notice * * * the evidence may be heard and the cause decided at that term."

It is true the decree of the court recites "that the defendant had been served by publication as required by law," and it is well settled that a court of general jurisdiction proceeding within the scope of its powers will be presumed to have jurisdiction to give the judgments and decrees it renders until the contrary appears. And it is equally well settled in this state that where there is a recital in a judgment of due service of a summons upon a defendant, nothing short of a clear contradiction in the judgment roll will affect the recital. (*Ladd v. Higley*, 5 Or. 296.) But where a decree contains a recital that due service was made and the return of the sheriff purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. (*Heatherly v. Hadley*, 4 Or. 2.)

Although the decree which granted a divorce to Hubert Petit, recited a service by publication of the notice, yet it is manifestly an impossibility that it could have been published four weeks before the first day of October, when the first publication was on or after the second day of September. It therefore necessarily follows, that the decree of divorce granted at the September term was made when the court had no jurisdiction of the person of Emerance Petit, and no principle of law is more clearly settled than that a judgment or decree rendered by a court which has no jurisdiction of the subject-matter of the suit, or of the person of the defendant, is void, and that it will be so treated whenever it is drawn in question. (*Hunsaker v. Coffin*, 2 Or. 107.)

There is another reason why the decree made in the divorce suit can not be upheld. The court which rendered it, although one of general jurisdiction, was then exercising a special power conferred upon it by statute, and not according to the course of the common law. And in such cases, even a court of general jurisdiction must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record

itself; and unless it does so appear, no presumption will be indulged to sustain the validity of its judgments or decrees. (*Heatherly v. Hadley*, 4 Or. 1; *Galpin v. Page*, 18 Wallace, 350; *Commonwealth v. Blood*, 97 Mass. 540; 1 Smith's Leading Cases, 1116.) In England the ecclesiastical courts only, had jurisdiction in cases of divorce. They were unknown to the courts of common law, and it is by statutory enactment only that our courts of general jurisdiction take cognizance of such cases. And the service of a notice to the defendant to appear and answer, made by publication instead of personal service, is also in derogation of the common law mode of service. It is to cases of this kind that the language of Mr. Justice Field, in the case of *Galpin v. Page*, applies: "Where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class of cases not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear upon the record."

The service of the notice upon the defendant, Emerance Petit, having been made by publication, the record should disclose affirmatively how and when and where it was published, so that an inspection of it would clearly show that every requirement of the statute had been strictly complied with. Failing to do this, the decree amounts to nothing, and it can not be invoked to sustain the appellants' cause of action, and as this decree was and is the foundation of their title, that necessarily fails also. It is needless, therefore, to pass upon the other points of error raised in the record, and the judgment of the court below will be affirmed.

Mr. Justice BOISE dissented.

JOHN A. CRAWFORD, APPELLANT, v. S. H. ROBERTS, RESPONDENT.

PLEADING—STATUTE OF LIMITATIONS OF ANOTHER STATE.—An answer which alleges that the note on which the action is based was executed in the State of California, and that the maker thereof was a resident of said state at the time of its execution, and has been ever since, is insufficient. Under section 26 of the code, in pleading the statute of limitation in force in another state, in bar of the action, it must be averred that the cause of action arose in that state, and was between non-residents of this state.

PROMISSORY NOTE—RELEASE OF ONE JOINT MAKER.—A release of one joint maker of a joint and several promissory note, by the holder thereof, operates as a discharge of all the joint parties to said note.

AFFIDAVIT FOR ATTACHMENT—ULTIMATE FACTS ONLY TO BE STATED.—Under the act of 1876, an affidavit for an attachment need not state the probative facts out of which the indebtedness of defendant arose, but it is sufficient if the ultimate facts required by the statute be shown as the basis of the writ.

APPEAL from Linn County. The facts are stated in the opinion.

R. S. Strahan, for appellant.

Humphrey & Wolverton, for respondent.

By the Court, PRIM, J.:

This was a several action against the respondent upon a joint and several promissory note, made, executed, and delivered by him and B. R. Freeland to the appellant, at San Francisco, California, on May 1, 1869.

To this cause of action the respondent undertook to set up two defenses: 1. That said note was executed and made payable in the state of California; that the respondent was, at the time of the making of said note, a resident thereof, and has been ever since, and now is a resident of said state, and the statute of limitation of the state of California is there set up in bar of said cause of action, to wit, four years, the statute being set out in proper form; 2. The second defense is that the respondent was discharged from his liability upon said note, on the ground that the appellant, for a valuable consideration, prior to the commencement of the

action, had agreed to discharge and did discharge the said Freeland, his co-joint maker, from all liability upon said note.

Both of these defenses were demurred to by the appellant, and said demurrer being overruled by the court, and the appellant electing to stand upon his demurrer, the court rendered judgment against him for costs, from which he has appealed to this court. A motion was also interposed by the respondent in the court below, to discharge the attachment, upon the ground of the insufficiency of the affidavit to authorize the issuance of the writ, which was sustained by the court.

The overruling of the demurrer to these defenses and the sustaining of this motion to dissolve the attachment, are the grounds of error complained of by the appellant. The first separate answer, we think, fails to contain facts sufficient in law to constitute a defense to the action, in this—it fails to show that the cause of action arose between non-residents of this state, which is an essential fact, that must be alleged in order to show that the action was barred in the state of California.

It is alleged that the note was executed in state of California and that the respondent was resident of said state, has been ever since, and now is, but it fails to allege that the appellant is now or ever was a resident of said state. And in this it is defective, and insufficient to bring the defense within the provisions of sec. 26, p. 109 of the Code. That section is in these words: "When the cause of action has arisen in another state * * * between non-residents of this state, and by the laws of the state where the cause of action arose an action can not be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state." The demurrer of appellant to this defense we think was improperly overruled.

The facts alleged in the second separate answer we think are sufficient to constitute a defense to this action, and that the demurrer to said defense was properly overruled by the court. It is a well-settled rule of elementary law that "a release of one joint maker by the holder * * * will

discharge all the joint parties, for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such case." (Story on Promissory Notes, sec. 425; Chitty on Bills, 314; 18 Pick. 414.)

The only remaining ground of error is based upon the ruling of the court in sustaining the motion of respondent to dissolve the attachment. This motion was based upon the insufficiency of the affidavit to authorize the clerk to issue the writ, and the court below entertaining this view, dismissed the attachment. The affidavit is in the language of the statute without undertaking to set out the probative facts necessary to establish the ultimate facts required by the statute to be shown as the basis of the writ. The present statute under which the attachment was issued was taken from the California practice act, and was adopted in 1876, and it is a familiar rule of construction that the legislature, in adopting the statute of another state, adopts along with it the judicial construction of that state, as understood at the time.

In *Wheeler v. Farmer*, 38 Cal. 215, the supreme court of California had the precise question presented here before it, and Justice Sprague, in passing upon the question, said: "Under our statute, it is the duty of the court in which the suit is commenced to issue the writ upon the filing by the plaintiff of an affidavit stating the ultimate facts in the language of the statute, together with an undertaking in amount and form as defined by statute. Upon such compliance with the statute, the plaintiff demands as a right the issuance of the writ, and in issuing the writ the clerk has no discretionary power. He but performs a ministerial duty in obedience to a plain statutory mandate." He then proceeds to comment on the New York authorities cited, holding that they are inapplicable to their statute. That in New York, to authorize the issuance of the writ, both under the revised statutes and the code, a state of facts had to be shown to the satisfaction of a judicial officer to whom the application was made. And in *Weaver v. Hayward*, 41 Cal. 117, on the same question being presented to the court, it was held that "the affidavit for an attachment need not

state the facts out of which the indebtedness of the defendant to the plaintiff arose." We think the court erred in dissolving the attachment on this ground.

The judgment of the court below is affirmed as to the overruling of the demurrer to second defense, and reversed as to first defense. It is therefore ordered that this cause be remanded to the court below for further proceedings.

JAMES S. COOPER, RESPONDENT, v. JOHN W. MCGREW ET AL., APPELLANTS.

COMPLAINT—ACTION ON UNDERTAKING IN REPLEVIN.—In an action brought upon an undertaking in replevin, facts were alleged showing the commencement of the action, the undertaking for the immediate delivery of the property in controversy, its delivery, and the failure to prosecute the action of replevin, or redeliver the property. The complaint then alleges, that by reason of the premises aforesaid, said undertaking has become forfeited to this plaintiff, and an action has accrued to this plaintiff against the said defendants, jointly and severally, and he hath right to demand and have from the said defendants, the said sum of one thousand two hundred dollars. *Held,* That the facts so stated are sufficient to constitute a cause of action.

LANDLORD AND TENANT—TENANCY IN CROP.—Where a landlord leases land and reserves a part of the crop as rent, the tenant can not sell or dispose of the part so reserved. The landlord and tenant are tenants in relation to such crop.

APPEAL from Polk County.

This is an action brought upon an undertaking in an action of replevin, heretofore brought by the appellant McGrew against this respondent, for the recovery of certain wheat and oats. The undertaking in the replevin action was executed by McGrew, with Townsend and Logan as sureties, and was for the immediate delivery of the property sued for, which delivery was had. Thereafter the defendant in the replevin, the respondent here, had a judgment of nonsuit; but the grain, which was the subject of the controversy, was never redelivered.

The additional facts are stated in the opinion.

R. S. Strahan and J. J. Daly, for appellants.

Butler & Truitt, and Tilmon Ford, for respondent.

By the Court, BOISE, J.:

It is claimed in this case, by the appellant, that the complaint of the plaintiff does not state facts sufficient to constitute a cause of action. The complaint, in setting out the proceedings in the replevin action, shows what property was taken in that action, and the termination of the action in favor of the defendant therein, who is the plaintiff in this action. This termination of the action to recover the property shows a breach of the undertaking which the plaintiff in this action alleges in terms. He then alleges that by reason of such forfeiture, and because the defendant still retains the possession of said property, or its value, and refuses to deliver to plaintiff either the property or its value, he is entitled to recover of the defendant the sum of one thousand two hundred dollars, which he says is justly due and owing to him, by reason of such forfeiture, etc.

This complaint is not perfect in form, but taken all together, it shows the plaintiff's cause of action, and is, we think, sufficient, for the facts are in it out of which the plaintiff's cause of action arises. The breach of the undertaking gives the plaintiff a cause of action for nominal damages, and as it appears what property was taken, and as the plaintiff claims that he is entitled to recover for such breach and taking and retaining of the property, one thousand two hundred dollars, the defendant is fully advised by the complaint, of the plaintiff's claim. (Bliss on Code, Pleading, 437; Morris on Replevin, 259.) It is also claimed that the circuit court erred in giving the instruction to the jury which is set out in the bill of exceptions. In the bill of exceptions it appears that the plaintiff, to support the issues on his part, introduced evidence tending to show that he had leased the premises upon which the wheat and oats grow, which are the subject of this controversy, to one John Chandler, and that by the contract between them, Cooper was to receive the amount of five hundred bushels of wheat for the land, to be taken out of the first wheat threshed on the premises, and also produced a certain bill

of sale of Chandler's interest in said wheat and oats, a copy of which is hereto attached marked exhibit "A," and made a part of this bill of exceptions, and hereupon plaintiff rested his cause.

The defendant, to support the issues, on his part introduced a mortgage on the said crop by said Chandler to said defendant, executed on the sixteenth day of May, 1878, a copy of which is hereto attached, marked exhibit "B," and made a part of the bill of exceptions; and also offered evidence tending to show that he had taken possession of the property described in said mortgage on or about the sixteenth day of August, 1878; and also the pleadings and proceedings in the action by the said John W. McGrew against the said J. S. Cooper, and the value of the property in dispute, and rested. After argument of counsel pro and con, the court, among other things, instructed the jury substantially as follows, to wit: "If the jury believe from the evidence that by the contract between Chandler and plaintiff, Cooper, in regard to the letting of the land, plaintiff was to receive five hundred bushels of wheat from the crop raised on the land, the first five hundred bushels threshed, for the use of the ground, or that Chandler was to have all the crop over and above the five hundred bushels to pay him for his work; the plaintiff's five hundred bushels to be left on the place and received there by him; then the plaintiff and Chandler were tenants in common, and neither could sell any more than his own interest in the crop, and McGrew only took the interest of Chandler, what there might be over and above five hundred bushels, by his purchase or mortgage." To which instruction and charge the defendant, by his counsel, then and there excepted.

Exhibit "A" referred to, purports to convey and release unto the Coopers all the right, title, and interest which the said Chandler had in the premises and crops on the twenty-third day of August, 1878, and nothing more.

The issue left to the jury to which this instruction is directed, was whether or not Cooper had leased the land and reserved as rent therefor a part of the crop raised; if the jury found that the lease was on this condition as to rent,

we think that the lessor has a right to retain the rent which was on the land in his possession, and that it was not the subject of sale by the tenant. (See the case of *Moulton v. Robinson*, 7 Foster (27 N. H.) 550.) It is held that "it could never be the intention or consent of any judicious landlord, nor the wish of any honest tenant, that the farmer should have no security for his share of the profits but the honesty of his tenant; nor that the tenant should have it in his power to sell the entire crop, or subject it to the payment of his debts; when in equity and justice neither he nor his creditors have any claim to more than an undivided share of it.

The policy of the law is to give such effect to the contract of the parties as will carry out their intentions, whenever it can be done without hazard to the rights of others. And the landlord, having reserved a share of the crop, is as to that share a tenant in common with the tenant, and this is not inconsistent with the possession of the tenant in his capacity of cultivating the land and disposing of his share of the crop. The tenant can not sell or dispose of the share of the landlord, nor can such share be levied on for the debts of the tenant. It seems to us that this is a just rule to be applied in such cases, as the rights of the landlord and tenant are both secured, and the rights of third parties are not unjustly affected, for the creditors of the tenant should have no claim on the crop greater than the ownership of the tenant in it. (10 Pick. 205; 15 Barb. 599.)

We have disposed of the questions in this case, and find no substantial error, and the judgment of the circuit court will be affirmed.

L. ELKINS, APPELLANT, *v.* G. PARRISH, RESPONDENT.

SLIGHT EVIDENCE ADMISSIBLE.—Where there are several issues of fact made by the pleadings to be tried by a jury, it is not error to admit any evidence, however slight, which tends to prove any fact so put in issue.

APPEAL from Linn County.

This action is founded on an instrument in writing whereby the respondent agreed to deliver to the appellant a

sufficient number of American brood mares and colts at their actual cash value to amount to one thousand dollars, at Wain Claypool's, on the Upper Ochico, in Wasco county, Oregon, on the first day of October, 1878. It is alleged on the part of the appellant that the respondent failed to deliver the mares and colts at the place named, to the appellant's damage, etc.

The answer of the respondent denies the alleged failure, and alleges that on the first of October, 1878, the parties entered into another agreement whereby the place of delivery of the mares was changed to Henry Clicks', on Willow creek in Wasco county; that the respondent was ready to comply with the agreement at the appointed time, but that the appellant was not present or ready to receive the property. The reply puts in issue the material allegations in the answer. The respondent had a verdict and judgment. The errors assigned are as follows: 1. The court erred in allowing respondent's counsel to ask the witness, G. Parrish, the following questions: "State what kind of a country it was where the horses were to be delivered, and what knowledge Mr. Elkins had of the country at the time the contract was made." 2. "What is the country there used for, and how is it used?" 3. "State whether the country is fenced at the place where the horses were to be delivered, and where they were kept." 4. "State what knowledge Elkins had of the country at the time the contract was made as to how stock was kept there?"

Weatherford & Blackburn, *Powell & Bilyeu*, for appellant.

L. Flinn, *R. S. Strahan*, *L. Bilyeu*, for respondent.

By the Court, PRIM, J.:

It is claimed by appellant that the court erred in allowing certain questions to be asked and answered by the respondent, as follows:

1. "State what kind of country it was where the horses were to be delivered, and what knowledge Mr. Elkins had of the country at the time the contract was made?" Answer. "It is a valley, timberless country, with very little water,

but covered with grass; it is not suitable for farming purposes but suitable only for cattle, except in the lower part of the valley; there are some few farms and houses. Mr. Elkins had no knowledge of the Willow creek country at that time, at least he told me he had not."

2. "What is the country there used for, and how is it used?" Answer. "For the purpose of raising and pasturing stock; the stock are turned loose upon the range."

3. "State whether the country is fenced at the place where the horses were to be delivered, and where they were kept." Answer. "It is fenced where the horses were to be delivered, but not where they were kept on the range."

4. "State what knowledge Elkins had of the country at the time the contract was made as to how stock were kept there?" Answer. "I think that he knew that stock were kept there loose on the range, as stock was generally kept in that country."

By reference to the pleadings it will be seen that the execution of the written agreement upon which the action is based is admitted in the answer of respondent, but that every allegation of default is denied. And in the separate answer it is alleged that by subsequent parol agreement, the place of delivery specified in the written agreement was waived and changed to Henry Clicks,' in Willow creek, Wasco county, Oregon. And that on the said first day of October, 1878, the said respondent was at the said Henry Clicks' on said Willow creek, and was then and there able, ready, and willing to deliver said horses, mares, and colts to the said appellant, but that he was not there ready or willing to receive the same. And then it is further averred, by way of counter claim, that respondent ever since the first day of October, 1878, has constantly kept the said mares and colts for the appellant, and furnished them feed and pasturage and the necessary care and attention, and that the same is of the reasonable value of three hundred dollars.

All these allegations of new matter having been put in issue by the replication, we think the questions to which objections are made were admissible as tending to elicit facts which tend to prove the counter-claim of the respond-

ent. If the country was unfenced and stock was allowed to run loose on the range, and a herder had to be kept with them, it was more expensive to keep them ready for delivery than it would have been if the stock had been kept in inclosed pastures. And we think this evidence was properly submitted to the consideration of the jury, as tending to elicit facts tending to prove the counter-claim of the respondent.

It appears from the bill of exceptions that the court, in passing upon the admissibility of this evidence, assigned the following reason for its admission: "Because it may be presumed that the parties had the nature of the country or place where the contract was by its terms to be executed, in view at the time the contract was made, and for the reason that the circumstances and condition of the subject of the contract, and of time and place when and where it was to be executed, must be considered in construing the contract.

This is also assigned as error, but no exception having been taken to it at the time, it can not be reviewed in this court.

Judgment of the court below affirmed.

G. W. MILLER, PLAINTIFF AND APPELLANT, v. W. N. VAUGHN, DEFENDANT AND RESPONDENT.

WATER-DITCH—RIGHT OF WAY.—Where the owner of a tract of land granted to another the right of way for a mill-race, to conduct water from a steam above the land to a mill below it, the grantee did not thereby become entitled to use and appropriate the water of a small stream on the land of the grantor, which ran across the line of the race.

IDEM.—A grant of the right of way over land for a mill-race is merely an easement, and not a right to the land over which the race is constructed, nor to water flowing over the land. Such rights remain with the grantor, and no express reservation is necessary in the deed granting the right of way.

APPEAL from Tillamook County.

On the sixteenth day of August, 1872, the respondent sold and conveyed to W. T. Baxter fixe acres of land for a

mill-site, and on the same day, by a separate deed, conveyed to him a right of way across his land for a mill-race, for the purpose of floating logs and supplying the mill with water, as follows:

"This indenture, made the sixteenth day of August, 1872, between Warren N. Vaughn, of the county of Tillamook and state of Oregon, of the first part, and William T. Baxter, of the same place, of the second part. Whereas, the said parties, at the time of the sealing and delivering of these presents, are rightfully seised in fee a certain piece of land with the appurtenances, in the county of Tillamook aforesaid; and, whereas there is in course of construction a race upon a certain stream of water known as the Kilchis river, the said party of the second part. Now, therefore, know all men by these presents, that I, Warren N. Vaughn, in pursuance of said agreement, and in consideration of the sum of one dollar to me paid by the party of the second part, do hereby give, grant, sell, and convey unto the said William T. Baxter and his heirs and assigns, a right of way in and over the land, the strip of land being of the width of one rod, and running from the east side of said Vaughn's place, thence westerly through said place to the saw-mill of said party of the second part, and the way is and shall forever be of said dimensions; and also, for the consideration above mentioned, the said Warren N. Vaughn do hereby give, grant, sell, and convey to the said William T. Baxter, his heirs and assigns, the right to enter into the said strip of land, to be used as a passage-way as aforesaid, for the purpose of floating logs and supplying water to said mill. The considerations of the above grant are as follows, the parties agreeing before the delivery of this deed: the said Baxter agrees where the race enters and leaves the inclosure of said Vaughn's place, he will construct, or cause to be constructed, a good gate, for the purpose of preventing stock from entering the above-mentioned premises, and keep the same in good repair; the said Vaughn reserves the right of putting fences or bridges across the said race at any point he deems necessary."

At the date of the deed, Baxter had already commenced

the construction of the mill-race from a point on Kilchis river about two and a half miles above the mill, towards the land of Vaughn. The object in making it was to supply the mill with water from Kilchis river, and to float logs down to the saw-mill, and this could only be done by digging the race across the land of respondent, which was done after the right of way was obtained. Two small streams of water on the land of respondent ran across the line of the mill-race, one of which is known as Vaughn creek, and since its completion, both of them flow into it. After the race was completed, a dam was made at the head of it, to turn the water from Kilchis river into it. The dam only remained a short time, when it was washed away, and since then the mill has been supplied with water during the rainy season of each year from Vaughn creek and the other small streams which flow into the race.

During the time that Baxter remained the owner of the mill, he did not claim to have any right to the water in Vaughn creek, and the understanding between him and the respondent was, that the latter could take it, if he so desired, in a flume across the race and use it as he should think proper. And when Baxter did use it to propel the mill, it was by the license and permission of the respondent. In September, 1874, the interest of Baxter in the mill and its appurtenances, including the mill-race, was sold at sheriff's sale, and became the property of the appellant. For some time after he became the owner of the mill the appellant did not claim the water in Vaughn creek as a right under the deed giving the right of way to Baxter for the mill-race, but finally concluded that he had such right by virtue of the deed. In February, 1879, the respondent, by constructing a flume across the mill-race at Vaughn creek, diverted the water of that stream from the race into its ancient channel, for the purpose of obtaining water for his cattle. And soon afterwards this suit was brought to restrain him from diverting it, and for damages for the alleged wrongful act.

Yocum and Olarno, for appellant.

Stott & Gearin, for respondent.

By the Court, KELLY, C. J.:

The deed made by the respondent to Baxter, on the sixteenth of August, 1872, is somewhat informal; but, after all, there is no difficulty in ascertaining what was the intention of the grantor when he made it, and what was actually granted by the deed. By a recital contained in it, it appears that Baxter was then in the act of constructing a race along Kilchis river, and the testimony shows that the place where the water was to be taken from the river was about one and a half miles above the upper end of respondent's land. Baxter was about to erect a saw-mill on a small piece of land which he had purchased on the lower end of the same that belonged to respondent, and the object in making the race was to convey water from Kilchis river to propel the mill, and necessarily to take it across the respondent's land.

By the deed the respondent granted to Baxter, his heirs, and assigns, the right of way over a strip of land, one rod in width, from the east side of his tract of land, to the saw-mill on the west side, to be used as a passage way for the purpose of floating logs to the mill and supplying it with water. The right so granted was an easement, an incorporeal right; a right which was intangible. It was not the grant of a strip of land, nor of any water naturally flowing on the land, but simply the right to dig a race and conduct water in that race across the land of respondent, for the purposes specified in the deed. When an easement is granted, nothing passes as an incident to such grant but what is necessary for its reasonable and proper enjoyment. And notwithstanding the grant, there remains in the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. And it is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. (3 Kent's Com. 420; *Maxwell v. McAtee*, 9 B. Munroe, 20; *Lyman v. Arnold*, 5 Mason, 195.)

It appears from the deed itself, as well as the evidence in the case, that it was manifestly the intention, both of the grantor, who made the deed, and the grantee, who accepted it, that the right of way was given to enable the latter to conduct the water from Kilchis river, not from Vaughn creek, to the saw-mill. And it would be a perversion of the terms of the grant to say that, because the grantee neglected to repair the dam in the Kilchis river, he thereby acquired the right to supply his mill with water from a stream which never was intended to be granted to him, and which, in fact, never was granted. Even if the respondents had granted fee simple title to the strip of land, instead of simply the right to take water over it, it is questionable whether Baxter, or his assigns, would be authorized to divert the water in Vaughn creek from its natural channel, to the injury of the riparian owners below the race-way. It is sufficient for us to say that no such right exists under the deed of the sixteenth of August, 1872.

The decree of the court below is affirmed with costs.

EDGAR POPPLETON, RESPONDENT, v. YAMHILL COUNTY, APPELLANT.

ASSESSMENTS—WRIT OF REVIEW TO CORRECT.—A writ of review may be prosecuted to review the orders made by the board of equalization of a county correcting the assessment of an individual taxpayer.

IDEM—BOARD OF EQUALIZATION—INCREASING ASSESSMENTS.—Said board of equalization has power to raise the assessment of a taxpayer, by adding to his assessment property owned by him, which was not found or included in his assessment by the assessor.

IDEM—FRAUDULENT LOANS TO AVOID TAXATION.—If a taxpayer, having a large amount of notes and mortgages, in order to escape the payment of taxes on the same, borrows a sum of money of a person residing out of the county, and deposits with his creditor such notes and mortgages, for the purpose of avoiding the payment of taxes on the same, such notes are taxable in the county where such taxpayer resides; and such deposit on transfer is a fraud on the revenue of the county. And it is competent for the board of equalization to try this question of fraud.

PRACTICE—WRIT OF REVIEW, QUESTIONS OF FACT NOT TRIED ON.—In trying questions raised in cases of review, this court will not try questions of fact which were passed on by the inferior court, unless such findings are manifestly wrong.

NOTES AND MORTGAGES TAXABLE.—Notes and mortgages are property which is subject to taxation.

APPEAL from Yamhill County.

The board of equalization of taxes for Yamhill county, at its September term, 1879, caused a notice to be served upon Edgar Poppleton, the respondent, in accordance with sections 38 and 39 of chapter 57, Miscellaneous Laws, requiring him to appear before said board, and show cause, if any he had, why certain notes and mortgages described in said notice, should not be assessed to him. On the day specified in said notice, Poppleton appeared before the board, and filed assignments of the notes and mortgages in question, which he had made in favor of De Lashmutt and Oatman, of Portland, and made oath as to the good faith of such assignments. The notes and mortgages aggregated twelve thousand two hundred and nine dollars and twenty-five cents. It was claimed in behalf of Poppleton that he had assigned this property to secure an indebtedness to De Lashmutt and Oatman for one thousand dollars. Upon the hearing, the board found that the assignment did not pass the assessable interest of Poppleton to De Lashmutt and Oatman, and it, therefore, increased his assessment by the sum of twelve thousand two hundred and nine dollars and twenty-five cents. The case was then taken before the circuit court on a writ of review, and the order and decision of the board of equalization was reversed, and it is from this decision of the circuit court that this appeal is taken.

E. C. Bradshaw, *H. & A. M. Hurley*, for appellant.

W. D. Fenton, *James McCain*, for respondent.

By the Court, BOISE, J.:

It is claimed by the appellants that this proceeding should have been dismissed in the circuit court, for the reason that no writ of review will lie from a decision of a board of equalization correcting the assessment of the property of a taxpayer. This question was before this court in the case of

E. W. Rhea, appellant, v. Umatilla County, 2 Oregon, 298. In that case it was held that such board was a tribunal whose decisions are subject to be reviewed, and we think that decision correct.

It is claimed by the respondents that the board were not authorized by the statute, p. 756, sec. 38, to assess the notes in question, for the reason that their authority only extends to making corrections as to property already assessed by the assessor, and not to property which the assessor has failed to find. This question must be determined by the construction of section 38, which is as follows: "If it shall appear to such board of equalization that there are any lands or other property assessed twice, or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, *or any lands, lots, or other property not assessed*, said board should make the proper corrections." The property in question was property *not assessed*, and we think is embraced in this section in terms, and that it was a proper subject for consideration and adjustment by the board.

We come now to consider the only important question in the case, which is, Was the board warranted, from the evidence before them, in finding that the property was the property of Poppleton, and subject to assessment in Yamhill county? That the property in the notes was in Poppleton is not questioned, but it is claimed that by the evidence it appeared that they were pledged to De Lashmutt and Oatman to secure the one thousand dollar note given by Poppleton to them. If they were so pledged, in good faith, to secure the payment of this note, then they were not taxable in Yamhill county, but were taxable in Multnomah, under section 15, p. 757 of the statute. But if, in order to avoid the payment of taxes in Yamhill county, Poppleton borrowed one thousand dollars of De Lasmutt and Oatman, and assigned or delivered these notes to them for the purpose of avoiding such taxes, then the transaction was in bad faith and a fraud on the revenue of Yamhill county, and the question of the interest of the respondent in this transaction was a question of fact, which the board was

necessarily called on to try from the evidence. We think the evidence sufficient to show the transfer of the notes into the possession of De Lashmutt and Oatman, and the finding of the board seems to indicate that such was their view of this fact. But they found that Poppleton was the owner of an assessable interest in these notes, and that the assignment did not pass the assessable interest in said notes. To have found this they must have found from the evidence that these notes were transferred by Poppleton to avoid the payment of taxes on them to said county, which would have been a fraud on the revenue of the county, and void as to the county, and could not affect the right of the county to have the property taxed. The board have not set out in their findings the facts found which enabled them to arrive at the conclusion that the transfer was to avoid the taxes, and the respondent claims that there was no evidence to support such a conclusion, and that the finding is not warranted.

We think there was some evidence to support such a conclusion. 1. The security was greatly disproportioned to the amount of money borrowed, which may have been taken as a circumstance by the board. To illustrate, suppose a person who is involved, and on the eve of insolvency, sells property worth twenty thousand dollars to his son for one thousand dollars. In a suit by the creditors to set aside such a sale, it would be competent for a court to consider the inadequacy of the consideration, as evidence tending to show that the sale between the father and son was for the purpose of securing the property from payment of his debts.

2. The evidence shows that Poppleton continued to loan money in large sums, after the giving of this note of a thousand dollars, and shows that he was in circumstances to pay this note, which shows that it was not necessity which compelled him to deposit this large amount of notes as security for a thousand dollars. This tends to show that so large a deposit was not necessary to secure this loan.

3. The evidence shows that one of the large notes deposited by him as collateral, that is, the note of L. A. Smith

et al., for two thousand two hundred dollars, was taken by him from the bank and eight hundred dollars collected on it. This is evidence tending to show that he had control of these notes, and from these facts the board may have come to the conclusion that the transfer to De Lashmutt & Oatman was not in good faith, and to avoid the payment of taxes on this large amount of property. And as, in a case of this kind, it is the duty of this court to respect the findings of inferior tribunals, as to matters of fact passed on by them, when they have the opportunity of seeing the witnesses and better means of determining the surroundings of the parties than this court can have, we think, as a rule, it is better not to disturb such findings of fact on a writ of review, which is properly a proceeding to try questions of errors of law which appear on the record; and as it is apparent that this question, as to whether or not this transfer was made to avoid the payment of taxes, was considered and passed on by the board, we think that finding is binding on us in this proceeding.

It is further claimed by the respondent that notes and mortgages, being only evidences of indebtedness, are not property subject to taxation, and refer to article nine, section one of the constitution of the state. This section provides: "The legislative assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal." Choses in action are a species of personal property, and in order to judge correctly whether or not the convention that framed our constitution intended to include notes as property to be taxed when they used the words "personal property," in the section just referred to, we may profitably examine the laws of the territory at the time the constitution was framed and promulgated. Section 3 of chapter 1 of the laws of the territory, then in force, defines personal property, subject to taxation, as "all household furniture, goods, chattels, moneys, and gold dust on hand or on deposit, etc.; and all debts due or to become due from solvent debtors, whether on account, contract, note, mort-

gage, or otherwise," etc. Now this law was not only in force at the adoption of the constitution, but by the schedule, article eighteen of the constitution, it was declared to be the law in force under the constitution, and was in force and administered for years after the state government was inaugurated. We think, therefore, that the convention did intend that notes and mortgages should be regarded as personal property, and subject to assessment for taxes.

We think in this case the judgment of the circuit court should be reversed, and that the order of the board of equalization of Yamhill county be affirmed.

BENJAMIN GRIFFIN, APPELLANT, v. JOHN J. A. PITMAN, RESPONDENT.

JUSTICE'S COURT—OMISSION TO SWEAR JURY.—If a justice of the peace, through inadvertence, omits to swear a jury in the trial of an action before him, and the parties, being present, proceed with the trial of the cause without making any objection to the jury until after the judgment is entered on the verdict, it is then too late for the party against whom it is rendered to question its validity. on the ground that the jury was not sworn.

IDEM—NEW TRIAL, NO AUTHORITY TO GRANT.—After a justice of the peace has rendered a judgment, on the verdict of a jury in a case tried before h'm, he has no authority to set aside such judgment and grant a new trial.

APPEAL from Yamhill County.

This was an action brought by the respondent against the appellant in a justice's court to recover thirty-three dollars and forty-five cents. The case was tried with a jury, and the plaintiff had a verdict for the amount claimed, upon which a judgment was rendered. Subsequently it was discovered that the justice had inadvertently omitted to swear the jury. Thereupon, on motion of the respondent, the judgment and verdict were set aside and a new trial ordered. Upon the second trial the respondent failed to appear, and the appellant had judgment. The respondent then obtained a writ of review, upon which the second judgment was reversed and the first affirmed. From the order thus made this appeal is taken.

E. C. Bradshaw, for appellant.

H. & A. M. Hurley, for respondent.

By the Court, KELLY, C. J.:

To the ruling of the court below the appellant assigns the following errors: 1. The court erred in rendering judgment on plaintiff's complaint, for the reason that said complaint does not state facts sufficient to constitute a cause of action. 2. The court erred in affirming the judgment of the justice rendered on the twenty-fourth day of January, 1878, for the reason that said judgment had been set aside on motion of plaintiff therein. 3. The court erred in sustaining the judgment of the justice rendered on the verdict of a jury that was not sworn.

In regard to the first assignment of error, we hold that the same was not well taken. The complaint alleges "that the plaintiff on the first day of June, 1877, contracted with the defendant to dig a well, in which he was to insure water, for which he agreed to pay the sum of thirty dollars. That the work was performed according to contract, and that the defendant is indebted to him in the sum of thirty dollars, and * * * that no part of the same has been paid, though due and demanded." Sec. 86, p. 123, of the code, provides that "in pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part." We hold that the allegation "that the work was performed according to contract," is equivalent to stating that the plaintiff duly performed all the conditions on his part.

2. In support of the second assignment, it is urged by the appellant that inasmuch as the judgment rendered by the justice on the twenty-fourth day of January was set aside on the motion of the plaintiff, it was error in the circuit court to hold that it was valid and binding. The justice had no power to set aside the judgment rendered by him on that day, and grant a new trial on the twenty-second

of March. No such authority is conferred on justices of the peace by the statute, and none being conferred, it can not be lawfully exercised.

3. It is claimed by the appellant that the judgment rendered on the twenty-fourth of January was void because the jury was not sworn before they proceeded to try the case. The defendant was present at the trial, and ought to have urged this objection to the jury, before the rendition of their verdict. In practice, it is required of every one to take advantage of his rights at the proper time, and neglect to do so will be considered a waiver. If, through inadvertence, it happens on the trial of a cause that the justice fails to swear the jury, and either party, being present and aware of that fact, remains silent and takes the chances of a verdict in his favor, he will not be permitted to question the validity of it, if the verdict should prove unfavorable to him.

The court did not err in its rulings, and the judgment is affirmed.

HENRY SCHMIDT, APPELLANT, v. MAX VOGT, PHILIPENA CHAPMAN, AND J. B. CROSSEN, RESPONDENTS.

SCHOOL LAND—PURCHASER'S RIGHT TO SEVER TIMBER BEFORE COMPLETING PAYMENTS.—The purchaser of a tract of school land, having paid one-third part of the purchase-money, and received a certificate of purchase under section 10, p. 632, of the Code, afterwards cut and piled up a quantity of cord-wood on the land, and then assigned his certificate of purchase; the assignee did not thereby become entitled to the wood by virtue of the assignment of the certificate. The wood so cut became personal property when severed from the realty, and belonged to the purchaser of the land who cut and piled it up; and it did not remain the property of the state until the land was fully paid for.

APPEAL from Wasco County.

This is an action of trover, brought by the appellant for the alleged conversion of one hundred and twenty-five and one-half cords of wood, valued at six hundred and ninety dollars and twenty-five cents. On the eighth of June, 1877, B. F. Foley made application to the local agent of the board

of school land commissioners to purchase eighty acres of school land in section 16, T. 2 S., R. 12 E., the price of which was one hundred dollars. He made the first payment on it, and gave two notes, amounting to sixty-six dollars and sixty-six cents, for the balance of the purchase money, and went into possession of the land. After the purchase, he cut the wood in controversy upon it, and piled it up. On the eighteenth of April, 1878, Vogt and Chapman commenced an action against Foley, and on the following day attached the wood, and held it until judgment was rendered in the action, on the seventeenth of June, 1878, against Foley. On the seventeenth of July, an execution was issued on the judgment, and placed in the hands of the sheriff, who had previously attached the wood. This writ was returned on the seventeenth of September, and on the same day, an alias execution was issued, which was filed with the clerk on the fifteenth of October, 1878, without any return of the sheriff's doings.

On the twenty-second of April, 1878, four days after the wood was attached, Foley transferred his right to the land on which it was cut and piled, to one Charles A. Schuster, who paid the balance of the purchase-money, sixty-six dollars and sixty-six cents and interest, on the twentieth of May, to the local agent of the board of school land commissioners, and on the twenty-seventh of May, 1878, obtained a deed for the land. On the thirteenth of August following, Schuster sold and conveyed the land and all his right and title to the wood in controversy to Henry Schmidt, the appellant, in consideration of one hundred dollars. The wood was then still upon the land. Thereafter, by agreement between Foley and Chapman and Vogt, the wood was delivered to the latter.

J. E. Atwater, for appellant.

W. Lair Hill, for respondents.

By the Court, KELLY, C. J.:

The position taken by the appellant is that Foley had no right to cut the wood in controversy on the land which he

purchased from the board of school land commissioners until he had fully paid for it, and that, having done so and severed it from the realty, it was and still remained the property of the state. That when Schuster bought the land from the state he acquired its right and title to the wood also, and that when Schuster sold and conveyed the land to appellant he became the owner of the wood as well as the land itself. We do not consider this position to be correct, but conceding for the present that it is, and that Foley was not the owner of the wood when cut and piled up, it does not follow that when the state conveyed the land to Schuster it transferred to him the wood that was upon the land.

In the case of *Wincher v. Shrewsbury*, 2 Scam. 3 Ill. 283, it appears that the plaintiff went upon a tract of land belonging to the United States and made a quantity of rails from timber trees on the land. The rails were lying in piles on the land when the defendant entered and purchased it from the United States. He then forbade the plaintiff from taking the rails off his land, and hauled them away and converted them to his own use without the consent of the plaintiff. In an action to recover the value of the rails, Chief Justice Wilson, delivering the opinion of the court, said: "At the time the trespass was committed by the plaintiff, the land, and consequently the timber growing on it, of which the rails were made, belonged to the government. The cutting of the timber was, therefore, an injury and a trespass against the government, and it had a legal remedy. Therefore the defendant had neither a right of property nor a right of action at the time of the plaintiff's trespass in making the rails. To what, then, did he acquire title by a subsequent purchase of the land? Certainly not to a right of action for a previous trespass; nor to the timber which had previously been severed from the land and converted into rails, farming utensils, or anything else. A certificate of purchase or patent vests in the patentee a title to the land, and, generally, all that is growing on or is, in contemplation of law, attached to the land, as houses, fences, growing timber, etc., and, it is said, fallen timber,

passes with the land. But that which has been severed from the land, and by the art and labor of man converted into personal property, such as implements of husbandry, barrels, furniture, or even rails, when not put into a fence, * * * * do not pass with it, any more than the grain, grass, or fruit which has grown upon it and been gathered from it. The government being the owner of the land at the time of the trespass by cutting timber, it might recover in trespass for the injury done to the land, or by action of trover to recover the value of the rails, which would certainly be a ban to the defendant's recovery for the same trespass, * * * * The vendor and vendee of the land can not both have a remedy for the same trespass." The same principle was afterwards enunciated by that court in a similar case (*Brown v. Throckmorton*, 11 Ill. 529.)

Applying to the case under consideration the principle declared by the supreme court of Illinois, which we hold to be a correct exposition of the law, it follows as a necessary result that no title to the wood passed to Schuster when the state made him a deed for the land; and consequently he could give none to the appellants; and it is well settled that in an action of trover the plaintiff must establish property in himself at the time of conversion, in order to recover. (*Sheldon v. Soper*, 14 Johns. 353.) We hold, however, as a matter of law, that the wood, for the conversion of which this action was brought, did not belong to the state, but that Foley was the owner of it after it became personal property by severance from the realty. He had purchased the land, paid one-third of the purchase money, and given his notes for the balance; and was in the lawful possession of it. He could not, therefore, on any principle of law, be considered a trespasser when he cut the wood upon it, nor be held responsible for the value of it. The legislative assembly, when it authorized a sale of the school lands belonging to the state, imposed no condition upon the purchaser as to the manner in which he should use the land. Whether it is good policy or not to permit him to cut down and dispose of growing timber, before he has fully paid the purchase money, is a matter for legislative consideration,

with which the courts have nothing to do. It is for them to say that any restrictions should be imposed upon him in the enjoyment of the land, or the use he shall make of it.

It is true that a pre-emption settler on the public lands, before purchasing the same, is not allowed to cut down and dispose of growing timber, other than such as may be necessary for his own use in the ordinary course of husbandry. But that is because the land belongs to the United States, and the settler has, at most, but a license from the government to occupy it, and the right to purchase the same within a specified time, at the minimum price. He is not, therefore, permitted to lessen the value of the land which is not his own.

It follows, from the view we take of the law, that the appellant never had any interest or property in the wood in controversy, and that he is not entitled to recover in this action. It is not necessary, therefore, to examine or consider the other points raised in the argument by counsel.

The judgment of the circuit court is affirmed with costs.

JOHN J. GERRISH ET AL., APPELLANTS, v. A. HINMAN ET AL., RESPONDENTS.

DEVISE—SPEAKS FROM TIME OF TESTATOR'S DEATH.—The general rule is, that a devise, in designating the objects of the testator's bounty, speaks from the time of his death, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts as may be entitled to consideration in construing its provisions.

WILL—CONSTRUCTION.—The will of G. provided as follows: "I devise all that may remain of my real and personal property, to each of my living children, and the children of my deceased daughters, alike." *Held,* That the latter being mentioned in their representative capacity, thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him, the property should be divided *per stirpes* and not *per capita.*

APPEAL from Yamhill County.

This is a suit for partition of real property among the children and grandchildren of James Gerrish, under his will. The clause in the will, under which the parties all

claim, is as follows, to wit: "I give and bequeath to my beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time. At her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise."

When this will was signed the testator had three children —two sons and a daughter, living—and two daughters dead, who had left children. At the time of the death of the testator he had two sons living, and the children of three daughters, deceased; and such were the objects of his bounty at the time of the decease of Mary Ann, the tenant for life.

James McCain, W. D. Fenton, and Northup & Gilbert, for appellants.

Shattuck & Killin, and T. H. Tongue, for respondent.

By the Court, PRIM, J.:

The parties to this suit all claim under the will of James Gerrish, and the clause under which they claim is as follows: "I give and bequeath to by beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time. At her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise."

Upon the construction of this clause, two questions are presented for consideration: 1. At what time does the will speak as to the objects of the testator's bounty, at the time of his death or at the date of the will? 2. How do the objects of his bounty take, *per capita* or *per stirpes?*

On the first proposition, it is claimed by the appellants that the will, in designating the objects of the testator's bounty, speaks from the time of his death and was from the date of the will. This proposition is correct, and is well established by the authorities. The general rule appears

to be that "a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intent can be inferred from some particular language of the will or from such extrinsic facts as may be entitled to consideration in construing its provisions." (*Campbell v. Rawdon*, 18 N. Y. 412; 1 Redfield on Wills, pp. 7, 8, 9, 210; Jarman on Wills, pp. 286, 287; *Walker v. Williamson*, 25 Ga. 540; 21 Conn. 550.) And in this case there is no language in the will nor extrinsic facts from which a contrary intent can be inferred. Then we hold that at the time of the death of the testator, all of his children and the children of his deceased daughters took a vested interest in his estate, subject to the life estate of his said wife, Mary Ann. (*Henry Warren v. Mary M. Hembree*, *ante*, 118).

The next question to be considered is whether the objects of the testator's bounty are to take *per capita* or *per stirpes*. In this matter the intention of the testator must control, and that must be ascertained by looking into the language employed by the testator in designating the objects of his bounty. The objects of his bounty are designated as his living children and the "children of deceased daughters." The number and names of the latter are not mentioned in the will, but are merely referred to as a class in their representative capacity, thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him. Such is the construction given generally by the courts upon wills containing similar provisions. (*Lyon v. Acker*, 33 Conn. 222; *Risk's Appeal*, 52 Pa. St. 269; *Fissel's Appeal*, 27 Id. 55; 3 Jones N. C. Eq. 205.)

Entertaining the views herein expressed, we have reached the conclusion that it was the intention of the testator that his property should be divided among his descendants named *per stirpes* and not *per capita*.

Therefore it is ordered that the decree of the court below be so modified as to divide the land into five equal portions.

*ROSA N. GERRISH ET AL., RESPONDENTS., v. JOHN J. GERRISH ET AL., APPELLANTS.

CONSTRUCTION—WILL—ADOPTION OF PROVISIONS BY REFERENCE TO ANOTHER WILL.—Where the will of a testatrix otherwise properly executed refers to the will of her late husband, and so describes it as to leave no doubts of its identity, and adopts the provisions therein contained: *Held,* That it becomes a part of such will, and should be considered in construing its provisions.

IDEM.—It appears that the provisions of the will of G. are referred to, adopted, and made a part of the will of the testatrix. *Held,* That the children and grandchildren of the testatrix having been named in the will of G., are "named and provided for" in the will of the testatrix within the meaning of the statute.

IDEM—AUTHORITY FOR INTERPRETING—STATUTES OF OTHER STATES.—When the statute of another state is adopted in this state, we must look principally to the decisions of that state to ascertain its proper judicial construction.

WILLS—NAMING CHILDREN IN—OBJECT OF STATUTE.—The object of the statute is not to compel parents to make actual beneficial provisions for their children and their descendants, but to prevent the consequences of forgetfulness or oversight, and to produce an intestacy only when the child, or the descendant of such child, is unknown or forgotten, and thus unintentionally omitted.

APPEAL from Yamhill County.

This suit is a suit to quiet title. The respondents claim as devisees of Mary Ann Gerrish, and the appellants claim as her heirs at law. The appellants claim, that as to them the will of Mary Ann is void, because they, being the children and grandchildren, representing deceased children, are neither named nor provided for in the will of Mary Ann. Mary Ann made no mention of or provision for the appellants, except that her will contained the following provision: "I direct that whatever may remain at my death of the personal property bequeathed to me by my late husband, James Gerrish, for my life, shall at my death be distributed in accordance with the provisions made in the last will of my said husband concerning the same." The will of James Gerrish, referred to, provided as follows: "I give and bequeath to my beloved wife Mary Ann all the rest and residue of my personal property for her life-time; at

* See 34 Am. Rep. 585.

her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise."

The controversy is concerning the construction of Mary Ann's will. If it be held that the heirs generally are named or provided for, then the appellants take nothing; otherwise, Mary Ann as to them died intestate and they have a valid and subsisting estate and interest in the lands in controversy.

Shattuck & Killin, Thos. Tongue, R. Williams, and Fenton & McCain, for appellants.

Northup & Gilbert, for respondents.

By the Court, PRIM, J.:

This is a suit in equity to quiet title to a certain parcel of land lately owned by Mary Ann Gerrish, deceased. The respondents claim as the devisees of said Mary Ann, and the appellants claim as her heirs at law. The appellants are the children and grandchildren of the deceased, and they claim that said will is void because they are neither named nor provided for therein; and that is the question to be decided on this appeal. The statute, page 788, section 10, provides that "if any person make his last will and die, leaving a child or children, in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as shall regard such child or children, or their descendants, not named or provided for, shall be deemed to die intestate." * * * * It is admitted that the will itself makes no direct reference to the other children of the testatrix, but it is claimed that it refers to her husband's will, and adopts the provisions made in that for all of her children and descendants.

The clause in the will which refers to her husband's will is as follows: "I direct that whatever may remain at my death of the personal property bequeathed to me by my

late husband, James Gerrish, for my life, shall at my death be distributed in accordance with the provisions made in the last will of my said husband concerning the same." This is the only clause in the will which refers in any manner to the appellants. The portion of the husband's will, to which the above clause in the will of the testatrix refers, is as follows. "I give and bequeath to my beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time; at her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughter alike, to be divided as a majority of them shall say, by sale or otherwise." This portion of the will of James Gerrish is clearly referred to in the will of the testatrix, and the provisions thereof adopted as a portion of her will. In *Tounele v. Hall* (4 Com. 140), it was held that "where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper, it seems, makes part of the will, although the paper be not subscribed or even attached."

In this case there can be no question as to the identity of the instrument referred to: The husband of the testatrix had been dead and his will admitted to probate several years before her will was written. In fact, she was then enjoying under the provisions of his will a life estate in several farms and a large amount of personal property. Then considering the language of the will of James Gerrish, thus adopted and made a part of the will of the testatrix, we think there was a sufficient naming of the appellants to bring the case within the provisions of the statute.

Our statute is an exact copy of the Missouri statute, and the courts of that state having been called upon frequently to construe it, we must look principally to the decisions of that state to ascertain its proper judicial construction. In that state it is held that the statute does not require that an actual provision shall be made for the children, nor that the children shall be designated by name; that its object is not to compel parents to make testamentary provision for chil-

dren, but to prevent the consequences of forgetfulness or oversight. In *Hockersmith v. Slusher* (26 Mo. 237), Judge Richardson says: "It may now be considered as settled that the object of this provision is to produce an intestacy only when the child or the decendants of such child is unknown or forgotten, and thus unintentionally omitted, and the presumption that the omission is unintentional, may be rebutted when the tenor of the will, or any part of it, indicates that the child or grandchild was not forgotten." In that case a bequest had been made to a son-in-law, without naming his relation, and on the application of the daughter for a child's share, it was held that the bequest must have been given to her husband because he was such, and the daughter, though not named or provided for, could not have been forgotten. In *Guitar v. Gordon* (17 Mo. 408), the testator named his daughter, who was then dead, but did not name her children, and that was held a sufficient provision for his grandchildren, as they were represented by their mother, who was in his mind, though dead. To the same effect is *Block et al. v. Block et al.*, 3 Ohio, 495; *Beck v. Metz*, 25 Mo. 70; *McCourtney et al. v. Mathes*, 47 Id. 533.

The decree of the court below is affirmed.

SAMUEL D. GAUNT, APPELLANT, v. J. B. PERKINS, RESPONDENT.

JUSTICE'S COURT—DEFAULT, AT WHAT HOUR TAKEN.—Where the docket of a justice of the peace shows that he rendered judgment against a defendant for want of an answer, without giving him an hour after the time specified in the summons in which to make his appearance, such judgment will be reversed on a writ of review.

APPEAL from Yamhill County.

The respondent brought an action in a justice's court against the appellant, to recover a balance due him on an account. A summons was issued and served on the appellant, requiring him to appear "on the twenty-sixth day of March, 1879, at one o'clock in the afternoon of said day," etc. On that day the following proceedings were had be-

fore the justice, as appears by his docket: "March 26, A. D. 1879, one o'clock P. M. Cause called. The plaintiff appeared in person, and answered the call. The defendant, after being called three times, came not, but wholly makes default. The plaintiff, therefore, demands judgment for the sum of one hundred and six dollars and thirty-seven cents. It is therefore ordered and adjudged by the court, in default of the appearance of defendant, that the plaintiff do have and recover judgment of the defendant for the full sum of one hundred and six dollars and thirty-seven cents," etc.

The appellant obtained a writ of review, and assigned the following among other errors: "That the justice did not give the defendant one hour in which to appear, as allowed by statute." After hearing the case, the circuit court dismissed the writ and affirmed the judgment of the justice, whereupon this appeal is taken.

W. D. Fenton and James McCain, for appellant.

E. C. Bradshaw, for respondent.

By the Court, KELLY, C. J.:

The statute regulating the manner of proceeding in justice's court (sec. 124, p. 479), is as follows: "A party is entitled to one hour, in which to make his appearance, after the time specified in the summons, and not otherwise." * * * It appears from the justice's docket that at one o'clock, the hour that the defendant was summoned to appear, he made default, and judgment was then rendered in favor of the plaintiff for the amount demanded. The justice should have waited one hour, as required by the statute, before he entered the judgment. Counsel for respondent claim that there is a legal presumption that the justice properly discharged his duty in this respect. Such is not the case where the contrary affirmatively appears.

The judgment of the circuit court, as well as the judgment of the justice's court, is reversed.

THE CITY OF PORTLAND, RESPONDENT, v. PERRY G. BAKER, APPELLANT.

PLEADING—INJUNCTION—IRREPARABLE INJURY.—To warrant the court in granting an injunction, it must appear from the facts stated in the complaint that the plaintiff will suffer irreparable injury unless the defendant be enjoined; and the allegation in the complaint that the plaintiff will be irreparably injured is not sufficient. Facts must be stated from which the court may judge of the injury and its extent.

EMPLOYMENT OF CHINESE—REMEDY FOR VIOLATION OF CONTRACT CONCERNING.—Where the statute declares that the employment of certain laborers on the public works shall render null and void a contract by a contractor with a municipal corporation, such contract is forfeited by the contractor on the doing the unlawful act, and the corporation may disregard the contract without resorting to a court of equity to annul the contract.

APPEAL from Multnomah County.

On the twenty-ninth day of May, 1879, in pursuance of ordinance No. 2427, duly passed by the common council, the appellant entered into a contract with city of Portland, for the improvement of Tenth street in front of and abutting upon block Nos. 266 and 267 in said city. The improvement consists of grading, laying sidewalks and crosswalks. The consideration, as named in said contract, is merely nominal.

It is alleged that previous to the entering into the contract the appellant, for the purpose of avoiding the provisions of the law upon the subject of the employment of Chinese upon the public streets, had entered into a private contract with the owners of the adjacent property, which would, under the law, be chargeable for the improvement made under said contract, and that the real consideration for said work was to be paid to said appellant by such owners without the intervention of the city. That said improvement is a public work to be done under the supervision of the respondent, The City of Portland, and to the satisfaction of its officers and agents. That by the provisions of the said contract, the appellant expressly agreed and promised not to employ any Chinese upon said work, and said contract was upon that condition. That afterward he entered upon the performance of the said contract, and is

now engaged in the same. That in violation of the law and of the express terms of said contract, he is performing, and causing to be performed, the labor of said improvement, almost wholly by Chinese labor.

That by reason of the premises, the respondent and the citizens thereof have been and are greatly damaged, and, unless restrained, will suffer great and irreparable injury, and that the city has no remedy at law, wherefore it asks that the appellant be restrained from employing Chinese on said work.

The appellant demurred. The demurrer was overruled and judgment entered as prayed for.

Northup & Gilbert, for appellant.

To entitle a suitor to an injunction, he must suffer irreparable injury if the injunction is not granted. This principle is a fundamental one in equity, and we only quote from many authorities. (High on Injunctions. secs. 388, 421, 428, 486, 519; 11 Am. Dec. 506.) The mere allegation in the pleadings that plaintiff will suffer irreparable injury if injunction not granted, is not sufficient. Facts must be alleged from which it must appear that such injury will arise. (High on Injunctions, sec. 35; *Branch v. Supervisors*, 13 Cal. 190; *Battle v. Stephens*, 32 Ga. 25.) Equity will not interfere where no irreparable injury is alleged beyond an averment of a breach of contract. (*W. Union Tel. Co. v. Phila. R. R. Co.* 9 Phil. 494.) Equity will not interfere where the injury is susceptible of pecuniary compensation. (*Burges v. Kattleman*, 41 Mo. 480; *Morris & Co. v. Cen. R. R. Co.* 16 N. J. Eq. 419; *Pusey v. Wright*, 31 Penn. 396; *Hart v. Marshall*, 4 Minn. 294; *Cockey v. Carroll*, 4 Md. Ch. 344.) Nor will an injunction be granted for any purpose which can be attained by any other process. (*Ward v. Kelsay*, 14 Abb. Pr. 107; *Marks v. Wilson*, 11 Id. 88.) If a statutory remedy exists for a redress of the wrong complained of, equity will not interfere by injunction. (High on Injunctions, secs. 31, 82 and 697.) Nor will equity restrain a party from the violation of a contract where the parties have fixed the damages for a violation. (*Nessle v. Reese*, 19

Abb. Pr. 240; *McCafferty v. McCabe*, 4 Id. 57.) Nor while the right to an injunction is doubtful. Courts of equity, in granting injunctions, act with great caution. (High on Injunctions, secs. 523, 762; *Steamboat Co. v. Livingston*, 3 Cow. 755; *Attorney General v. Utica Ins. Co.* 2 Johns. Ch. 390.)

Apply the principles above stated to the case at bar. It is alleged that the plaintiff will suffer irreparable injury if an injunction is not granted. How, is not stated; nor are facts stated from which an injury can arise. The city has done its duty when it provides properly improved streets, and sees that the claim of the contractor therefor is paid from the proper fund. It can make no difference to the city what class of labor is employed in the work. If the contractor employs Chinese, they get the money that otherwise would be paid to other classes of labor. But if Chinese are not employed, it does not follow that citizens of Portland or of Oregon *will* or *must* be. The latest importation from the remotest corners of the earth, provided he be not a Chinaman, may be employed. The only qualifications are muscle and the will to use it. It is claimed, however, that an open violation of the law brings lawful authority into disrespect. This may be so, but it is not the province of equity to interfere. The only ground for this would be, that the employment complained of constitutes a nuisance, but that can not be claimed in this case. Even if the citizens of Portland are injured by the acts alleged, it is not the province of the city itself to correct them. It can not maintain a suit to protect them in their rights of labor. It has no such trust or Quixotic mission, nor is it its duty to bring suits to enforce state laws. Its duty and authority alike are confined to its own ordinances; it derives its power entirely from its charter. (Charter city of Portland; Dillon on Municipal Corp., secs. 9*a*, 9*b*, and 10.)

But a remedy exists at law. The statute itself provides one. If Chinese labor is employed, the contract becomes void; if void, then the contractor can get no pay; a void contract can not be enforced. It was the intention to make

the remedy simple by stopping payment. But it is urged that as the consideration in this case is a nominal one, the contractor and the owners of the adjacent property having, prior to the letting of the contract by the city to defendant, made a contract for the improvement in which the real consideration was to be paid, the penalty is small and the contractor gets his pay, and thus the law is evaded. Not so. The contract with the property owners is void equally with that of the city. If the property owners choose to pay when they can not be compelled to, is it the right of any one to prevent them? Besides, the city does not allege its ignorance of this prior contract at the time of entering into the contract with defendant. It is only where one has exercised due caution to prevent an injury that he can be relieved by injunction. (High on Injunction, sec. 707; *Russ v. Wilson*, 22 Me. 207.)

The law under which relief is sought (Laws of 1878, p. 9) is void. It is in conflict with the constitution and treaties of the United States. All treaties are the supreme law of the lands. (Constitution of U. S. art. 6.) The treaty with China of June 18, 1858, and the additional articles thereto of July 28, 1868, provide: "That the two high contracting parties recognize the inherent and inalienable right of man to change his home and allegiance; and, also, the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other for the purpose of curiosity, of trade, or as permanent residents." Article VI. declares: "That Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may be then enjoyed by the citizens or subjects of the most favored nations." (Pub. Treat. U. S. 148.) Chinese laborers stand on the same footing with those of Great Britain. No distinction can be made. (*Baker v. City of Portland*, a decision of the U. S. circuit court for Oregon; see, also, the decision of Justice Field in the celebrated "Queue Ordinance Case," lately rendered; Reporter, August 13, 1879.)

J. C. Moreland, City Attorney, and A. H. Tanner, for respondent:

Two questions are presented: 1. Is the law of this state, prohibiting the employment Chinese laborers upon streets and public works, valid? 2. Can this law be enforced by injunction?

The first question is one of interest, and the answer thereto involves questions of great magnitude. To defeat this law, appellant relies upon the treaty of the United States with the Chinese empire. In the discussion of this question, we admit fully the authority of the United States to make treaties with foreign nations. But whenever the treaty infringes upon the rights of the states to manage their domestic affairs in their own way, then the treaty becomes null and void. Suppose this treaty had undertaken to grant Chinese in the several states immunity from punishment for crime committed in those states, whom could it bind? Certainly, no none. And no treaty can be binding which in any wise infringes upon the right of the states to legislate upon all matters upon which the power to legislate was not delegated to the general government by the constitution. The treaty-making power can not rise above legislative authority. When the power is not expressly delegated, or does not arise by necessary implication, it remains in the states. The treaty provides that "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may be then enjoyed by the citizens or subjects of the most favored nations." These qualifying words, "in respect to travel or residence," certainly mean something. If they imply the right of the Chinese to come here and enjoy all the rights guaranteed to other nations, in all particulars, then why qualify their rights? These words "travel" and "residence," are well defined. There is no necessity of resorting to courts to interpret them. Their meaning is known of all men. Apply to this language the two familiar maxims, both of which are well-sustained axioms of constructions, viz., "The expression of one thing is the exclusion of another," and "That which is expressed,

puts an end to that which is implied," and the discussion would seem to be at an end.

There is another rule of construction, which should be applied to this case: When the court is at liberty to adopt one of two constructions upon a law, that will be adopted which favors the rights of our citizens, rather than that which is against their rights. Again, it is a fundamental rule of construction that the court will, if possible, give such a construction as will give the statute the effect intended by the legislature, and every reasonable doubt will be solved in favor of the legality of the legislative action. (Cooley Const. Lim. 181.)

There is an authority directly against the legality of this law, in the decision by His Honor, Judge Deady, in the United States circuit court, last summer. In that case, the learned judge holds that the right to reside in a foreign country implies the right to labor there for a living, and that any attempted intrenchment upon that right is beyond the power of the state as regards Chinese.

His Honor, Judge Bellinger, in passing upon this case in the court below, reviews somewhat this decision, and his reasoning upon the case is so apt that we give it:

"The case of *Baker v. The City of Portland* is in point, but I can not admit the correctness of its conclusion. The fact that the improvement in question is a public improvement has not been questioned. The state has the power and it is its duty to provide means of facilitating communication between distant localities. The establishment and maintenance of roads is therefore one of the high exercises of its sovereign power. A street in any city or town, common to all people, is a public highway. The act of a state legislature authorizing the paving and grading of streets in a city, and the assessment of the expenses of the same upon the owners of lots fronting on such street, has been held to be a proper and constitutional exercise of the taxing power by the legislature. (Angell on Highways, sec. 181.) The city, in opening or improving streets, exercises a merely delegated authority conferred by the state. The right to improve streets, and the manner in which the improvement

shall be made, are matters exclusively within the regulation and control of the legislature—as much so as the erection of public buildings for state uses. Those who perform labor upon such improvements are in an employment which the state has authorized and provided for, and which is paid for out of a fund raised, as has been seen, by a tax. It follows that if the state can not prohibit the employment of any class of persons upon street improvements, it can not make such prohibition in respect to any employment which it authorizes. If the legislature should enact that no Chinese subject should be employed as guards at the penitentiary, or as janitors about various offices of the state, or as workmen upon the unfinished capitol building, the act, under the authority cited, would not be allowed to stand.

"The decision in the case referred to is upon the assumption that the right secured by the treaty to subjects of China to reside in the United States implies the right to labor here for a living. Conceding this, it does not follow that the right to labor imposes upon the state the duty of providing employment. If this right to labor is thus secured, it is nothing more than the right to labor for those who choose to employ them. Is its right in this respect less than that of citizens within its jurisdiction? The state has undertaken to say for itself that it will not employ this class. This is not the limitation of a right, but the exercise of one. The construction of public works is sometimes resorted to by governments as a matter of state policy, one of the objects of the improvement being to benefit the laboring classes by providing an opportunity for labor. The propriety of the adoption of this policy in this country is sometimes urged. It would certainly not be claimed that the advantages which such a policy offers to labor is necessarily the property of the world, and that the government has not the right in the bestowal of its favors to discriminate between its own citizens and aliens.

"It is not apparent upon what reason the objection to the exclusion of Chinese subjects from employment on public works can be made that will not apply to every branch of the public service, nor, if a law which so excludes them is

void, why a law which prescribes such qualifications for office-holders as in effect excludes them from office should not also be held to be void. It is clear that if the right of residence is impaired by the determination of the state not to employ them, the resolution of a manufacturing corporation not to employ them will have the same effect. In either case, as the argument goes, the opportunity to earn a living, which the right of residence is made to imply, is abridged. * * * A court will hesitate in construing a law to imply an intention on the part of the law-maker to do that which is unreasonable. There are no presumptions that the treaty-making power acted without inducement; that it granted away important privileges without any compensating advantages. Unreasonable concession must be clearly expressed. And it is not probable in this case that it was intended by the treaty power to concede all the rights which it is the object of government to secure to its citizens for the consideration which is implied in the extravagant construction given the treaty. * * * Nor is it probable that the treaty intended to destroy the police power of the states—the right of self-preservation of which man can not be divested under any form of government or in any state of society. There are no presumptions in favor of a construction that makes the treaty so unreasonable and far-reaching in its results, and that abolishes in favor of Chinese subjects that honorable distinction which is the citizen's just pride, and which it is obviously the policy of the government to maintain.

"In the case of *Ho Ah Kow v. Sheriff Nunan*, it is decided that the ordinance which provides for cutting the hair of criminals is special legislation, for the reason that upon Chinese subjects it operates as a cruel and unusual punishment; that though general in its terms, it operates upon a specific class with exceptional severity, since the possession of long hair is a religious and national custom peculiar to that class. The decision is one of unusual interest. It lays down the doctrine that when any general law bears with greater severity upon one class than upon others, although the fact may be due to the customs, peculiar

views, or religious beliefs of that class, such law is special legislation and void. Stated as broadly as the decision states it, the polygamous practices of the Mormon sect will find ample guarantees in the fourteenth amendment, and a sect religiously believing in human sacrifice might hope to set aside any state statute against homicide.

"But the argument against the infliction of cruel and unusual punishment has no application in the cases under consideration, and the decision upon the ordinance case can have no more than a remote bearing in their decision. Courts are never in haste to declare acts of the law-making power void, and for that reason, in cases like these, if the words of the treaty are susceptible of two meanings, one favorable to the law of the state and the other hostile to it, the former will be allowed to prevail. So far as this court is concerned, the law of the state against the employment of Chinese subjects upon public works will be enforced."

The second question suggested, we think, is one of less difficulty. If the law be valid, then the only possible way it can be enforced is by injunction. The charter takes away the right to govern streets and highways from the state, where it was primarily vested, and places it in the city. It can designate the kind of improvement, and the time and manner of putting it down. It pays the contractor by drawing warrants upon the fund for the improvement of the street, and that fund is only supplied by the levy of an assessment upon the owner whose property is improved. Now, if that owner shall, as alleged in this case, make a private contract to improve the street, then it is taken at a nominal rate from the city. No money is required to be collected; the contractor presents no bill to the city; the work has been done by Chinese labor; the law of the state and the express terms of his contract have been violated, and yet there is no remedy unless by injunction. When a contract contains covenants to do certain acts, and also other covenants to abstain from doing certain other acts, the breach of the negative covenants may be restrained by injunction, even though there may be no jurisdiction to compel a specific performance of the affirmative covenants. (3 Waits'

Actions and Defenses, sec. 6, p. 693; 26 N. J. Eq. 40; 1 Holmes, 253; Hilliard on Inj. 621; High on Inj. secs. 17, 23, 24, 31, 695, 697, 714, 733, 734, 735, 913; 23 N. J. Eq. 161; 34 Ind. 115; 44 Ind. 248; 5 Wall. 74; 39 Wis. 160.)

In the present case the defendant was not only bound by the provisions of the state law not to employ Chinese, but he was bound by the solemnity of his contract. The city could not compel him to go on and employ other laborers, but in the language of the celebrated Lord Eldon, "it could do the only thing in its power; it could induce him indirectly to do one thing by restraining him from doing another."

The enforcement of specific covenants are matters which are properly cognizable in courts of equity, and the remedy by injunction to prevent the violation of negative agreements not to do a particular thing, is closely akin to the remedy by specific performance of agreements of an affirmative nature. (High on Inj. sec. 913.)

By the Court, BOISE, J.:

We think the complaint in this case does not show that the plaintiff has or is likely to suffer any pecuniary injury from the employment of Chinamen by the defendant, and that the complaint does not therefore make a case which would authorize the court to interfere by injunction. It is true the complaint alleges "that by reason of the premises (that is, the employment of Chinamen), the plaintiff and the citizens thereof have been and are greatly damaged, and that unless defendant is restrained, will suffer great and irreparable injury." But the complaint fails to allege in what manner the city is injured, either by showing that the work is not well done, or making any allegation of any fact from which the court can conclude that any injury has or will result from such employment, and facts showing the injury must be alleged to warrant the court in restraining a defendant by injunction, which is the exercise by the court of an extraordinary and harsh power, which can not and ought not to be invoked or exercised except in cases where a plaintiff is in danger of suffering irreparable injury. In

High on Injunction, sec. 35, the rule is stated to be that "the mere allegation of irreparable injury will not suffice to warrant an injunction; but the facts must appear on which the allegation is predicated, in order that the court may be satisfied as to the nature of the injury."

The contract in this case, between the city and the defendant, was simply an undertaking on the part of the defendant to do the work on Tenth street for a nominal consideration, with the understanding that he should be paid for said work by the owners of the adjacent property, and that he should not employ Chinamen to do the work. The city had no pecuniary interest in the matter of who did the work, except to have the work well done. On this subject there is nothing alleged in the complaint, and we are not to presume, from the employment of Chinamen, that pecuniary injury would result.

If the act of the legislature referred to is in force, then the contracts which the defendant had, both with the city and with the adjacent owners, became void when he violated the law by employing Chinamen, for it provides that "all contracts which any person or corporation may have for the improvement of any such street or part of street, or public works or improvements of any character, shall be null and void, from and after the date of any employment of any Chinese laborers thereon by the contractor." When the fact of the employment became known, the contract was forfeited to the city, together with the work done by the Chinese. From the time of such violation, the contractor had no more right to work on the street than any other person, and the city being a municipal corporation, with full power to protect its streets, had no need of aid from a court of equity.

We think, therefore, that the plaintiffs have not shown in the complaint a sufficient case to warrant a court of equity in granting an injunction, for no injury is shown to have resulted or to be likely to result from the acts of the defendant. He has violated the law, his contract has become null and void, and the law executes that penalty by depriving the defendant of all benefits under the contract.

The view we take of this case renders it unnecessary to decide the question, whether or not this act of the legislature is in conflict with the treaty with China, and we do not express any opinion on that subject.

The decree of the circuit court will be reversed, and the plaintiff's complaint dismissed with costs, but without prejudice to the rights of plaintiff to commence a new suit.

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*DANIEL SPRAGUE, APPELLANT, v. F. A. FLETCHER ET AL., RESPONDENTS.

WAIVER—DEMAND OF PAYMENT—PROMISSORY NOTE.—F., who was an accommodation indorser, indorsed on the back of a note before due, these words: "I hereby waive notice of protest for non-payment." *Held*, not to be a waiver of *demand of payment* from the maker when due. Agreements of this character are to be construed strictly, and not extended beyond the fair import of the terms.

APPEAL from Multnomah County. The facts are stated in the opinion.

Caples & Mulkey, for appellant:

The complaint alleges that the indorser waived demand and protest for non-payment by the following indorsement on the back of the note: "I hereby waive notice of protest for non-payment." The indorsement on the note is an "express waiver," and an admission that the note has been presented or need not be presented. (3 Denio, 16, same case as below; 1 N. Y. 186; *Matthey v. Galley*, 4 Cal. 63; 5 East, 230; Chitty on Notes, 747; 19 Ind. 110; Edwards on Bills, 594; Story on Promissory Notes, 347; *Wall v. Bry*, 1 Louis, 312; *Scott v. Green*, 10 Barr. P. 103; Biles on Bills, Sharswood's ed., top 350, note; Story on Notes, 479, sec. 354.)

The question here presented is as to the sufficiency of the pleading. The allegation here is much stronger than in the California case above cited; there the allegation was simply that Galley & David "waived notice of non-payment," which the court held to be sufficient. In this case the complaint alleges that Fletcher "waived demand and

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* See 34 Am. Rep. 587.

notice of protest for non-payment;" also setting forth the waiver in terms as indorsed on the back of the note. The word protest, in a popular sense, and as used among business men, includes all the steps necessary to charge an indorser, and where he waives notice of protest he waives everything. (*Coddington v. Davis et al.*, 1 N. Y. 186.)

E. C. Bradshaw and Wm. Strong & Sons, for respondents:

The language of the indorsement is clear and distinct: "I hereby waive notice of protest for non-payment." This does not waive the necessity of a demand. It is questionable whether it waives a notice of non-payment. Demand and notice of non-payment are two distinct things, both of which are necessary to charge an indorser. (Story on Promissory Notes, secs. 272, 366; 11 Wend. 629; 6 Mass. 524; 4 Am. Dec. 175; Edwards on Bills, 596.)

By the Court, PRIM, J.:

This action was brought against Fletcher as an accommodation indorser on a promissory note. The complaint alleges that on the second day of August, 1875, one Jane Armstrong made and delivered to one T. Coyle her promissory note for four hundred and eleven dollars and eighty-seven cents, payable with interest on one per cent a month in ninety days after date. That before the delivery of the note to Coyle, Fletcher, to secure the note and as an accommodation to Jane Armstrong, indorsed the note on the back thereof. That afterwards, and before the note became due, Coyle transferred the same to Bradley, Marsh & Co. That S. L. Marsh, one of the members of the firm of Bradley, Marsh & Co., before the note was due, transferred the same to Levi Anderson. That afterwards, and before said note became due, F. A. Fletcher indorsed on the back his waiver of demand and protest, as follows:

"I hereby waive notice of protest for non-payment.

"(Signed) F. A. FLETCHER."

And that by reason of said indorsement of said note by F. A. Fletcher aforesaid, and his said waiver of notice of non-payment, he, the said F. A. Fletcher, became, and now

is, liable for the payment, etc. That the note belongs to the plaintiff and is wholly unpaid.

To this complaint, defendant Fletcher interposed a demurrer upon the ground that it does not state facts sufficient to constitute a cause of action. The court having sustained the demurrer, judgment was rendered against the plaintiff for costs, from which an appeal has been taken to this court.

The objection to the complaint is: That the respondent is sued as an indorser without any allegation of demand of payment being made upon the maker when the note became due; nor is there any excuse for the failure of such demand shown. On the other hand, it is claimed that demand and notice of non-payment were especially waived by an indorsement on the note before due in these words: "I hereby waive notice of protest for non-payment." Signed by the indorser. The question for determination is whether this operated as a waiver by the indorser of demand of payment, as well as a notice of such non-payment. We think it did not so operate. The general rule is that agreements of this character are to be construed strictly, and not extended beyond the fair import of the terms thereof. (Story on Promissory Notes, sec. 272; *Berkshire Bank v. Jones*, 6 Mass. 524; 19 Pick. 375; *Backus v. Shepard*, 11 Wend. 629.)

In this case, the indorser does not say that he will waive demand of payment, but that he will "waive notice of protest for non-payment." Demand and notice are two distinct things, both of which are necessary to charge an indorser, and only one of them is waived by the indorser in this case. But it is claimed by appellant that the indorsement operated as a waiver of both, and the following decisions are cited to sustain the proposition. (*Coddington v. Davis et al.*, 3 Denio, 16; *Matthey v. Galley*, 4 Cal. 63; 19 Ind. 110.)

In *Coddington v. Davis*, the indorser wrote to the holder as follows: "You need not protest. T. B. C.'s note due, etc. I will waive the necessity of protest." This was held sufficient to dispense with a presentment and notice of non-payment, on the ground that the word "protest," as used by the indorser, in connection with the promissory note, was under

stood to mean the taking of such steps as were required by law to charge an indorser; that is, protest was understood to include both demand and notice. Although in a technical sense the term protest means only a formal declaration drawn up and signed by the notary, yet as used by commercial men it includes all the steps necessary to charge an indorser. (Burrill's Law Dict. 349; 2 Ohio, N. S. 345.) The case in 4 California is in point, but not a single case is cited in the opinion to sustain it. The case in 19 Indiana does not come up to this case. There the agreement was that "protest and notice of protest were waived," and were held sufficient to include waiver of demand.

Thus it will be seen that none of the cases cited sustain the proposition of appellant except the California case, while there are numerous decisions holding the contrary doctrine. (6 Mass. 524; *Freeman v. O'Brien*, 38 Iowa, 406; *Scott v. Green*, 10 Penn. St. 103.)

The judgment of the court below is affirmed, and case remanded to the court below for further proceedings.

Judgment affirmed.

J. B. CROSSEN, APPELLANT, *v.* R. P. EARHART, SECRETARY OF STATE, RESPONDENT.

MILEAGE—SHERIFF CONVEYING PRISONERS.—A sheriff is not entitled to mileage in addition to other fees prescribed in section 5 of the laws of 1874, prescribing the fees of sheriffs for transporting a convict to the state penitentiary. Said section 5 prescribes all the compensation a sheriff is entitled to for such service.

APPEAL from Multnomah County.

This case is a petition for a writ of mandamus to require the respondent, as secretary of state, to audit, allow, and issue a warrant on the treasury for thirty dollars, which appellant claims to be due him for mileage in conveying a prisoner, convicted of felony, from the Dalles to the penitentiary at Salem, the appellant being sheriff of Wasco county, and charged with the duty of conveying said prisoner as aforesaid.

The court below sustained the demurrer and gave judgment, from which this appeal is taken.

Shattuck & Killin, for appellant:

The amount here involved is small, but the question applies to all the sheriffs in the state, and to every prisoner. This mileage is claimed under the express provisions of law. Every statute of this state since 1855 which has attempted to regulate in a general way the fees of officers, has contained in letter or substance this general provision: "Every officer or person whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed shall be entitled to mileage, at the rate of ten cents per mile, in going to and returning from the place where the service is performed." (Sec. 14, p. 605 of the Code; sec. 18, p. 483 of laws of 1855.)

This is a provision of law, particular or special in its character, but general in its operation. Through all the changes, amendments, and repeals and re-enactments of the fee bill, or portions of it, this provision has stood unrepealed and untouched until 1876 (Laws of 1876, p. 34), when it was re-enacted in the same words, with a proviso that it should not apply to assessors. And this re-enactment in 1876, excepting assessors out of its provisions, makes it conclusive that it was the legislative intent to allow sheriffs mileage for the service in question.

The act of 1874 (p. 125, sec. 5), did not in terms repeal this section 14, nor does it do so by implication, for there is no repugnance, either in letter or spirit, between section 14 and the act of 1874; for the rule is that a general statute without negative words will not repeal the particular provisions of a former one, unless the two are irreconcilably inconsistent. (Sedg. Stat. and Const. Law, 123-128; Smith Com. 879, and authorities cited; 21 Penn. St. 42, 43; 70 Id. 346.) The act of 1874 is not a separate and independent act. It is a substitute, and nothing more, for sections 2 and 4, etc., of the tit. 1, chap. 20 of the General Laws, and section 14 of the latter, re-enacted by the statute of

1876 (p. 34), applies to the act of 1874. Otherwise there is no law whatever allowing a sheriff mileage for any service whatever, an oversight of which we cannot presume the legislature guilty. It is said that the travel in this case is itself the duty or service performed, and that *per diem* is provided, and no mileage can be allowed, but this is straining the meaning out of words. "Conveying and delivering him" surely imply something more than merely traveling with him. It is a further duty to be performed outside of the sheriff's business office, and carrying the same responsibilities and liabilities of other public duties, and in addition, the necessity of travel.

The former statutes, in providing for the compensation of sheriffs for conveying and delivering a convict to the penitentiary, provided in the same paragraph for mileage, while this statute of 1874 does not mention mileage; but from this circumstance no argument can be drawn against the construction we claim. For the former statutes all allow mileage for the sheriff "and such convict." If mileage for the convict had not been provided, there would have been no necessity of mentioning mileage in the same paragraph in order to entitle the sheriff to claim it, because section 14 had already provided for it, and to have mentioned mileage in the act of 1874, or in any provision where the convict was not coupled with the sheriff in drawing mileage, would have been simply surplusage.

Dolph, Bronaugh, Dolph & Simon, for respondent:

In sustaining the demurrer, the court below gave the following written opinion:

"Prior to 1874, the fees of county clerks and sheriffs were provided for in sections two and four of chapter twenty, of the Miscellaneous Laws. Section four provided, among provisions for other service, that the sheriff should have 'for conveying a convict to the penitentiary and delivering him to the proper officer thereof, four dollars per day, besides mileage for himself and such convict, besides the necessary expense incurred in guarding such convict during such conveyance, to be paid out of the state treas-

ury.' The compensation here provided for applied to the sheriff of Wasco county. In the same chapter—chapter twenty, Miscellaneous Laws—it was provided as follows: 'Every officer whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage at the rate of ten cents per mile, in going to and returning from the place where the service is performed.' (Sec. 14, chap. 20, Misc. Laws.) The supreme court having held that this provision only applied to officers whose fees were provided for in that part of the chapter which preceded this section, the legislature of 1876 so amended it as to make it applicable to every case provided for in the chapter, excepting only the case of assessors. This amendment, however, does not affect the question presented in this case.

"In 1874, the legislature passed an act entitled 'An act to repeal sections two and four of an act approved October 23, 1872, entitled,' etc. These were the sections which provided for the fees of sheriffs and clerks. The first section of this act repeals sections two and four of chapter twenty, Miscellaneous Laws, prescribing the clerks' and sheriffs' fees, in express terms. The second section provides a table of fees for county clerks. The third, fourth, fifth, and sixth sections of the act prescribe the fees of sheriffs. Section five is as follows: 'The sheriff shall receive for conveying a convict to the penitentiary, and delivering him to the proper officer thereof, three dollars per day for each day actually engaged, besides necessary traveling expenses for himself and such convict, and the necessary expense incurred in guarding such convict during such conveyance, to be paid out of the state treasury; *Provided*, That where there is direct communication, either by railroad or by steamboat, from the place from which said convict is to be conveyed to the penitentiary, no allowance shall be made for guards.' This provision differs from that contained in section four, repealed by this act, in this, that it allows the sheriff three dollars per day instead of four dollars, for conveying convicts to the penitentiary, and instead of mileage

for the sheriff and convict, it allows him necessary traveling expenses.

"Counsel for the petitioner claims that the effect of this act of 1874, so far as it relates to the compensation of sheriffs, is merely to amend section four, of chapter twenty, of the Miscellaneous Laws, and that the provision for mileage for all officers whose fees are prescribed in that chapter, and who are required to travel, therefore applies to the case of sheriffs when they convey convicts to the penitentiary. In support of this view, it is argued that unless this act be construed to be amendatory, and a part of chapter twenty, of the Miscellaneous Laws, the legislature will have done a 'wrong' to sheriffs, since the provision for mileage in any case only applies to persons whose fees are prescribed in that chapter. The act of 1874 is by its terms an independent act. It provides a complete table of fees for sheriffs and clerks. It does not purport to amend any part of chapter twenty, referred to. It expressly repeals certain sections in that chapter, and enacts other sections in lieu of those repealed. The new enactment does not correspond with the old statute in the number of the sections, or in their arrangement. Thus, the services and fees prescribed for the sheriffs in sections three, four, and five of the new act are embraced in four, five and twelve of the old one, and the provision in relation to conveying convicts to the penitentiary, which constitutes the whole of section five in the new act, is a portion of section four in the old one, while section five in the latter act relates to the fees of coroners, and is not repealed. A new rule of construction will have to be discovered before the act of 1874 can be held to be amendatory of the old law in the particulars claimed in the argument.

"The object of the new act, as appears from the emergency clause expressed in it, was to reduce the fees of clerks and sheriffs. The taking away of the sheriff's mileage is consistent with the main object of the act. If the legislature carried this reduction to an unreasonable extent, the judges are not for that reason to reject the act. 'For,' as Blackstone expresses it, 'that were to set the judicial power

above that of the legislature, which would be subversive of all government.' I do not, however, place the decision of this question upon the ground that the new act is not amendatory of the old one. I assume for the purposes of this case that it is so amendatory, and that the sheriffs are entitled to mileage where they are required to travel in order to perform any service required of them in section 3 of the act of 1874.

"Assuming, therefore, that a sheriff is entitled to mileage, whenever he is required to travel in order to perform any public duty, the question still remains, is the travel which he performs in conveying convicts to the penitentiary, travel performed in order to enable him to execute a duty required of him, or is it in itself the duty required? When a sheriff serves a subpeona or summons he is entitled to receive twenty-five cents for the service. He may be required to travel fifty or more miles to perform the duty. In such case the duty is one thing, the travel another. The compensation is for the performance of the duty, of which the travel is no part. The conveyance of prisoners to the penitentiary necessarily includes travel. To 'convey' a prisoner to the penitentiary is in every case to travel to the penitentiary and transport or carry the prisoner there. The travel is a necessary and principal part of the service of conveying, for which the statute allows three dollars per day. If the statute, instead of providing that the sheriff shall receive three dollars for every day he is actually engaged in conveying convicts to the penitentiary, had provided that he shall receive ten cents per mile for the service of so conveying convicts, the argument now made would have applied with no less force than it now does. Whether the compensation for the service performed be measured by the time consumed in the act of conveying or by the distance traveled, the construction of the statute must be the same.

"To say that a sheriff is entitled to three dollars per day and expenses of travel and guards for conveying convicts, and to ten cents per mile for all travel performed 'in order' to convey, would be a solecism in words and in legislation.

There is no other service aside from that of traveling in the act of conveying prisoners, to which the *per diem* provided for can apply. It is not intended to compensate him for consenting to be sheriff, for enjoying the honors or bearing the responsibilities of official existence. These do not come within the language of the provision which describes the service. The effect of the construction contended for would be to make the compensation of sheriffs for this service greater under the act of 1874 than it was under the old law, and yet the intention of the legislature was, as it appears in the act, to reduce the compensation of sheriffs and clerks. The provision allowing the sheriff three dollars per day for the time actually employed in conveying convicts to the penitentiary, besides necessary traveling expenses for himself and such convict and the expense of guarding such convict, includes all the compensation which he can receive in consequence of such service."

With the lucid statement of facts and conclusive argument contained in the foregoing opinion, we might well rest the case, but we will briefly state the reasons why we think the petitioner not entitled to mileage as claimed by him.

Section 14, of title 1, of chapter 20, of the Miscellaneous Laws of Oregon, as amended by the act approved October 20, 1876, provides only for mileage in addition to the fees prescribed by chapter 20. The amended section is as follows:

"Section 14. Every officer or person whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees prescribed in this chapter, shall be entitled to mileage at the rate of ten cents per mile in going to and returning from the place where the service is performed, except assessors, who shall not be entitled to mileage."

While the act of 1874 does not professedly and in express terms repeal the provisions of chapter 20 of the Miscellaneous Laws, in regard to sheriffs' fees, yet being a new and independent act, repugnant to the previously existing law on the same subject, the former statute was thereby necessarily superseded and in effect repealed. (5 Or. 152; Id. 243; Id. 275.) Wherefore, the fees of sheriffs were not "pre-

scribed in this chapter" 20, but were prescribed by the act of 1874, at the time when section 14, of title 1, of chapter 20, was amended by the act of October 20, 1876, and sheriffs are therefore not entitled to the mileage of "ten cents per mile" allowed by the act of 1876, to officers whose fees were then prescribed in said chapter 20 of the Miscellaneous Laws.

"A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as on reason and common sense, operate to repeal the former." (Smith's Stat. and Const. Con., sec. 786; 7 Mass. 142; 12 Mass. 545.) "When some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled." (Smith's Stat. and Const. Con., sec. 785; 12 Mass. 537; 1 Pick. 43.) There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy. * * * And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. (1 Bl. Com. 87.)

The mischief intended to be remedied by the act of October 29, 1874, is expressed in the emergency clause of that act to be that "the present fees of clerks and sheriffs are manifestly too high, and are therefore an unnecessary burden upon the taxpayers." It would be a startling method of construction, indeed, if the judges should precisely reverse the above canon, and "so construe the act as to suppress the remedy and advance the mischief," by allowing to sheriffs ten cents per mile under the act of 1876, contrary to its letter, beside the fees and traveling expenses allowed by the act of 1874, thus increasing their compensation above what they were entitled to receive under the provisions of chapter 20 of the Miscellaneous Laws, which the legislature declared to be "manifestly too high."

And, further, the point made by his honor, the judge of the court below, in his opinion in this case, that the "conveying" of a prisoner to the penitentiary is within itself the

very "duty to be performed," under the provisions of either sec. 4, of chap. 20, Misc. Laws, or of sec. 5 of the act of October 29, 1874, which duty necessarily includes the act of traveling in order to convey," is so unanswerably sound, and conclusive of the question at issue, that any attempt on our part to elaborate his argument in that behalf would detract from its conciseness without adding to its force.

By the Court, BOISE, J.:

In this case we are called on to construe section 5 of the act of the legislature approved October 29, 1874, providing for the fees of clerks and sheriffs. Said section is as follows: "The sheriff shall receive for conveying a convict to the penitentiary and delivering him to the proper officer thereof, three dollars per day for each day actually engaged, besides necessary traveling expenses for himself and such convict, and the necessary expenses incurred in guarding such convict during such conveyance." This section is a substitute for a former section of the general laws. See Statutes, 603, which provides that the sheriff shall be allowed "for conveying a convict to the penitentiary and delivering him to the proper officer thereof, four dollars per day, besides mileage for himself and such convict, besides the necessary expense incurred in guarding such convict during such conveyance."

In the section last above quoted, mileage was expressly given to the sheriff for himself and convict; in the latter, this provision is left out, and in lieu thereof the sheriff is given his necessary traveling expenses for himself and such convict. It is claimed that, in addition to the allowances in this section, the sheriff is also entitled to charge mileage, under section 14 of chapter 20 of the general laws, see p. 605. This section provides that "every officer whose fees are prescribed in this chapter, who shall be required to travel in order to perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage, at the rate of ten cents per mile, in going to and returning from the place where the service is performed."

A question is made that the sheriff is not one of the officers whose fees are prescribed in the chapter referred to. But suppose it be granted that he is such a person, did he have to travel to a place where this duty was to be performed? The duty to be performed was to convey a convict to the penitentiary. The place where the conveyance (which was the duty to be performed) commenced, was at the county jail where the convict was confined, and extended to the penitentiary. The conveyance was the transportation of the prisoner over the journey, and the responsibility and guarding of the prisoner commenced at the jail and continued along the whole journey, as much as the responsibility in the transportation of freight commenced at the place where the common carrier receives it of the consignor, and continues to the place of delivery to the consignee. The travel was included in the conveyance. If the sheriff is required to summon a juror, his duty is the service which must be performed where the juror is, and if he does not find him, the duty cannot be performed in whole or in part.

But if he is required to transport property from Salem to Portland, and he takes the property at Salem, the service begins to be performed when he takes the property, and continues until he has finished the transportation; the duty to be performed necessarily extends over a certain definite space, and travel is a part of the duty, as much as reading a summons is part of the service. If any travel could be charged in this case for going to the place of performance, it would be for going to the county jail to find the prisoner, for there is where the duty to be performed must commence. We think it was the intention of the legislature to fix in this section 5 all the compensation which a sheriff should be entitled to for this service.

The judgment of the circuit court will be affirmed.

STEPHEN G. SPEAR, APPELLANT, v. J. W. COOK AND V. COOK, RESPONDENTS.

RIGHT OF WAY TO FLOW WATER—GRANT CONSTRUED.—Where S. granted to C. all the water in a certain creek, and the right to convey such water over the land of S. to the land of C., and granted to C. the right "to enter upon lot one (land of S.), and build, maintain, repair, and keep up and in operation, all claims, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of said C.," such conveyance gives to C. the right to construct several canals or courses for the water over said premises of S.

IDEM.—By such conveyance, the grantee has the right to convey all the water, and at different times and places.

IDEM.—Such grantee may first construct a ditch and take part of the water, and afterwards construct another ditch to convey the balance, or enlarge the first ditch.

IDEM.—Such grantee may also change his ditch when located, if such change is necessary to enable him to convey the water in a convenient and reasonable manner.

IDEM—RIGHT TO FLOAT WOOD.—Such grantee may also float wood through his ditch, provided he does not thereby injure the grantor.

APPEAL from Clatsop County.

This is an action for damages brought by appellant against respondents for an alleged trespass claimed to have been committed by them, in entering upon, and building a flume across, certain lands of appellant, and in floating wood through the flume, and thereby causing water to overflow, and portions of said wood to be cast upon the lands of the appellant.

Respondents deny that they were guilty of a trespass in doing any act alleged in the complaint, but justify their acts and doings in the premises under a claim of right by virtue of the grant contained in a certain deed, executed by appellant to one of them, by which deed the appellant granted to the respondent, James W. Cook, certain lots numbered 2 and 3, and also the water of the east fork of Spear's creek and the right and privilege to divert said water from its channel, and to convey it upon, over, and across said lots 2 and 3, and also to enter upon lot 1, the premises in question, and build, and maintain, and repair, and keep in operation all dams, ditches, pipes, aqueducts, or flumes,

necessary and proper for conveying said water to said premises so conveyed to J. W. Cook, one half of which grant has since passed to the respondent, V. Cook.

The appellant, replying to the matter thus set up, alleges that the deed in question does not specify the place or line upon which the flume should be constructed, and that soon after the execution of the deed, J. W. Cook, with the appellant's acquiescence, entered the premises of appellant and located and constructed a flume under the grant and used the same to convey the water of the east fork of Spear's creek until 1877, when the respondents constructed on a different route the flume complained of, and that the new flume is not necessary or proper for the conveyance of the water in question to the respondent's premises.

The testimony offered on the trial tended to show that the route of said new flume varies from the route of the old flume in its passage through appellant's land, at distances varying from six to seventy feet, as shown on said plat or diagram; that the old flume was generally constructed on the ground or on low trestles not exceeding five feet in height at any place, and was six inches square and made of boards, leaving an inside measurement of four inches square, and covered; was on a good grade, and conveyed the water of said east fork of Spear's creek across appellant's land to the lands of respondents freely and rapidly; that its capacity was sufficient to convey the water during the dry season of the year, but during the heavy storms of winter was insufficient, and sometimes during the summer, owing to certain angles in its construction, was liable to become partially obstructed by frog spittle and sediment, and required clearing every few days; that it was practicable to construct on the site, or location and grade, of this flume, a larger one, of capacity sufficient to carry all the water of said east fork of Spear's creek; that the defendants and their employes made a common pathway of this old flume in 1873 and 1876, and by means thereof had put it out of grade and caused it to leak, and interfere with the free passage of the water therein. That this flume nevertheless was used with the common acquiescence of both parties, for

the conveyance of water for three seasons, and the location thereof was acquiesced in and assented to by plaintiff. That in the latter part of the year 1876, the defendants intimated a purpose to construct another flume for the conveyance of said water over plaintiff's said land, but were forbidden by plaintiff, and fully informed that such a structure in any other place than upon the route of the old flume was against plaintiff's will. That defendants, nevertheless, in January, 1877, against plaintiff's protest, proceeded to construct a second flume across plaintiff's land on a route varying from the route of the old flume from six to seventy feet, and the same was constructed on high trestles, and in some places nailed to plaintiff's trees; was eight to ten times the capacity of the first flume, and had along its sides, upon the trestles aforesaid, plank walks, upon which people could pass and repass. That said flume was thereupon used by defendants for the purpose, not only of conveying water, but also of floating wood from lands owned by the defendants above plaintiff's premises, to defendants' cannery, upon the premises sold to J. W. Cook by plaintiff in 1873. That said flume was still insufficient to carry all the water of the east fork of Spear's creek in time of flood. That during the winter and the months of March and April, defendants used said flume for floating cord wood every year after its construction until the commencement of this suit; and the same became often obstructed, and the water overflowed therefrom on to plaintiff's improved lands, washed his lands, caused slides, obstructed his pathway and roads, destroyed his trees, injured his garden crops and strawberry beds, which he had on his land below said flume. That said flume itself, irrespective of the water which issued from it, was an obstruction to plaintiff's enjoyment of his land far greater than the flume which had been constructed in 1873, on the first route, and rendered the defendants' easement more onerous to plaintiff, and that he was damaged thereby in a considerable sum. That to all these proceedings of defendants, in constructing and operating said flume built in 1877, plaintiff has continually ob-

jected and protested. That the old first flume, constructed in 1873, still remains upon the plaintiff's premises.

The defendants, to establish the issues on their part, introduced in evidence plaintiff's deed of August 12, 1873, to J. W. Cook, and also introduced evidence tending to show that the flume constructed in 1873 was insufficient to convey the water of said creek to defendants' premises. That the same was too small in size, and was located along a very abrupt mountain side, and following around the points of the hills contained several sharp angles, which frequently filled with mud and sediment, and obstructed the flow of the water until cleaned out. That the line of the old flume was very crooked, and the flume insufficient in size, and because of its location, to convey the water at all seasons of the year. That the new flume is more nearly on a straight line, affords an easier flow to the water, and is also insufficient in size to convey all the water granted by plaintiff's said deed. That at the time when the new flume was constructed, the old flume had become rotten by decay in several places, so as to need rebuilding. That no damage was done to the trees, grass, or land of the plaintiff in constructing the new flume, and that no damage has since accrued to plaintiff in any particular therefrom. That the new flume is substantially upon the line of the old flume for the greater portion of its route, and the furthest departure therefrom is only about thirty feet at one point, and twelve to fifteen feet at another point.

That defendants had employed a force of men to tend their flume while floating wood therein, and the obstruction thereof, and the overflow therefrom, was accidental and temporary, and that plaintiff had not been injured in any respect thereby. That the water of which plaintiff complained, and which he alleged had injured his crops and improved land and fruit trees, arose from natural springs, and did not proceed from the flume. The jury also, under the direction of the court, and in charge of the sheriff, viewed the premises, and thereupon the cause was submitted to the jury; the court, of its own motion, delivering to them a general charge in words following:

1. By the deed in question the defendant had the right to construct, over and across plaintiff's land, all ditches, flumes, and aqueducts necessary to convey the water of the east fork of Spear's creek to his fishery. The deed does not define or limit the place in which the pipe is to be laid, nor the size and character of the flume, ditches, etc., except as the latter is defined by the stipulation that the ditches, flumes, etc., are to be of such size and character as is necessary to the conveyance of the water of the creek in question.

2. Under this deed, after Cook had once constructed his ditch or flume, and thus selected the place where he would exercise the easement granted, such easement could not be exercised in any other place. If he once exercised the right granted in a fixed and definite course, with the full acquiescence and consent of Spear, he can not change the course of his ditch, or the manner in which his right is to be exercised, at his will.

3. That this rule must be understood with the reasonable qualification that Cook, the grantee, is not necessarily confined to the precise location in all its parts which he has selected. It is enough if the location is substantially the same. If it followed substantially the same route, the fact that it deviates in places from the old line will not necessarily preclude the defendant from exercising his right upon the new line.

4. The rule which I have stated is the general rule. To this rule there is this exception, if the grantee of a right of way for flumes, ditches, etc., to convey or lead water, locates and constructs his flumes and ditches, and it turns out, from experiment made, that the flumes or ditches as located, will not, through mistake in the grade or location, answer the purpose, that it will not conduct the water to the intended place, then, in that case, the grantee may change the location and direction of his ditch or flume altogether. He is not allowed to do this as a matter of his own convenience, but is allowed to do it if it is a matter of necessity. If in this case, through mistake or bad engineering, Cook's ditch was so constructed that it would not

answer the purpose which the right secured in the deed was intended to effect, then, in that case, he has the right to construct a new ditch on a different grade, and in another location, keeping as close to the old location as the requirements of his ditch will permit.

5. The same rule applies so far as the size of the ditch complained of is concerned. The size of Cook's ditch is defined in the deed. It is to be large enough to convey certain water. He would have no right arbitrarily to enter upon plaintiff's land and construct new flumes without limit, because the old ones were not large enough to convey all the water provided for in the deed. And yet, if through mistake he so constructed his first ditch that upon experiment it was found not to be large enough to answer the purpose, he will not be precluded from constructing a new flume or ditch of sufficient capacity.

6. You will therefore determine whether the new ditch substantially follows the course of the old one. If you find that it does not, you will determine whether the changes made in the location are necessary to avoid defects in the old ditch, which prevented the old ditch from answering the purpose for which it was intended.

7. If you find that the new ditch does not substantially follow the line of the first location, and that the change was not necessary, then you will determine how much the plaintiff is damaged by the new location.

8. If you find either that the new location substantially follows the old one, or that it is necessary that it should deviate on account of the bad location of the old ditch, then plaintiff is not entitled to recover, although the new ditch is larger than the old one, unless the new ditch has been so constructed as to unnecessarily damage plaintiff's land, or the size of the ditch is greater than is necessary to convey the water of Spear's creek, and such increased size has the effect to damage plaintiff.

9. If you find that plaintiff is entitled to recover, then you must find for him in such damages as he has actually sustained. The actual injury to his land, to his orchards, or timber, or pastures, or garden, etc. You are not to find,

speculative damages—that is to say, what the value of trees killed, or of a garden destroyed, if such there has been, would be proper to be considered; yet the expected profits from the sale of the products of the orchard or garden can not be considered by you; such damages are too remote and uncertain to afford a safe guide in estimating injuries of the kind alleged in this case.

The appellant requested the court to give the following instructions:

"1. If the jury believe from the evidence that the defendants, immediately after the execution of the deed by Spear to J. W. Cook (described in the pleadings), proceeded, with the acquiescence of Spear, to locate and construct a flume for the purpose of conveying the water of the east fork of Spear's creek across plaintiff's premises, and that such location was used and the water so conveyed for three years, and that the grade of that flume was sufficient to pass the water, then Cook had no right to change the location without Spear's consent, and the change of location in 1877, if against the will of Spear, was unlawful, and the plaintiff is entitled to recover."

When the court gave, but added thereto an oral qualification referring to instructions already given, and in substance saying to the jury that if by experiment the old flume, by reason of its location or form of construction, was found to be defective, and that a larger and different structure and a more direct route were necessary to convey all the water of the east fork of Spear's creek, then the new flume was lawful.

"2. If the jury believe from the evidence that the old flume failed to carry the water required, by reason of its form and size, and not by reason of its mistaken grade, and that the new location in 1877 was taken and the new flume built, mainly because of its being a route more convenient for Cook and cheaper than the old route, they should find for the plaintiff."

Which the court refused.

"3. If the jury believe from the evidence that the right of way for conveying the water, though granted by the deed

in general terms, without fixed and defined limits, was immediately exercised by Cook on a route selected by him and assented to by Spear, and that such route was used for three years, from 1873 to 1877, with like assent, then the jury should hold and find that such selection and use operated as an assignment of Cook's right, and must be deemed to be the route intended to be conveyed by the deed, and the same in legal effect as if it had been fully described in the deed, and any change of route by Cook without Spear's consent, is unlawful, and entitled Spear to a verdict for such damages as he has sustained and proven."

And the court refused to give said instructions simply as asked, but gave the same with a modification or qualification referring to instructions contained in the general charge, and in the instructions before given, and in effect said verbally to the jury that if the old flume, by reason of its shape, angles, and mode of construction and location, did not prove sufficient to carry the water of the creek, and a new route and a new flume were necessary for that purpose, then the defendants had the right to make the change.

"4. The question to be determined in this case is not the right to make a larger or differently shaped flume than was built in 1873, but the right to change the location and route. Cook had by his deed a right to convey the water of the east fork of Spear's creek across plaintiff's land, and having selected his route or location, he might there build a flume sufficient for that purpose; but if he selected a route and used it for three years with the acquiescence of Spear, he had no right to change it to another and different location, nor had he any right to make use of his easement more onerous to Spear than it was or would be on the line of the first location."

The court refused to give said instructions simply as asked, but gave it with a qualification or modification, referring to former instructions given, and in effect said to the jury that if the old location was a bad one and the water would not pass freely by that route, and the old flume was found to be insufficient for the purposes of the grant, then

the defendants had the right to make a different structure, and in a place more suitable for the object intended.

"The grant by Spear to Cook was simply a grant of a right of way, and the right to construct a passage to convey water, and any use of the easement for transportation of wood was in excess of the grant, and any change of route or of the form of the flume, not necessary for the mere conveyance of water, was unlawful, and subjected Cook to the action for damages."

And the court refused to so instruct the jury, but gave such instructions with the additions in effect as follows: "That Cook had a right to construct a flume that would carry all the water of the creek, and if the water conveyed was sufficient to carry wood, then Cook had the right to use his flume and the water therein to convey wood, provided he did not thereby injure plaintiff.

Shattuck & Killin, and O. F. Bell, for appellant:

The right of way for conveying the water, granted in general terms, without a specific location in the deed, became fixed and defined when Cook exercised the right by selecting a route and building the flume thereon in 1873, with Spear's assent, and using it for three years with like assent; and that such selection and use operated as an assignment of Cook's right, and must be deemed to be the route intended by the parties to be conveyed by the deed, and the same in legal effect as if it had been fully described in the deed, and any change from that route without Spear's consent is unlawful, and entitles Spear to a recovery for such damages as he proved, which is the purport of instruction 3, asked by plaintiff. (2 Allen, 128.)

A right of way, whether for travel or conveying water, granted without any designation of the place in the deed, becomes located by usage, and being so located it can not afterwards be changed by the grantee. (Same case, and 12 Johns. 221; 3 Mas. 272; 11 Gray, 426, 427; Angel on Watercourses, 557, 558; 71 N. Y. 196; Wash. on Easem. 225; 1 Pick. 486.) The only exception to this general rule is when the first location is upon an insufficient or mistaken

grade, so that no benefit accrues to the grantee. (Wash. on Easem., 55, subd. 20; 4 Vt. R. 199; 49 Barb. 646.)

Dolph, Bronaugh, Dolph & Simon, for respondents:

If the grant had been of the right to construct "a flume," or "an aqueduct" necessary and proper to carry the water of said creek, and one such conduit had been laid which by experience was found to be too small, and to be upon such a grade, and to contain so many sharp angles as to render it incapable of containing and conveying the water of the creek, respondents would even in that case have had the right to alter the size, grade, shape, and location of the flume, so as to enable them to receive and enjoy the benefits granted to them, particularly if they adhered substantially to the route of the old flume, and made only such alterations in size and grade as were essential to the given purpose. And yet the rights of respondents were, by the instructions, virtually limited to the same extent, under the terms of this far more comprehensive conveyance. Grants of this nature are construed as having reference rather to the quantity of water to be taken and used, than to the purpose for which it shall or may be applied; and in these cases, as in others, the rule prevails that the terms of the conveyance are to be construed most favorably for the grantee. (3 Pars. on Cont. 533, 534; Wash. on Easem. 349, 350; *Cromwell v. Selden*, 3 Comst. 255-60; *Olmsted v. Loomis*, 9 N. Y. 426, 427; *Beals v. Stewart*, 6 Lansing, 408; *Van Rensellaer v. Alb. R. R. Co.* 1 Hun. (N. Y.) 507; *Borst v. Empie*, 5 N. Y. 33.)

If the respondents had the right, under the grant to them, to enter upon the premises of appellant and there construct the new flume, as a necessary and proper conduit of the water of the creek, they can not be converted into trespassers for floating wood down their own flume, even though appellant was thereby damaged. The remedy would be by special action on the case. Beside which, the attempt to introduce this new feature into the case by the reply, was a clear departure from the cause of action stated in the complaint, and that portion of the reply should therefore have been stricken out as irrelevant. (11 How. Pr. 36; 4 Wend.

643; 2 Cai. 320; 3 Johns. 367; 5 Duer, 660; 13 How. Pr. 97; 46 Vt. 29; 1 Hill on Torts, 106, 107; *Adams v. Rivers*, 11 Barb. 390; *Allen v. Crofoot*, 5 Wend. 506; *Six Carpenters' Case*, 1 Sm. Lead. Cas. 216; *Van Bruett v. Schenck*, 13 Johns. 414; *Hunnewell v. Hobart*, 42 Me. 565; *Dingly v. Buffum*, 57 Maine, 379.)

By the Court, BOISE, J.:

The defendants justify the trespass complained of under a grant from the plaintiff of an easement or right to use the premises which are the subject of the alleged trespass, for the purpose of conveying the water over the same. It appears from the allegations of the answer that the plaintiff, in August, 1873, conveyed to J. W. Cook, defendant (and grantor of V. Cook), a parcel of land in lots 2 and 3 in section 5; and further, a grant of the water of the east fork of Spear creek, and the right and privilege to divert said water from its natural channel, and convey it upon and across said lots 2 and 3, conveyed to said Cook; and also to enter upon lot 1 in section 6 (plaintiff's), and build, maintain and repair, and keep up and in operation, all dams, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of said Cook. The rights of the parties in this case must depend on the construction of this instrument.

1. The defendant, by this instrument, became the owner of all the water of the east fork of Spear creek.

2. The deed gives them the right to convey the same over said lot 1 to lots 2 and 3, but is silent as to the location of the part or parts of said lots to which the water may be conveyed.

The grant is that the defendants may enter on lot 1 and construct and maintain all dams, ditches, pipes, aqueducts, or flumes necessary and proper for such conveyance. This grant is very broad, and gives the defendants the right to take the water over said lot 1 in several channels or courses, if such should be necessary, in order that they may use it for several distinct purposes on said lots 2 and 3; that is, defendants may use it to supply a cannery on one portion

of said lots, and run one or more mills on other portions. Such is the natural and obvious meaning of the language used, and the instrument is to be construed strictly towards the grantor and to effectuate the object of the grant. (3 Pars. on Cont. 533, 534.) The deed grants the water to defendants to be used on lots 2 and 3, and as the use to which the water is to be applied is not named, the presumption is that it can be used for any purpose the defendants may desire, and at such time in the future as may suit their convenience.

The defendants purchased and owned all the water of Spear creek, and the right to convey it over lot 1 in one or more channels. Suppose in 1873 defendants wished to divert a part of this water to their cannery, and constructed a flume for that purpose, which was sufficient to convey only a part of said water, the whole not being needed for that establishment, they did not thereby lose their right to take the balance of said water when they should need it, either for their cannery or for any other purpose. The purchase was of all the water and the right to convey it over said lot, and the defendants can not be supposed to have located their easement on said lot 1 until they have established channels sufficient to convey the water. If the defendants had constructed one or more passages for the water, which were sufficient for the purpose of conveying it, and had established the location of its entire use, then they might be deemed to have located their easement on this lot, and fixed its limits. But whether or not they had done this, it being a matter in parol, would be a question of fact to be established by evidence. Such being, as we think, the proper construction of this conveyance, we will consider the questions presented by the bill of exceptions, being objections taken to portions of the instruction given by the court to the jury in the trial of this case in the circuit court.

It is claimed that the court erred in instructing the jury that Cook, in constructing his new flume, was "not necessarily confined to the precise location of the old flume in all its parts." It is enough, says the court, "if the location is

substantially the same. If it followed substantially the same route, the fact that it deviates in places from the old line will not necessarily preclude the defendant from exercising his right upon the new line." We think this instruction was proper, for it might be necessary to deviate in order to avoid defects which so far impaired the easement as to render it valueless; and the question whether it did substantially follow the old line was a matter for the jury, and a necessary deviation by the defendant would not be a violation of his easement, provided he had already located and used a definite line.

The next error claimed is to the following instruction: "If, through mistake, he (Cook) so constructed his first ditch that upon experiment it was found not to be large enough to answer the purpose, he will not be precluded from constructing a new flume or ditch of sufficient capacity." We think this construction is correct, for the reasons stated above, because Cook owned all the water, and had a right to a ditch of sufficient capacity to bring it; otherwise, his grant would be in part defeated.

What we have said in reference to the plaintiff's objections to instructions numbers three and five is sufficient to dispose of the objections to instructions six and eight, which involve the same questions. The foregoing are objections made by the plaintiff to the general charge of the court.

The court then gave certain instructions asked for the respondents, which appear in the foregoing statement of the case, to all of which instructions the plaintiff excepted. We think all these instructions correct, and they are in accordance with the views heretofore expressed, which we have already said in construing the conveyance by which respondents claim, and it will not be necessary to repeat these views here, or further consider the questions presented by these instructions.

The plaintiff then asked certain instructions, which were given with certain modifications, which modifications were excepted to. These instructions and modifications are also set out in the foregoing statement of the case. These instructions, except the last, number five, raise no questions differ-

ing materially from those already discussed, and need no further notice. Instruction number five is as follows: "The grant by Spear to Cook was simply a grant of a right of way and the right to construct a passage to convey water, and any use of the easement for the transportation of wood was in excess of the grant; and any change of route, or of the form of the flume, not necessary for the mere conveyance of water, was unlawful, and subjected Cook to the action for damages."

The court refused to so instruct the jury, and gave such instructions with the addition in effect as follows: That Cook had a right to construct a flume that would carry all the water of the creek, and if the water conveyed was sufficient to carry wood, then Cook had the right to use his flume and water therein to convey wood, provided he did not thereby injure the plaintiff.

All the questions presented by the several propositions contained in this instruction, except the right of the respondent to float wood in their flume, have been sufficiently noticed in what we have already said in defining the rights of the respondents under the conveyance by which they justify. The court simply said to the jury that the respondents had a right to float wood in the water conveyed, if they did not thereby injure the plaintiff.

The object of the instruction asked was to have the court say to the jury that the floating of the wood was unlawful, and that the doing of this unlawful act was a trespass, and would entitle plaintiff to nominal damages without the proof of any actual injury. We think the flume and the water was the property of the respondents, and that they might use them in any manner they pleased, if they did not thereby injure the plaintiff, and were only responsible to the plaintiff for actual damages caused to plaintiff by such use, and the question of actual damages caused by floating the wood was properly left to the jury.

We think there were no substantial errors in the instructions of the circuit court, and the judgment will be affirmed.

*THE STATE OF OREGON, RESPONDENT, v. THOMAS DUCKER, APPELLANT.

LARCENY—MONEY PAID BY MISTAKE.—One who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud the owner thereof, is guilty of larceny.

BILL OF EXCEPTIONS—WHEN SILENT, WHAT PRESUMPTIONS ARISE.—Where a bill of exceptions is silent as to whether certain instructions were given which are necessary to sustain the judgment, it must be presumed that they were given, and especially where it appears that other instructions were given which are not specifically set out therein.

APPEAL from Clatsop County.

The appellant was indicted for the crime of larceny, was tried, convicted, and sentenced to three years imprisonment. The facts constituting the alleged larceny are briefly these: The appellant asked one Theodore Bracker to change a ten-dollar gold piece for him. Bracker did so; but by mistake, instead of giving the appellant a ten-dollar roll of silver pieces, gave him a roll consisting of ten twenty-dollar gold pieces, or two hundred dollars in gold, instead of ten dollars in silver. This money the appellant converted to his own use, and refused to make any restitution or give his note therefor, although at the time of discovering the mistake he had reason to know that it belonged to Bracker.

Ball & Gregory, for appellant.

J. F. Caples, District Attorney, and *M. F. Mulkey*, for the state.

By the Court, PRIM, J.:

The indictment charges the appellant with the larceny of ten twenty-dollar gold pieces. At the trial, the court among other things charged the jury that "if the prosecuting witness delivered to the defendant ten twenty-dollar gold pieces under the belief that he was giving him that number of silver pieces, and the defendant so took them sharing the mistake, and if, upon discovering the mistake, the defendant

*See 34 Am. Rep. 590 and note.

knew or had the means of knowing who the owner of the gold pieces was, but he thereupon, nevertheless, converted them to his own use, it was larceny." This instruction is objected to on behalf of the appellant and assigned as error.

This objection, we think, is not well taken, as the instruction contains a correct statement of the case upon the point developed by the evidence in this case. The money in excess of that which the appellant was entitled to receive, was taken without the owner's consent, and that which was thus taken was appropriated to the appellant's use with an intent to cheat and fraudulently to deprive the owner thereof.

These two elements, being both present in this case, are sufficient to constitute the crime of larceny, for it will not do to say that the owner parted with his money voluntarily, and, therefore, there could not have been any unlawful taking. While it may be said that it was the physical act of the owner in handing that which was his to another, yet there was lacking his intellectual and intelligent assent to the transfer, upon which the consent necessarily depended. And so in the case "where money or property is obtained from the owner by another upon some false pretense, for a temporary use only, with the intent to feloniously appropriate it permanently, the taking thereof, though with the owner's consent, is larceny." (*Wolfstein v. The People*, 13 N. Y. Supm. (N. S.) 121; *The People v. McGarren*, 17 Wend. 460; *The People v. Crall*, 1 Denio, 120.)

It is further claimed by counsel for the appellant that the court was asked to charge, on appellant's behalf, as follows:

1. That unless the jury believed from the evidence that defendant intended to convert the money so received by mistake as soon as he discovered this mistake, the subsequent conversion was not larceny.

2. That if at any time after defendant discovered the mistake, and before conversion defendant honestly intended to return the money to Bracker (if Bracker was the person he received it of), then any subsequent conversion would not constitute larceny.

3. That the *animus furandi* must have existed as soon as

defendant discovered the mistake, in order to constitute larceny.

It is claimed that these instructions were refused, and that the court erred in so refusing. The bill of exceptions being silent upon this matter, it must be presumed that they were given. The bill of exceptions says the instructions first complained of and heretofore referred to in this opinion, among others, were given without specifying what they were.

There being no substantial error in the record, the judgment of the court below is affirmed.

THE STATE OF OREGON, EX REL. J. F. CAPLES, DISTRICT ATTORNEY OF THE FOURTH JUDICIAL DISTRICT OF SAID STATE, RESPONDENT. *v.* THE HIBERNIAN SAVINGS AND LOAN ASSOCIATION, APPELLANT.

CONSTITUTIONAL PROVISION CONSTRUED—BANKS MAY BE INCORPORATED.—Section I, article II, of the constitution of Oregon does not prohibit the establishment or incorporation of banks, excepting only banks and moneyed institutions with the privilege of making, issuing, and putting in circulation bills, checks, certificates, promissory notes, etc., to circulate as money.

APPEAL from Multnomah County.

This is an action brought by the district attorney of the fourth judicial district to test the validity of the appellant's corporate existence under the constitution of the state. The complaint is as follows:

Now comes the above-named plaintiff, on leave heretofore, for that purpose, granted by this honorable court, and for cause of complaint against said defendant alleges: That defendant is a corporation duly incorporated under and by virtue of the general incorporation laws of the state of Oregon, on the fifteenth day of November, 1879, having its principal office and place of business in the city of Portland, in Multnomah county and state aforesaid; that said corporation was incorporated and organized for the object and purpose of receiving deposits, making loans, and carry-

ing on a banking business at Portland, Oregon. That since the incorporation of said defendant, said defendant, in said city of Portland and state aforesaid, has received deposits, made loans, and transacted a banking business, and by so doing has exercised franchises and privileges not conferred upon it by law, and not permitted by the constitution of said state of Oregon.

Wherefore plaintiff prays judgment that the said defendant be excluded from all corporate rights and privileges and franchises, etc.

The appellant, answering, alleges that it is now receiving deposits, making loans, and exercising such rights, franchises, and privileges, as are conferred upon it by law, by virtue of its articles of incorporation, a copy of which is hereto attached, and that it has exercised no other rights, privileges, or franchises.

ARTICLES OF INCORPORATION OF THE HIBERNIAN SAVINGS AND LOAN ASSOCIATION.

Know all men by these presents that we, whose names are hereto signed, desiring to incorporate ourselves into a private incorporation for the purposes and objects hereinafter mentioned, under the laws of the state of Oregon, and in pursuance thereof, do hereby declare, publish, and agree to the following articles of incorporation:

Article 1. The name by which this corporation shall be known is the Hibernian Savings and Loan Association.

Art. 2. The enterprise, business, and pursuits of this corporation, and in which it shall engage, is to provide a safe and profitable place of deposit where persons dealing with the corporation may deposit their money, to be retained, loaned out, invested, and returned, together with such interest as the corporation may choose or agree to pay for the use thereof, and in the manner and according to the custom of other savings and loan institutions, and to this end this corporation shall have power to make such rules, regulations, stipulations, and agreements with its depositors and persons dealing with the corporation in its corporate capacity as may be convenient or desirable, and not in conflict

with the laws of the state of Oregon. The corporation shall have full power to loan money on such security as may be approved by a board of directors, to be elected or appointed by the stockholders of the corporation, and do any and all things necessary or convenient to secure depositors such profits and increase upon their deposits as may be legitimate and proper for the corporation to pay, and in carrying out the true objects and interests of these articles of incorporation, and for the successful accomplishment of the purposes of the corporation. This corporation shall have power and authority to purchase, lease, rent, and hold such real estate as may be necessary or convenient in the transaction of its said business. The corporation shall never have the power, privilege, or authority to make, issue, or put into circulation any bill, check, certificate, promissory note, or other paper, or the paper of any bank, company, or person to circulate as money.

Art. 3. The principal office and place of business of this corporation shall be at Portland, in the county of Multnomah, and state of Oregon.

Art. 4. The amount of the capital stock of this corporation shall be one hundred thousand dollars.

Art. 5. The amount of each share of such capital stock shall be one hundred dollars.

Art. 6. The duration of this corporation shall be perpetual.

The following facts were agreed upon by the parties:

1. That defendant is a private incorporation, duly incorporated under and by virtue of the general laws of the state of Oregon, on the fifteenth day of November, 1879, having its principal office and place of business at Portland, Multnomah county, state of Oregon.

2. That "Exhibit A" of defendant's answer is a true copy of defendant's articles of incorporation.

3. That defendant is exercising no other powers, privileges, or franchises than those set out in article 2 of said articles of incorporation.

4. That defendant had elected a board of directors, and in every manner complied with the statute, in order to vest in them whatever powers they may legally exercise.

5. That defendant is now receiving deposits from persons choosing to deposit their money with defendant, and is paying interest to said depositors on said deposits, and is loaning such deposits for the benefit of said depositors and of the corporation, and has an office in said city of Portland for the transaction of said business."

Dolph, Bronaugh, Dolph & Simon, and Stott & Gearin, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for respondent.

By the Court, KELLY, C. J.:

The question presented for our consideration involves the construction of section 1, article 2, of the constitution, which is as follows: "The legislative assembly shall not have the power to establish or incorporate any bank, or banking company, or moneyed institution whatever; nor shall any bank, company, or institution exist in the state with the privilege of making, issuing, or putting into circulation any bill, check, certificate, promissory note, or other paper, or the paper of any bank, company, or person, to circulate as money."

It is claimed by the respondent that the first clause of this section prohibits the legislative assembly from incorporating or from authorizing the incorporation of any bank or moneyed institution whatever; and that under the second clause, all banks, companies, and institutions are forbidden to exist in the state, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory note, etc., to circulate as money. In other words, it is claimed that this section of the constitution contains two distinct propositions, independent of each other. That, we hold, is not the proper construction to be placed upon it, nor was it so intended by the convention which framed the constitution. As a matter of history, it is well known that during the whole time of the territorial government, the currency consisted of gold and silver only; and that bank notes were unknown, and never circulated among the

people as money. The precious metals were then in great abundance here, and in the adjoining state of California. They were the production of our own coast, and the great source of its wealth, and very naturally the people of Oregon preferred that kind of money which then commanded the attention of the civilized world. They, moreover, as naturally distrusted paper money, with which they were then unacquainted, and to which they were unaccustomed. Many of the members of the constitutional convention, too, were not unfamiliar with banking operations, in the states where they lived before coming to Oregon. They had known or heard of repeated failures of banks to redeem the notes which they had put in circulation, and the losses and consequent suffering which those failures had caused to the communities where the banks existed. And it was to prevent a recurrence of these remembered evils that the clause in question was inserted in the constitution. The convention did not intend to exclude banks and moneyed institutions from the state, but to prohibit them from issuing bank notes to circulate as money. It is hardly to be supposed that the members of that body did not know that banks of deposit and discount, and banks of exchange, were necessary to properly transact business in every commercial state; or that they were ignorant of the benefits which savings banks, properly managed and conducted, are to every civilized community. In order to arrive at a correct understanding of what the convention intended by placing that section in the constitution, we have examined its journal and proceedings, and they only tend to confirm the opinions before expressed.

As originally reported by the committee on corporations and internal improvements, the first section of article 11 reads as follows:

"Sec. 1. The general assembly shall not have the power to establish or incorporate any bank or banking company or moneyed institution whatever, with the privilege of making, issuing, or putting in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the

paper of any bank, company, or person, to circulate as money."

In the debate which took place upon this section, it was supposed that as it was reported by the committee on corporations and internal improvements, the section would not prohibit corporations organized in other states from coming to Oregon and establishing branch offices and putting paper money in circulation. To prevent this, Mr. Williams offered the following amendment: Insert in sec. 1, second line, after "*whatever*," "nor shall any bank, company, or institution exist in this state," which amendment was adopted. Excepting striking out the word *general* and inserting the word *legislative*, this was the only amendment made to the committee's report. And all that was intended by the convention in adopting the amendment was to place corporations from other states under the same restrictions as those incorporated in this state. All alike were to be prohibited from making, issuing, or putting bank notes in circulation as money.

Excepting that the amendments adopted by the convention are not italicized, the engrossed copy of article 1, sec. 11, is as follows:

"Section 1. The legislative assembly shall not have the power to establish or incorporate any bank or banking company or moneyed institution whatever, *nor shall any bank, company, or institution exist in the state* with the privilege of making, issuing, or putting in circulation any bill, check, certificate, promissory note, or other paper, of any bank, company, or person to circulate as money."

The section, as engrossed, is without any punctuation whatever. We are, therefore, well satisfied that the convention did not intend to separate that part of the section which preceded the amendment from the context which followed the amendment. It follows from this that the semicolon, placed immediately after the word "*whatever*" in the printed constitution, was a clerical mistake, and that it was not entitled to have the force and effect claimed for it by the respondent.

Another thing we must take into consideration in the con-

struction of this section. If it be construed as contended for by the respondents, then it presents this singular anomaly, that banking privileges have been extended to the citizens of other states and the subjects of foreign nations, which have been denied to our own people. They are permitted to establish banking corporations in Oregon, having all the rights and privileges usually exercised by banks, excepting only those of making and issuing bank bills and notes to circulate as money. If conceded to them, why should these privileges be withheld from citizens of this state? Such, we again say, was not the intention of the framers of the constitution.

The judgment of the court below is reversed, and judgment will be entered in favor of the appellant on the statement of facts agreed upon by the parties.

JOHN W. JACKSON, APPELLANT, v. LAURA JACKSON, RESPONDENT.

CUSTODY OF MINOR CHILD, UNDER DECREE OF DIVORCE.—In a suit to dissolve the marriage contract by a husband against his wife, where the court granted a divorce on account of the adultery of the wife, and also decreed that the custody of an only child of the parties, a boy between three and four years of age, should be given to its maternal grandfather, with whom the divorced wife resided, *held*, that this was erroneous, and that the father of the child, having the means to provide for its maintenance and support, and being otherwise a proper person to care for it, and being the party not in fault in the divorce suit, was entitled to the care and custody of the child in preference to its grandfather.

APPEAL from Clackamas County.

This is a suit by the appellant to obtain a divorce from his wife on account of adultery committed by her, and for the custody of Gilbert Roy Jackson, the minor son of the parties, four years of age. The circuit court granted the divorce, but awarded the care and custody of the child to Harrison Ogle, its maternal grandfather, with whom the respondent was living before and since the trial. From this part of the decree the appeal is taken.

Septimus Huelat, for appellant.

Johnson & McCown, for respondent.

By the Court, KELLY, C. J.:

By the common law, a father has the paramount right to the care and custody of his minor children, unless it be shown that he is a man of grossly immoral principles or habits, or that he has not the ability to provide for them, or that they have been ill-used by him. (*People ex rel. Nickerson*, 19 Wend, 16; *People ex rel. Olmstead v. Olmstead*, 27 Barb. 9.) The statutes of this state somewhat modify the doctrines of the common law, and whenever a marriage is declared to be dissolved, the court has power to decree as follows: "For the future care and custody of the minor children of the marriage as it may deem just and proper, having due regard to the age and sex of such children, and unless manifestly improper, giving the preference to the party not in fault. (Civ. Code, sec. 497, subd. 1, p, 211.)

It becomes necessary, therefore, to examine the evidence in the case in order to ascertain the character, standing, and fitness of the parties, and their ability respectively to provide for the future maintenance and education of the child. It appears by the testimony of many respectable witnesses, who have known the appellant nearly all his life, that he has ever maintained the character of an honest, industrious, and sober man, and was a kind husband and father to his wife and child while they lived with him. It further appears that by his industry and economy he had accumulated considerable property as a farmer and stock raiser, valued at four thousand or five thousand dollars, and that he is quite able and willing to support and educate his child.

On the other side, it appears from the evidence on file in the case, that the respondent, without any cause, deserted her husband in Grant county under the pretense of going to her parents' residence in Clackamas county. That instead of going there, she went off with her paramour to British Columbia, and lived with him, passing as his wife under an assumed name. That she was afterwards a wit-

ness in her own behalf on the proceedings to obtain a divorce, when she denied under oath that she was guilty of any act of adultery, which we are constrained to say was far from the truth, if many other respectable witnesses are to be believed. It further appears that the respondent is now living with her father, and that she has no property of any considerable value, with which she can support herself and her child.

The statute before referred to, requires the court, in cases of divorce, to give the care and custody of minor children to the party not in fault, unless otherwise manifestly improper. And observing this rule laid down to govern the courts, we think the child in this case should be placed under its father's care. It is now within a few days of four years of age. Its father is an industrious, sober, and competent person to take charge of it, and has the means to provide for its education and welfare. He was not the party in fault in the divorce proceedings, and we know of no manifest impropriety in giving the care and custody of the child to him. On the other hand, its mother has not shown that she possesses a good moral character, so far as chastity and truth are concerned, and she has not the means to provide for and educate the child, and she was the party in fault in the divorce case. It is true the decree of the court was not to give the care and custody of the child to the respondent, but to her father. This, however, is virtually placing it under her control, as she also resides with him. As between the father and frandfather of a child, the former certainly has the better right to its care and custody, unless he is manifestly an improper person to take charge of it, which does not appear to be so in this case.

The decree of the circuit court is, therefore, reversed, so far as the same relates to the custody of the child. And it is ordered that the appellant, John W. Jackson, shall have the care and custody of the said minor child, Gilbert Roy Jackson, until the further order of the circuit court for Clackamas county.

R. WILLIAMS, APPELLANT, v. H. ACKERMAN, RESPONDENT.

PAROL LEASE FOR MORE THAN ONE YEAR.—Where A. leases of W. a store under a verbal lease for three years, and enters into possession and pays rent, such tenancy becomes a tenancy from year to year, and can only be determined by notice from one party to the other.

APPEAL from Multnomah County.

The respondent (Ackerman) occupied the north half of lot number two in block number one, Portland, under a parol lease from appellant Williams, for the term of three years. The original lease was made December 1, 1876, with the firm of Ackerman & Co. Respondent was the successor of the said firm, occupying the premises under the same lease from January 1, 1877. A written lease had been prepared and presented to and retained by the lessees, but never executed, though they took possession by virtue thereof. Respondent so occupied said premises until February 6, 1878, with the consent of appellant, and paid appellant the rent up to that time. On that day respondent abandoned the premises and sent the key to appellant, who refused to receive it, and it remained in possession of respondent until the twenty-second day of March, 1878, when appellant proposed to receive the premises from that day, and the respondent, without remark, delivered the key to appellant. The monthly rental was one hundred dollars. No notice, either verbal or written, had been given by either party to the other. The action was commenced by appellant in the county court for the rent accruing from February 6 to March 22, in which court the appellant recovered judgment for the sum of one hundred and fifty-eight dollars and thirty-three cents.

The respondent appealed from this judgment to the circuit court. The latter court, the judge having heard the case upon a written stipulation and without the intervention of a jury, found for respondent. From that decision this appeal is taken.

Claude Thayer, for appellant.

Whalley & Fechheimer, H. Ach, and James Gleason, for respondent.

By the Court, BOISE, J.:

From this statement of facts it appears that Ackerman & Co. entered the premises in question under a parol agreement to lease the same for three years, and being so in possession delivered the possession to the defendant, who became their successor under the same right. We think that under the authority of *Garret v. Clark*, this became a tenancy from year to year, and could only be determined by notice by one party to the other. The rule is fully stated in that case, and we feel constrained to adhere to it as settling an important principle concerning such tenures and we are not at liberty to change this rule at this time unless we should find very cogent reasons for so doing, and we think no such reasons exist. We therefore refer to the opinion of Judge Shattuck, in that case, for a full statement of the reasons on which the rule was established. (5 Or. 64.)

The judgment of the circuit court will be reversed and judgment given for the plaintiff on this agreed statement of facts.

J. F. HENDRIX, RESPONDENT, *v.* HENRIETTA B. GORE, JAMES GORE, AND PHILIP GRIGGSBY, APPELLANTS.

A MORTGAGE TO SECURE FUTURE ADVANCES IS VALID.—A note and mortgage given for a greater sum than is due by the mortgagor, to secure both a present indebtedness and future advances, is valid to secure the amount due at its date as well as future advances actually made in pursuance of a parol agreement entered into when it was given, although the mortgage does not set forth the real character of the transaction.

IDEM—PLEADING, WHAT ALLEGATION OF PAYMENT SUFFICIENT.—Where a defendant, in his answer, in a suit to foreclose a mortgage, alleged that he had fully paid it, he was entitled to prove on the trial that the plaintiff received money at different times, to be applied as payment on the mortgage, although he had not pleaded such payments as a counter-claim.

IDEM—PAYMENTS ON MORTGAGE NEED NOT BE PLEADED ON FORECLOSURE. —A payment of money made on account of a mortgage, is not a cause of suit, which must be pleaded by the defendant as a counterclaim to entitle him to prove such payment in a suit to foreclose the mortgage.

APPEAL from Linn County. The facts are stated in the opinion.

Humphrey & Hewitt, Bonham & Ramsey, for appellants.

E. N. Tandy, John Burnett, R. S. Strahan, for respondent.

By the Court, KELLY, C. J.:

In the early part of 1871, the appellants, who are husband and wife, erected a building for a hotel on two lots owned by the appellant, Henrietta B. Gore. In building and furnishing it they contracted debts with different persons, which they were unable to pay. Among these was one to Driggs and Carter, for two hundred and sixty-one dollars, for lumber and material used in the construction of the house, and another to one Farrier, for about one hundred dollars, for furniture put into it. Needing more money to furnish it, the appellants borrowed three hundred dollars from the respondent about June 27, 1871, and on that day gave their promissory note to him for one thousand dollars, payable one year after date, and to secure its payment, on the same day executed a mortgage on the lots and house belonging to the wife. It is admitted by the respondent, that at the time appellants gave the note, they did not owe him a greater amount than three hundred and ninety-seven dollars and ninety-five cents, including the money loaned by him. But he alleges that the note and mortgage were given to secure not only this debt, but also other sums of money then owing by the appellants, and which the respondent then assumed to pay, particularly the amounts which they owed to Driggs and Carter, and to Farrier. Respondent further alleges that at the time the note was given, it was the understanding of the parties that whenever the amount then due to respondent and all future advances, and interest thereon at the rate of one per cent. a month,

should be fully paid, then the note was to be delivered to appellants, and the mortgage was to be satisfied.

On the other hand, it is contended by the appellants that the note and mortgage were given to secure the payment of the three hundred dollars then loaned by the respondent, and for the further purpose of keeping off their creditors until such time as they could pay them. We think the evidence tends more strongly to support the position contended for by the respondent. The facts that after two payments, amounting to two hundred and ninety dollars, had been made on the note, it was agreed by the parties that the rents due by Hendrix and Baker, on the lease executed on the twenty-sixth of January, 1876, for two years, were to be applied to the payment of the note and mortgage, as testified to by R. F. Baker, a disinterested witness, shows that the amount was for more than three hundred dollars. Moreover, it will not be presumed by the court that the note and mortgage were given for the unlawful purpose of delaying creditors of the appellants in collecting their demands. We think, therefore, that the weight of testimony substantially establishes the fact that the note and mortgage were given by the appellants, not only to secure the payment of the demands then owing to the respondent, but also to secure future advances to be made by him to pay off certain debts then due by them to other creditors.

But the appellants contend that inasmuch as there is no reference in the mortgage to any future advances, to be made by the respondent, no payments made by him to such creditors can be tacked to or included in such mortgage, and in support of this position, we are referred to the cases of *Divver v. McLaughlin* (2 Wend. 596), and *Walker v. Snediker*, (1 Hoffman Ch. 144.) The vice-chancellor, commenting on these decisions, in the case of *Craig v. Tappan* (2 Sandf. Ch. 596), says of the case in 2 Wend. 596, "that the absence of a statement in the mortgage that it was also to secure future advances, was commented upon by the chief justice with many other circumstances, but he does not say that this omission is of itself essential; and there were other abundant evidences of fraud in that case

upon which to base the decision." In the case cited from 1 Hoff. Ch. 144, the assistant vice-chancellor says: "But the better opinion, if not the decided law, is, that the mortgage must express the object. It is certain that it can not be rendered available for future liabilities by a subsequent parol agreement." It will be perceived that he was referring to a parol agreement for future advances, made after, and not at the same time with the mortgage, as in the case now under consideration. After the decisions which have been referred to by the appellants' counsel were made, the authorities were all reviewed by the vice-chancellor in the case of *Craig v. Tappan*, 2 Sandf. Ch. 85, where he held "that a mortgage intended to secure future advances, need not express that object in the mortgage itself, but when it is not stated the mortgage will be liable to suspicion, and the holder put upon stricter proof of the payment of the consideration; but its omission will not render the security invalid." The same principle was afterwards declared by the supreme court of Illinois, in *Collins v. Carlisle*, 13 Ill. 254, and still later by the supreme court of California in *Tully v. Harloe*, 35 Cal. 302.

The true principle to be deduced from all these cases seems to be, that where a mortgage is given in good faith to secure a present indebtedness and future advances, whether the object be expressed in the mortgage or not, it is valid to the extent of the lien therein expressly created. It is always better, however, that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is engendered by misrepresentation, but disarmed by a statement of the truth. (*Shirras v. Caig*, 7 Cranch, 34.) The appellants must therefore be held liable on the note and mortgage, for the amount which they actually owed to the respondent when the mortgage was given, and also for the amount paid by him to Driggs and Carter; and such other small sums as he agreed to and actually did pay for the appellants, together with interest thereon since the time of payment. The rate of interest which was to be paid on these several sums is a matter of dispute between the parties, and as it is not specified in the

note or mortgage, only the legal rate of interest will be allowed.

The respondent claims a credit for one hundred and twelve dollars and eighty-two cents, being a debt due by appellants to Wm. Farrier, which respondent assumed to pay. It appears that the promise to pay was not in writing, and an agreement to answer for the debt, default, or miscarriage of another, unless in writing, is void. It would, moreover, be unjust to allow him credit for an amount which he promised to pay, but which promise he failed to fulfill, and that, too, while James Gore is still liable for the same debt. This claim will be disallowed, except the small sums paid thereon by the respondent. So, also, the claim of seventy-five dollars balance due on the wagon and harness, will be disallowed, because it does not appear that it was a debt secured by the mortgage. The appellants in their answer deny that there is anything due on the mortgage, and allege that it has been fully paid. They now claim, that in addition to the two payments of two hundred and forty dollars and fifty dollars, admitted by the respondent, they should also be allowed a credit for the rents due on a certain lease of the mortgaged premises to Hendrix and Baker, made on the twenty-sixth day of January, 1876. It appears from the evidence of R. F. Baker, one of the lessees, that it was the agreement and understanding of the parties to the lease that the rents, as they became due, at the end of each month, were to be applied to the payment and discharge of the mortgage debt, and that he paid his share of the rent to the respondent accordingly. But it is objected by the respondent that the amount due for rent on the lease should not be considered or allowed, because it is not between the same parties, and there is no counter claim pleaded in either answer. We think the appellants are entitled to a credit for the rents paid by Hendrix and Baker, the lessees to the respondent, and which he received according to the understanding and agreement of the parties to the lease, to be applied as payments on the mortgage debt. That it was agreed that the rents should be so applied, is clearly proven by R. F. Baker, and is not denied by the respondent. And the objection

that these monthly rents so received by the respondent from the lessees should not be allowed as credits in favor of the appellants because they have not been pleaded as a counter claim, is untenable. A payment made on a note or other evidence of indebtedness is not a cause of action or of suit which may be pleaded as a counter claim. It is rather the extinguishment of a cause of action or suit by the adverse party, to the extent of the payment so made; and evidence of such payment may be offered on the trial under the general allegation, that the demand of such adverse party has been paid. We therefore hold that the appellants are entitled to a credit for the rents of the mortgaged premises under the lease of the twenty-sixth of January, 1876, "less the cost of the improvements made thereon which were a permanent part of the house, and actually necessary for the convenience, profit, and protection of the premises," as specified in the lease. The rents received by the respondent from the twenty-first of February, 1876, to the twenty-first of February, 1878, amounted to six hundred dollars, from which should be deducted two hundred and twenty-nine dollars and fifty-six cents for permanent improvements on the mortgaged premises; one hundred and eleven dollars and fifty cents for insurance paid by the lessees, and thirty-three dollars for rent paid to appellant, James Gore; in all, three hundred and seventy-four dollars and sixteen cents, leaving two hundred and twenty-five dollars and ninety-four cents, and interest thereon to be applied in part payment of the mortgage.

A statement of the accounts between the parties in accordance with the views herein expressed, is annexed to this opinion, by which it appears that there is now due upon the mortgage the sum of four hundred and eighty-nine dollars and twenty-four cents, and a decree will be entered accordingly for that sum.

[The statement of accounts referred to in the opinion is not necessary to an understanding of the points decided. It is therefore omitted.—REPORTER.]

GEORGE ALLEN, APPELLANT, v. EDWARD HIRSCH, STATE TREASURER, RESPONDENT.

CONSTITUTIONAL ACT—WAGON ROAD ACT NOT LOCAL OR SPECIAL.—The acts entitled "An act to provide for the construction of a road in Grant and Baker counties, to be known as the Eastern Oregon and Winnemucca Road," approved October 19, 1872, and "An Act to provide for the construction of a wagon road up the south bank of the Columbia river from near the mouth of Sandy, in Multnomah county, to the Dalles in Wasco county," approved October 23, 1872, are not in conflict with article 4, sec. 23, subd. 7, of the constitution, which declares that "the legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say, * * * for laying, opening, and working on highways, and for the election or appointment of supervisors." The said acts of the legislative assembly are public laws, and not special or local laws, within the meaning of that clause in the constitution.

APPEAL from Marion County.

The case is mandamus to compel the payment of certain warrants drawn by the secretary of state upon the state treasury. The appellant filed in the circuit court his petition for a writ of mandamus, in which he referred to the acts of the legislative assembly of October 23, 1872, and October 21, 1876, providing for the issuing of warrants on account of the road commonly known as "The Dalles and Sandy Wagon Road, and to the act of October 19, 1872, providing for issuing warrants on account of the "Eastern Oregon and Winnemucca Road;" and recites so much of each of said acts as relates to the appropriation of moneys to meet the warrants, the funds out of which such warrants should be payable, and the proceedings necessary to authorize the secretary of state to draw the warrants. The petition then states particularly and at length such facts as show that on the twenty-fourth day of May, 1875, a warrant was drawn in accordance with the provisions of said act of October 23, 1872, by the secretary of state, for one thousand dollars, payable to the order of the chairman of the board of commissioners created by said last named act, out of the funds applicable thereto under said act; that on said twenty-fourth day of May, 1875, said warrant was presented to the state treasurer for payment, but was not paid for want of

funds in the hands of the treasurer applicable thereto; that since that time, and prior to the twenty-seventh day of August, 1879, the said warrant had been indorsed by the said chairman of the board of commissioners, and the petitioner had become the holder thereof; that before said twenty-seventh day of August, 1879, sufficient moneys belonging to said funds had been received into the state treasury to pay said warrant; and that on that day the petitioner presented said warrant to the defendant, who then was and still is state treasurer, and demanded payment thereof, but payment was refused. This is the first count of the petition.

The petition then proceeds, with the same particularity, to set forth the drawing of a warrant by the secretary of state, on the thirteenth day of September, 1877, in accordance with said act of October 21, 1876, for one thousand dollars; the presentation of that warrant to the state treasurer on the day it was drawn; its non-payment for want of applicable funds; the subsequent transfer of the warrant to the petition; the receipt into the treasury of funds sufficient to pay it; the presentation and demand of payment on the twenty-seventh day of August, 1879; and the refusal of defendant, as treasurer, to pay it.

In the same manner the petition states the drawing of a warrant, by the secretary of state, on the fifteenth day of May, 1873, upon the treasury, in accordance with the said act of October 19, 1872, for one thousand nine hundred and ninety-six dollars; its presentation to the treasurer on the day it was drawn, and its non-payment for want of applicable funds; its subsequent transfer to the petitioner; that there was on the thirty-first day of October, 1879, sufficient funds in the treasury applicable to its payment; and that on that day it was presented by petitioner to the defendant as treasurer, and payment was demanded and refused.

Upon these allegations the petitioner prayed writ of mandamus to compel the defendant, as treasurer, to pay said several warrants, and the accrued interest thereon. The alternative writ was issued, commanding the defendant to pay the warrants, or show cause why he had not done so. On the return day, the defendant demurred to the petition,

on the ground of insufficiency; and the circuit judge, without argument, and upon the understanding that the case was to go to the supreme court to test the constitutionality of the several acts of the legislative assembly, under which the warrants were drawn, made a *pro forma* decision sustaining the demurrer and dismissing the cause at petitioner's cost. The petitioner appeals to this court.

W. Lair Hill, for appellant.

Subdivision 7 of section 23 of article 4 of the constitution of the state provides as follows: "The legislative assembly shall not pass special or local laws in any of the following enumerated cases, viz: * * * For laying, opening, and working on highways, and for the election or appointment of supervisors." It is contended that the several acts referred to in the petition are special or local laws, and by reason of their subject-matter are prohibited by the constitutional provision just quoted; and that therefore the warrants drawn under those acts are void. On the surface of the case it is seen, that in order to reach a decision as to the right of the petitioner to the relief demanded, the court must consider and pass upon the questions:

1. Are the acts in question special or local laws within the meaning of the constitution?

2. If these acts are special or local laws, are the warrants drawn in pursuance of them void?

Are the acts in question special or local laws within the meaning of the constitution? This is primarily a question of definitions. It must first be ascertained what is a special or local law; in other words, what are the definitions of the terms special and local, as used in the constitution; and then it must be determined by examination of the acts in question, whether they fall within either of these definitions. It will hardly be contended that these acts fall within the definition of local laws, as there can hardly be any difference of opinion among lawyers upon that subject. If, however, it should be contended on the part of the respondent, that they are local laws, the error of that position will be per-

ceived upon a moment's consideration of the matter. A local law is a law which affects only the inhabitants of a particular district. It is operative generally within certain geographical boundaries, but inoperative outside of those boundaries. It is general in character, but local in its application. (1 Bl. Com. 74; Bouv. Dict., *in verb.* "Custom;" *People v. Supervisors of Chautauqua*, 43 N. Y. 10.) Neither of the three acts under which these warrants were drawn comes within this definition. In *People v. Supervisors*, just cited, the fact that the money to be raised was to be used in paying for a local public work, was held not to make the law local, and that is the only feature of the acts now under examination which even suggests the idea of their being local laws.

Are these acts special laws within the meaning of the constitution? The answer to this question depends on the question, What is a special law, as the term is employed in the constitution? And unless, by the constitution itself, or by the historical circumstances under which it was adopted, it is apparent that the word special, as applied to a law, was intended by the framers of that instrument to have a meaning different from its technical or common law meaning, that technical or common law definition must be taken as the true meaning in the constitution. This is a settled canon of constitutional interpretation. (Cooley on Const. Lim. 59-61.) Applying this rule of interpretation, what is meant by "special law" in the constitution? It had, and still has, a well-known common law meaning. When applied to statutes, the word special is a technical word, and is synonymous with "private," which was formerly the more frequent term. A special or private statute is a statute which affects only certain specified individuals or private concerns. It is the opposite of a public or general law, which applies to all persons who may happen to be so situated as to fall within the general purview of operation. (1 Bl. Com. 85; Bouv. Dict., *in verb.* "Statute;" *Calking v. Baldwin*, 4 Wend. 668.) Examine the acts in question, bearing in mind this common law definition of a special law. The act of October 23, 1872, condensed into

a few words, was simply this: It created a commission to survey, and lay out, and construct a public road from the Sandy river, in Multnomah county, to Dalles City, in Wasco county; appropriated for the construction of the road, fifty thousand dollars out of the funds arising from the five per centum of the sales of public lands, and out of the funds arising from the sale of swamp and overflowed lands; and prescribed in detail the duties of the commissioners in carrying on the work. That is the act under which the first of the warrants described in the petition was drawn.

The act of October 21, 1876, under which was drawn the second of the warrants described in the petition, is merely an act changing, in some respects, the plan of carrying forward the work provided for by the former act, and making a further appropriation for that purpose. The act of October 19, 1872, under which was drawn the third of the warrants described in the petition, is in all respects, so far as concerns the question of whether it is a general or a special law, exactly similar to that of October 23, 1872. Neither of these confers any rights or privileges upon particular individuals. They are acts for a public purpose, namely, the making of certain public internal improvements. Their object is to promote and facilitate public travel and transportation, and their method is that which is necessarily adopted in the execution of all public works, that is, by the employment of public agents. They in no wise differ in this respect from the acts creating commissions to build the state house, to protect the rights of the state and people in the canal at Oregon City—to perform services in connection with any public improvement. Whatever may be the title conferred on the agent by the statute, the principle on which his relations to the public are to be determined is always the same. Such laws, it is plain, do not answer the common law description of special or private statutes. This proposition, so plain to reason, is equally supported by authority. (*Calking v. Baldwin, ubi sup.*) An almost unlimited array of decisions to the same effect might be cited, and none, it is believed, can be produced, holding the contrary.

These acts being shown to be neither special nor local, as those terms were defined by the common law, they are not such laws as the constitutional provision was intended to prohibit, unless it appears from the constitution itself, or from its historical surroundings, that the convention by whom the constitution was framed, were induced to employ the well-known terms of law in a sense different from their well-known legal meaning. No other deliberative body that ever sat in Oregon had among its members so many distinguished lawyers, as had that convention. In its roll of membership appear the names of no less than seven who have been supreme judges, including all the judges of the supreme court at this time. It was presided over by one whose reputation as a jurist is coextensive with the nation. Another of its members has since been attorney-general of the United States. And besides these, there were many lawyers whose achievements at the bar form a part of the public history of the country. One does not readily conclude that a convention controlled by men of such character, in framing an instrument which, by its nature, would be expected to be written in the peculiar language of the law, which was to be interpreted and administered by the courts of law, and which was to control all future legislation of the state, would employ the technical terms peculiar to their art and profession, in a sense different from their technical and legal sense, and then furnish no key or clue by which their intended sense could be discovered. But highly improbable as such a conclusion would be, it must be adopted before the court can hold these acts to be either special or local within the meaning of the constitution. If the views above expressed are correct, they dispose of the case by establishing the validity of the warrants in question.

But suppose the acts under which the warrants were drawn should be held to be special laws, so far as they provide for the laying, opening, and working the roads therein specified, does it follow that the warrants are void? I submit that it does not. Under these acts the warrants were drawn and went into circulation. The state, by its agents, received the money for them and used it in the internal improvements

provided for in the acts. Can the state now, after having gotten and used the consideration for which the warrants were issued, repudiate the debt and protect itself in so doing by pleading that the law made by itself and through which it was enabled to obtain the money and carry on its public works, is void? Certainly in morals it is estopped to do so, and it ought to be estopped in law. It seems to me this case is analogous, in respect of the point now under consideration, to that of one arising under a contract which is void for non-compliance with mere statutory requirements in its execution. So long as the contract remains wholly executory, either contracting party may repudiate it; but when one has performed it on his part, the other, having received the benefit of it, must make him whole. It will not be disputed that if one, having received value upon a void contract, gives his note, or bill for the payment, it is too late for him to question in a court the validity of the transaction.

If to this the answer be made that the principle on which the argument is founded applies only to cases of contracts which are void by reason of some defect in the mode of their formation, and not to those which are absolutely unlawful, I reply that while at first presentation there appears to be some force in the suggestion, it will not bear the test of logical scrutiny. Under the constitution, statutes may be passed providing for laying, opening and working highways, and the defect alleged against the acts in question is not that they are upon subjects on which the legislature did not prohibited from legislating, but that the legislature did not proceed in such a manner as to make the acts valid. The defect complained of is a defect of manner or mode simply, and the consequence contended for is not such as usually follows, as the penalty of violated law, but simply that the acts are invalid. So the analogy to the case suggested, a case under the statute of frauds, for example, is perfect. And by following this analogy the administration of justice is kept in the line of natural equity and good conscience, while by disregarding it, natural justice is trodden down, the state becomes a repudiator of its honestly-contracted obligations, and in the end suffers ten-fold more in the loss

of its credit than it can possibly gain from the ill-gotten exemption from its debts.

There is another point that deserves consideration as bearing on the question of the validity of the acts authorizing the first and second warrants described in the petition. These acts provide that the warrants shall be payable out of the funds arising from the five per centum of the net proceeds of sales by congress of public lands in the state, as well as out of the funds arising from the sale of swamp and overflowed lands. In the constitution (article 8, sec. 2), provision was made for diverting this fund to the fund for public education. But congress, in the act admitting the state into the Union, submitted six propositions to the "people of Oregon," each of which, if effectual, would modify, extend, or limit the constitution in some particular. One of these propositions was, that the five per centum fund above referred to should be "paid to the said state for the purpose of making public roads and internal improvements, as the legislature shall direct." And this proposition, as well as the others, was by the same act of congress made to depend on the express condition that the people of Oregon should "provide by ordinance, irrevocable without the consent of the United States," that the state should never interfere with the primary disposal of the soil, etc. The people of Oregon, by their legislature, thereupon, formally and solemnly, accepted all the propositions and passed the required ordinance, declaring it to be irrevocable without the consent of the United States. That was the last of the series of instruments, of which the constitution was the first, by which Oregon reached her present position in the Union; and I humbly submit that the proposition above cited has the effect so far to modify the constitutional provision upon which respondent relies, as to except from its operation such acts as apply to five per centum fund to the building of public roads. The proposition is not only that the fund shall be used in accordance with the original intention of congress as expressed in the act of 1841, but that it shall be applied to that object in such manner "as the legislature may direct." If this has

any force at all, it repeals, by unavoidable implication, the restrictions upon the legislative authority to pass special laws for the application of this fund to the construction of public roads.

Thus matters stood till 1871, when congress, by joint resolution, gave the consent of the United States for this fund to be transferred to the school fund; but in the same resolution it was expressly provided that nothing therein contained should "influence the construction" of the act, in which the six propositions were made. This proviso, I take it, makes the resolution of 1871 ineffectual until the state of Oregon shall revoke its acceptance of the proposition. The acceptance of the proposition was an enactment of its provisions, and the resolution of congress did not repeal that enactment; it merely absolved the state of Oregon from its obligation not to revoke it.

If I am correct in insisting that these acts are neither *special* nor *local* laws, it follows that all the warrants are valid. If I am wrong on this point, but right on the proposition that the state can not refuse to pay its warrants after it has received the consideration for them, it follows that all the warrants are valid. If I am wrong on both the above points, but right as to the effect of the act of congress admitting the state into the Union, and of the acceptance by the state of the propositions therein contained, it follows that the first two warrants described in the petition are valid.

Knight and Lord, for respondent:

The petition of appellant as to the first and second causes of action is fatally defective in this: There is no allegation in either of said causes that there was at the time the payment of said warrants was demanded of respondent, money in the state treasury sufficient to pay the same and applicable thereto. The allegation upon that point in the first cause of action is as follows: "Thereafter (the date of the first presentment of the warrant to the state treasurer), and prior to the twenty-seventh day of August, 1879" (the day payment was demanded of respondent), "there was received

into the state treasury, of said funds, an amount of money sufficient to pay said warrant."

The allegation in the second cause of action is precisely the same as in the first. These allegations, we claim, are not sufficient to constitute a cause of action against the respondent, and that the demurrer was properly sustained as to those causes of action.

In the next place, we claim that the several laws under which all of the warrants mentioned in the petition were issued are special and local laws, and are, therefore, void under section 23, article 4, of the constitution of this state, which reads as follows: "The legislative assembly shall not pass special or local laws in any of the following cases," and among the enumerated cases under that section is the following: "7. For laying, opening, and working of highways, and for the election or appointment of supervisors." This section of the constitution carries with it its own interpretation; and it is too plain for argument that no road or highway can be laid out or worked in this state except under and pursuant to a general law providing for the location and construction of all roads in the state. In obedience to that provision of the constitution, the legislature has provided by general law for laying, opening, and working of all highways in this state. (Civ. Code, 721.) Each of these laws provides for the laying out and construction of a special and particular work, and they are, therefore, unconstitutional and void. It follows, therefore, as a legal consequence, that these warrants, issued under and pursuant to those laws, are also void, and their payment was rightly refused by the respondent.

By the Court, KELLY, C. J.:

The question here presented for consideration is, whether the several acts of the legislative assembly referred to in the appellant's petition authorizing the construction of the Dalles and Sandy road and the Eastern Oregon and Winnemucca wagon road are constitutional.

Article 4, section 23, subdivision 7, of the constitution is as follows: "The legislative assembly shall not pass

special or local laws in any of the following enumerated cases; that is to say * * * 7. For laying, opening, and working on highways, and for the election or appointment of supervisors." It is claimed by the counsel for respondent. that these acts are special and local in their character, and therefore in conflict with the provision of the constitution just quoted, and the warrants drawn under and in pursuance of them are, therefore, necessarily void. Blackstone says: "Statutes are either general or special, public or private. A general or public act is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." (1 Bl. Com. 85.) The words "general" and "public" are here used as expressing the same kind of statutes. So, also, special statutes are, according to the common law definition, synonymous with private statutes. The early elementary law writers seem to have made no distinction between a private and a local statute, but define private acts to be those which relate to particular persons or classes of men, or which related to a particular place or town. (Burrill's Law Dict., *voce* "Private Statute;" Bac. Abr., Statute F; 1 Kent's Com. 459.) In more recent times. another distinction has been made by the constitutions of several states of the Union, including that of Oregon, in which the terms "local act" and "local laws" are used in contradistinction to public or private acts or laws. Notably this is so in the constitution of New York, and the decisions of the court of appeals have, in a measure, construed and settled the meaning of the words "local bills" or "local acts" in that state.

In the case of *The People v. Hills*, 35 N. Y. 449. it was held that "an act to amend and consolidate the several acts relating to the city of Rochester," was a local act, within the meaning of the constitutional provision "that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." In *The People v. O'Brien*, 38 N. Y. 193, the

question before the court was whether an act of the legislature, so far as it related to the terms of office and the time for electing councilmen in the city of New York, was a general or local law. The court said: "It is clear that it relates only to the offices of the municipal corporation of New York, and has no force outside of the territory embraced in the corporation, nor any possible effect upon property not within the corporate limits, or upon persons not for the time being within such limits. It would seem to follow necessarily that the act in question is local, as contradistinguished from general. The former is entirely confined in its operations to the property and persons of a specified locality, the latter embracing either persons or property of the people of the state generally, or some class of persons or species of property."

In *The People v. Allen*, 42 N. Y. 378, the question was whether an appropriation of money to improve Bouquet river was a general or local act. It was a small stream emptying into Lake Champlain, and navigable for boats about three miles from its mouth. Of it the court says: "Its name is not found upon the general maps of the state; it is not found in any general history of the country, and its character is in no way defined in any public statute; and it is not of such notoriety as to be known generally to the people of the state; and hence the courts can take no more notice of its character and existence than of the character, location, and usefulness of the ordinary highways of the state. In this respect it is unlike the great rivers and lakes of the state, and the mountain ranges, which are matters of general history and public notoriety." The court further says: "This is unlike any of the improvements of the Hudson river. That is a river navigable for about one hundred and fifty miles, forming a necessary link in the chain of water communication between the ocean and the great lakes. It acts an important part in the commerce of the whole state, and the citizens of the state generally are interested in its navigation. An improvement made in its navigation at any point would not be mainly or materially for the benefit of the people living at or near that point, but

would be for the benefit of the entire commerce of that great river, and of the commerce of the whole state." The statute was held by the court to be a local act, because of the insignificant character of Bouquet river, and because the improvement of it would be mainly for the benefit of the people living in the immediate locality. But the court clearly intimates that an act for the improvement of the Hudson river would not be a local but a general one, because it is the connecting link in the chain of water communication between the ocean and the inland lakes. The court of appeals, in the case of *The People v. Supervisors of Chautauqua*, 43 N. Y. 10, goes into a somewhat critical examination of the authorities defining what is a local and what a general act, but in its essential features it is substantially like the case last referred to.

The foregoing cases have been referred to, to show what are to be considered local acts or local laws. In contradistinction to these, all acts which relate to the location and construction of the public buildings of a state, to the establishment of new counties and prescribing their limits, are public acts, because in their very nature the people of the whole state have an interest in them. In the case of *The State ex rel. Cothren v. Lean*, 9 Wis. 279, the supreme court of Wisconsin say in relation to the establishment of the county seat of Iowa county: "At the county seat of each county, the state through its proper officers administers justice; all the inhabitants of the state are liable to be sued in any county and to have their rights litigated there. And we think there is much force in the reasoning of the late Chief Justice Stowe, in the Washington county seat case, where he contends that laws relating to the location of county seats are public acts; and this view is sustained by other authorities." The court in that case also says that it is undoubtedly difficult to draw an accurate line between general laws and those not general, and to establish a test that will be entirely satisfactory. But it was there held that the character of an act of the legislature, whether it be a "general" law or not, is determined by the greater or less extent to which it affects the people, rather than by the ex-

tent of territory over which it operates, and that a law operating in a single county, but affecting the rights of all the people therein, is a general law. In the case of *New Portland v. New Vineyard*, 4 Shep. 69, it was held by the supreme court of Maine that an act annexing one town to another was a public act. The court says: "Those are to be regarded as public acts which regulate the general interests of the state, or any of its divisions."

In the case of *West v. Blake*, 4 Blackf. 236, the supreme court of Indiana says: "that an act authorizing an agent of the state to lay off and sell lots in a particular town, it being the seat of government, was a public act." And in reasoning upon the question it says: "Statutes incorporating counties, fixing their boundaries, establishing court-houses, canals, turnpikes, railroads, etc., for public uses, all operate upon local subjects. They are not, however, for that reason special or private acts." Other cases might be adduced to mark the distinction between public and special or local laws. The general principle to be deduced from all the authorities seems to be this, that whenever an act of the legislature authorizes any public road or other internal improvement to be made or other act to be done, which in its nature is more beneficial to the community at large than to the inhabitants in the immediate locality of the road, or other internal improvement, such act is to be considered a public and not a special or local law.

During the ten years of territorial government in Oregon, it was the constant practice of the legislative assembly to pass special laws to lay out territorial roads from one point to another, sometimes in the same county, but more frequently in two or more counties of the territory. Generally they were passed through the influence of interested parties, who were often named in the act as commissioners to locate the road, and the expenses of such location were imposed on the counties in which the roads were established. And then by the act of January 27, 1854 (Statutes of Oregon, 1854), the expense of opening and working them was imposed on the several road districts through which they passed. These burdens thus imposed on the people of special local-

ities were considered as onerous, and the whole system of laying, opening, and working territorial roads came to be regarded as an exceedingly vicious mode of legislation, which interfered with the regular road system of the territory. And it was to destroy and prevent that kind of legislation that the inhibition referred to was inserted in the constitution.

Referring to the Dalles and Sandy road, now partially constructed under these acts of the legislative assembly: It is well known to all that during the winter months it is the only practicable route for a public road through the mountain range which separtes eastern from western Oregon, and it was deemed to be of the most importance to the people of the state that trade and travel and mail facilities should not be obstructed; that intercourse between these two great divisions of the state should not be suspended during that season of the year when navigation on the Columbia is generally closed by ice in the river. It was well known to the legislative assembly that, for weeks at a time, all communication between the east and west was suspended, until the interruption came to be regarded as almost a public calamity, and it was to prevent these obstructions that the appropriations of money were made to construct the Dalles and Sandy road. It is in no sense a local road. The advantages to the inhabitants living along the route or line of the road are insignificant when compared with what will be the benefits to the people at large, or at least to those residing in the two great sections before referred to, whenever the road shall be completed.

The reasons given to show that the acts making appropriations to aid in the construction of the Dalles and Sandy road are not special or local laws, will equally apply to the act authorizing the construction of the eastern Oregon and Winnemucca wagon road.

It may be noted here that the moneys appropriated by these acts are not derived from taxes levied on the people of the state. The five per centum of the net proceeds of the sales of the public lands are paid by the United States to this state expressly for the purpose of making public roads and

internal improvements, and can be applied to no other purpose without a violation of the trust upon which they are received. The swamp and overflowed lands also were granted to the state for the purpose of paying the expenses of reclaiming them. And the fund in the treasury arising from the sale of these lands is the excess of the purchase money, over and above the expenses of the reclamation, which expenses the purchasers have either paid or are under obligation to pay hereafter.

There is another reason why the acts of the legislative assembly, referred to in the petition, are to be regarded as general laws, and not special or local acts. Article 4, section 27, of the constitution, declares that "every statute shall be considered a public law, unless otherwise declared in the statute itself." Neither of the acts contains such a declaration.

We hold, therefore, that they do not come within the constitutional inhibition contained in section 23 of article 4, that "the legislative assembly shall not pass special or local laws * * * * for the purpose of laying, opening, and working on highways." We think the objection to the sufficiency of the first and second clauses of the petition is well taken by the counsel for respondent. In neither of them is there any allegation that when payment was demanded on the twenty-seventh day of August, 1879, there was sufficient money in the treasury to pay said warrants and applicable to such payment. The third clause in the petition is not open to this objection, and a peremptory writ of mandamus ought to be allowed, commanding the respondent to pay the warrant for one thousand nine hundred and ninety-six dollars, unless he shall ask leave to file an answer and defend upon the merits.

It is ordered that the judgment be reversed, and this cause remanded to the court below, for further proceedings. And it is further ordered that the costs of this proceeding be paid by the state.

BOISE, J., dissents from this opinion, on the ground that the laws providing for these warrants are special laws within

the meaning of section 23, subdivision 7, article 4, of the constitution. Section 27 of said article does not abridge the force of section 23, for the reason that a special law may be also a public law, and the provisions of these different sections are not repugnant to each other. Smith on Construction defines a special law as distinguished from a general law. Of the latter he says: "It is one which provides for all things of a kind or genus; special provides for a species of the genus." In this case a general law relating to highways should provide for all the highways of the state; a special law to a particular highway, as in this case.

APPOLLONIA PHILLIPPI, RESPONDENT, v. ANANIAS THOMPSON, APPELLANT.

EJECTMENT—TITLE MUST BE PLEADED.—In an action of ejectment, where the defendant merely traverses the allegations in the complaint, and does not set up title in himself or another, the defendant will be confined in his testimony to such facts only as tend to show the weakness of the plaintiff's title.

IDEM—EVIDENCE.—Where the plaintiff in his evidence produces a confirmatory deed to establish his title, in which is recited other deeds by their dates, through which plaintiff deraigns title, it is competent for defendant to offer in evidence and produce these deeds recited to show the boundaries of the land claimed by the plaintiff.

COLOR OF TITLE—PRESUMPTION.—A party entering land under color of title is presumed to enter and occupy according to his title.

APPEAL from Multnomah County.

This is an action of ejectment. The respondent alleges that she is the owner and is entitled to the possession of the premises described, and prays for their possession. The appellant denies the allegations of the compliant. The jury returned a verdict in the respondent's favor for a part of the premises described. The respondent had judgment upon this verdict, and the appellant appeals.

On the trial, the respondent offered in evidence the United States patent to the Couch claim, which assigns the south half of the claim to Caroline Couch. It was also shown that the property in controversy is included in the

south half of said claim. She also introduced in evidence a confirmatory deed from the widow and heirs-at-law of Couch to her, dated November 12, 1872, conveying lots 6 and 7 in fractional block 30, Couch's addition. She further offered in evidence testimony showing that she and her husband, from whom she derives title, had, since the year 1858, claimed possession, and had been in actual possession of all that portion of said lots 6 and 7 that lies north of an old fence, which was constructed by one Ebinger, prior to 1858. The appellant then moved for a nonsuit, which motion was denied.

The appellant then offered to introduce in evidence certain deeds, for the purpose of showing that the respondent held the land in dispute under a paper title, in which the same was described by definite boundaries, the introduction of which was disallowed. He also offered to introduce in evidence certain deeds to himself and to persons from whom he derives title, for the purpose of showing the boundary line between the lands of himself and the respondent, the introduction of which was allowed by the court. The appellant asked that the following instructions be given to the jury: "That if the possession of the land in dispute was originally taken under a paper title, then the presumption of law is, that they hold according to the description in their deed; this presumption will prevail until it is overcome by proof of a change in manner of holding;" which instruction the court refused to give, upon the ground that there was no testimony on that point.

The errors assigned are as follows: 1. The court erred in admitting the confirmatory deed from the widow and heirs-at-law of John H. Couch to the plaintiff, for lots Nos. 6 and 7 in fractional block No. 30, Couch's addition, etc., and dated November 12, 1872, Exhibit "A" of the bill of exceptions; 2. In not allowing defendant's motion for a nonsuit; 3. In not admitting the deeds offered by defendant to prove that plaintiff held the land in dispute under a paper title, in which the land was described with certain specified boundaries; 4. In not admitting in evidence the deeds offered by defendant, for the purpose of showing the true

boundary line between the lands of plaintiff and defendant; 5. In not giving to the jury the instruction presented by defendant, and fully set forth in his bill of exceptions.

Wm. Strong & Sons, for appellant:

The deed offered in evidence by the respondent shows by its recitals that she held the land under a paper title, and concludes her from otherwise showing title to the property. A party who traces title through a regularly executed conveyance is concluded by its recitals. (3 Washburn on Real Property, 3d ed. 94, sec. 24; *Scott v. Douglas*, 7 Ohio, 227; 5 Id. 194; *Carver v. Jackson*, 4 Pet. 1; Id. 85-87.) In order to create title by prescription, there must be: 1. An actual occupancy, clear, definite, positive, and notorious; 2. It must be continued, adverse, and exclusive during the whole period prescribed by the statute; 3. It must be with an intention to claim title to the land occupied. *Cook v. Babcock*, 11 Cush 206; *Doswell v. De La Lanza*, 20 How. 32; *Grant v. Fowler*, 39 N. H. 101.

To give possession, the requisite characteristics of being visible, notorious, distinct, and definite in its extent, the ouster, in the first place, must be of such notoriety that the owner may be presumed to have notice of it, and of its extent. (3 Washb. on Real Property, 127, sec. 22, and authorities there cited.) The entry upon the lands must be made with an intention to dispossess the owner, otherwise the act would be a mere trespass. (4 Kent's Com. 488; 2 Smith's Leading Cases, 6 Am. ed. 637; note; *Broadstreet v. Huntington*, 5 Pet. 401, 439.) Mere possession, without a claim of right, gives no title, however long the same may be continued. (*Grube v. Wells*, 34 Iowa, 148; *La Frambois v. Jackson*, 8 Cowen, 588, 603; *Adams v. Guice*, 30 Miss. 397.)

A party inclosing and occupying by mistake for the period of limitation more land than his deed called for, will not operate as a bar to the claim of the true owner. The possession is not deemed adverse. (*Howard v. Reedy*, 29 Ga. 152; 34 Iowa, 148; *Dow v. McKenney*, 64 Me. 138.) When two adjoining proprietors of land, who are ignorant of the true boundary line between their respective lands, fix a line

with an agreement that each shall possess to that line until the true boundary is ascertained, and the true boundary, when ascertained, leaves one in possession of a portion of the other's land, this possession is not adverse. (3 Washb. on Real Property. 491; *Irvine v. Adler*, 44 Cal. 559; 34 Iowa, 148.) Evidence of a fence built merely for convenience, in working a farm, and not for the purpose of marking boundaries according to title, is of no weight in determining acts of possession. (*Soule v. Barlow*, 49 Vt. 329.) The testimony does not prove title by prescription to the land in controversy; if our position is correct, it follows that the court committed error in not granting the motion of defendant for a non-suit.

The court erred in not allowing the offered proofs showing plaintiff held under paper title; and in not admitting the deeds offered to show the true boundary line. Every presumption is in favor of possession continuing in the same subordination to a title, where it is once shown to exist. (*Hood v. Hood*, 2 Grant's Cas., Penn. 229.) A party's possession, if he enter under color of title, by deed, decree, etc., is often referred to the description of the premises in such deed or written instrument. (*Bell v. Longworth*, 6 Ind. 273; *Scales v. Cechill*, 3 Head. 436.) When the acts of disseisin are equivocal in their nature, the presumption always is that it is in accordance with, and not in hostility to the title of the true owner. (*Pipher v. Lodge*, 16 Serg. & R., 229, 231; *Smith v. Burtis*, 6 Johns. 218; *Jackson v. Sharp*, 9 Id. 163.) When two persons are in possession at the same time, under different claims of right, he has the seisin in whom is the true title. Both can not be seized, and the seisin consequently follows the title. (*Barr v. Gratz*, 4 Wheat. 213; Kent's Com. 482; *Codman v. Winslow*, 10 Mass. 146, 151.)

The court erred in not giving the instruction asked for by defendant. If a person enter on land having a title and right of entry, his entry and possession are presumed to be in conformity to his title. (*Means v. Welles*, 12 Met. 356; *Tappan v. Tappan*, 11 Fost. 41; *Wilson v. Williams*, 52 Miss. 487; *Loport v. Todd*, 3 Vroom, N. J. 124.)

S. W. Rice and W. W. Thayer, for respondent:

The patent and the confirmatory deed form a direct chain of title from the United States to the respondent; and as the appellant has not pleaded any title in himself, he can not object to the respondent's claiming the property under any title she may have. The only objection he could bring, would be that it did not show that the respondent had any title. This confirmatory deed was duly executed and acknowledged, and is entitled to be admitted in evidence. (Civil Code. 518, sec. 22.) As to the second assignment of error: A direct legal chain of title had been proven, and also an uninterrupted adverse possession of the premises for more than twenty years, which is a presumption that the premises had been held pursuant to a written conveyance. (Gen. Laws of Oregon, 262, secs. 766-68.) Therefore a nonsuit was properly denied.

The deeds offered to be introduced must be presumed to have included a less area than the premises which the respondent had occupied adversely for more than twenty years, or the appellant would not have offered to introduce them in evidence, unless he wished to prove the respondent's case. But the respondent had been in adverse possession of the whole tract for more than twenty years, and the presumption was that she had a written conveyance to all the lands she had so occupied. (Gen. Laws of Oregon, p. 262, sec. 766-38.) The bill of exceptions says that these deeds were offered in evidence for the purpose of showing that the respondent held the land in dispute under a paper title. The appellant ought not to complain because the respondent declined to allow him to prove her case.

As to the fourth assignment of error: These deeds, if they would show anything, would be proving title in the appellant himself, which is not permissible, as he has not pleaded any such title. (Gen. Laws of Oregon, p. 176, sec. 316.)

By the court, BOISE, J.:

In this case it was incumbent on the plaintiff to show

that she had a legal estate in the property and a present right to the possession. (Civ. Code, sec. 313.) This she attempted to do: 1. By producing the patent of the heirs of Couch, the original proprietor; and a confirmatory deed from her to plaintiff, to which we see no objection; 2. By producing evidence tending to prove that she, and those under whom she claimed, had been in adverse possession for twenty years; and we think the evidence was sufficient to make a *prima facie* case in her favor; and, therefore, the motion for a warrant was properly refused.

The next error is: That "the court erred in not admitting the deeds offered by defendant to prove that plaintiff held the land in dispute under a paper title, in which the land was described with certain specific boundaries." The defendant having simply denied the bill and right to possession of the plaintiff, and not having pleaded in his answer either that he was the owner, or that the title was in a third person, the evidence which the defendant could produce was restricted to a very narrow issue, and was very much more limited than in an action of ejectment at common law, for our statute has provided (p. 179, sec. 316) that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, * * * unless the same be pleaded in his answer." At common law, under the general issue (which is the issue in this case), the defendant could prove title in himself or another, so that most of the rules of law concerning evidence for the defense in ejectment, which have been established, and which are found in works on evidence and ejectment, are not applicable under our statute. We think, however, that the defendant was entitled to offer any evidence which had a tendency to weaken the claim of title under which the plaintiff claimed, for as the plaintiff must make out a *prima facie* case, the defendant might show flaws in that title. The confirmatory deed recites that this deed was to confirm a legal or equitable title, which the plaintiff held in possession "by mere conveyances from R. B. Wilson, by deed or instrument in writing, dated March 1, 1854, and recorded

in the book of records, transferred from Washington county, p. 30."

The defendant offered these mesne conveyances in evidence to show that plaintiff's title and right of possession under them was confined to the north-west quarter of said block 30, and claimed that the boundaries of the north-west quarter differed from the boundaries of the land contained in lots 6 and 7, in block 30, which was the land described in the confirmatory deed. These deeds offered in evidence tended to show that Mrs. Couch, the patentee, had sold all of block 30 to R. B. Wilson, March 1, 1854, and that plaintiff, prior to the confirmatory deed, had acquired a paper title to the north-west quarter of block 30, and as Mrs. Couch had, in 1854, parted with all her title to block 30, her confirmatory deed gave nothing to plaintiff; that is, provided the deed of March 1, 1854, was in proper form, for Mrs. Couch and others could not grant to plaintiff land she did not own by reason of its having been before conveyed, and we must presume the deeds were in proper form, for no objection was made to their form, the objections being only to their materiality and relevancy as evidence. We think, also, that these deeds might be material to limit and determine the boundaries of the land the plaintiff took under her paper title which she had offered in evidence, even if they only conveyed an equity, for these deeds constituted the paper title on which she entered the premises, and were the consideration of the confirmatory deed relied on to recover, for we must suppose that she relied on her paper title as well as on her evidence of possession, as both the evidence of the paper title and the possession were submitted to the jury to support her right to recover.

These deeds had a tendency to show that her right under them was only to the north-west quarter of block 30, and did explain and limit the land intended to be conveyed in the confirmatory deed, for where a confirmatory deed refers to the deed which it is intended to confirm, and there is a difference in description between the confirmatory deed and the deed to be confirmed, the description in the latter should prevail, for the reason that it describes the land

which was originally sold, and for which the consideration was paid, unless it appear that the confirmatory deed was to correct an error in description, which is not the case here, the confirmatory deed being to remedy errors of form, or "informalities." This evidence tended only to show to the jury the boundaries of the plaintiff's land, and should have been admitted for that purpose, and she having by the recital in her confirmatory deed made them a part of her muniments of title, could not properly refuse to be controlled by their contents. We think, therefore, that there was error in not allowing these deeds to be given in evidence.

It is claimed that the respondent having shown possession for twenty years, raised a presumption of a written conveyance of the land in dispute. Whether the evidence on this point showed an adverse possession for twenty years, of the strip of land in dispute, which was less than one foot in width, and on the boundary of the plaintiff's land, was a question for the jury. Any evidence by the defendant tending to show that the plaintiff had not occupied said land, or had not claimed it as hers, during the twenty years, was competent; and on this question of adverse possession, we think the defendant might show under what claim plaintiff entered it, and to what boundary the original possession extended; and if she entered under a deed, the deed would be evidence of the extent of the possession claimed under it, and in this case, the plaintiff in her testimony says that she was not in possession of the whole of lots numbers 6 and 7, of said fractional block 30. That she now resides on the north-west quarter of said block. That her husband John Phillippi, bought said place in the year 1858, and that she is his widow, and is the owner of the land at the present time. That ever since her husband bought said land, an old fence built by one Ebinger, a former owner of said land, has stood between the land claimed by plaintiff and defendant in this action, and that she claimed all the land on the north side of said old fence, and had been in fact in possession of the same since the said purchase by her husband. This testimony refers to the purchase of this land

from Ebinger, and as this purchase was by deed, the possession taken under the deed would only extend to the boundaries named in the deed; and if Ebinger had fenced in land not included in the deed, such land would not pass by the deed, and such deed would be evidence of the original extent of the possession under it, and was proper evidence in this case to show what land John Phillippi took possession of. If he afterwards or immediately took possession of other land, that could be proved by acts of possession on the land itself, and not by acts of possession under the deed which excludes it.

To be more explicit, she claims that her husband purchased this land of Ebinger, and that this fence was its boundary; this purchase being by deed, which describes the land as the north-west quarter of block 30. This fence is not a monument, and whether or not it was on the boundary must be determined by the deed and the parol evidence, and if the strip of land in controversy has become hers by adverse possession, she must have claimed and occupied it otherwise than under the deed, for when we settle her claim under the deed, its extent must be determined by the deed, and where a person enters under a deed, he will be presumed to hold under it and to the boundaries fixed in it, until the contrary is shown. As is said in *Tappan v. Tappan*, 11 Foster, 41, "A party entering on land under color of title, is presumed to enter and occupy according to his title." (See also *Meares v. Wells*, 12 Met. 356; *Wilson v. Williams*, 52 Miss. 487.)

For the reasons assigned, we think the judgment of the circuit court should be reversed, and a new trial ordered.

J. C. TRULLINGER, RESPONDENT, *v.* N. KOFOED ET AL., APPELLANTS.

DISTRIBUTION OF PROCEEDS, ON RESALE OF PROPERTY.—When a sheriff's sale of real property is set aside by the judgment of the supreme court, and a resale of the premises is ordered, such resale must be made in conformity with section 293, subdivisions 3 and 4, on page 169 of the Code. And if, upon such resale, the property shall be sold to any person other than the former purchaser, the court must first repay the former purchaser the amount of his bid, out of the proceeds of the resale.

APPEAL from Clatsop County. The facts are stated in the opinion.

O. F. Bell, for appellant.

Robb and Fulton, for respondents.

By the Court, KELLY, C. J.:

At the January term, 1878, of the circuit court for Clatsop county, a decree was rendered in favor of certain mechanic lien claimants against the defendants, N. Kofoed and Mary Kofoed. The decree directed a certain building and lot of ground to be sold, and the proceeds to be distributed among the several claimants. In the decree, precedence was give to the claim of Peter Runey, one of the defendants, over that of B. G. Crane, the appellant. The house and lot were sold upon execution, on the nineteenth day of March, 1878, to W. W. Parker, for four thousand two hundred and eighteen dollars and twenty cents. The purchase money was paid to the clerk, and the sheriff's sale was afterwards confirmed. After the sheriff's sale was made, B. G. Crane appealed to the supreme court from the decree adjusting the liens of the different claimants, and also from the order confirming the sheriff's sale. Both appeals were heard at the last term of this court. The decree in relation to the several liens was so modified as to give preference to the claim of Crane over that of Runey.

The order confirming the sheriff's sale was reversed and this order entered: "It is further ordered that this cause be remanded to the court below, with directions that a resale of the above-described premises be had herein, and for such further proceedings as are by law required."

When an order of resale is made, the manner of making the sale is prescribed in section 293, subdivisons 3 and 4, on page 169, of the code.

Upon the mandate of this court being filed in the court below, the following order was made: "Upon the foregoing mandate order of the supreme court and upon the motion of O. F. Bell, esq., counsel for the defendant and appellant, B. G. Crane, filed herein, it is ordered that execution issue

to enforce the said decree and order of the supreme court; that upon execution the property described in the said decree be resold as provided for in section 293 of the code of civil procedure; that if upon such resale the said property shall bring a greater amount than upon the sale already had under the order of this court, the said excess, after paying to the former purchaser the amount of his bid, if sold to any other person than such purchaser, shall be paid to the clerk of the court to be distributed as directed in said decree and order of the supreme court."

This order is in conformity with the provisions of the section referred to, and the court did not err in making it.

The judgment of the court below is affirmed, with costs.

J. B. PRICE ET AL., APPELLANTS, v. LEVI KNOTT AND A. J. KNOTT, RESPONDENTS.

ACT OF THE LEGISLATURE CONSTRUED—FERRY FRANCHISE.—The act of the legislature of the late territory, passed January 15, 1852, granting a ferry right to James B. Stephens across the Willamette river, at Portland, granted but one ferry, with fixed landings on each side of the river. The exclusive right to said Stephens to do all the ferrying across said river, within certain limits, for ten years, expired at the end of said ten years.

IDEM.—One ferry consists of one line of boats on one line of travel. The owners of this franchise, having a line of boats running as a ferry from Stark street to a point opposite in East Portland, the right to run this ferry does not grant them a right to run another line of boats from Oak street to a point opposite in East Portland.

STREETS—WHAT GRADE CITY MAY ESTABLISH.—The authorities of the city of Portland have control of the grading of the streets of the city, and may grade them down or elevate them when they approach the river, as the exigences of travel or commerce shall require.

INJUNCTION—ADJACENT LOT OWNER MAY SUE OUT, WHEN.—One owning a lot next to the river may lawfully claim an injunction against a private citizen who threatens to grade down a street next to the river, and adjoining the lot of such owner, if he shows in his complaint that such grading will permanently injure his improvements on said lot, or render its enjoyment less convenient.

APPEAL from Multnomah County.

This is a suit in equity, brought by plaintiffs to restrain defendants from digging or altering the ground or grade of

Oak street, between the east line of Front street and the Willamette river, in the city of Portland, and further asking that the defendants be enjoined and restrained from, in any manner whatever, interfering with, changing, injuring, or destroying certain roadways and a wharf erected by the plaintiffs, Rines and Newhouse, for the purpose of a wood-yard, upon and in front of the south half of said portion of Oak street; and for one hundred dollars damages for the injury already done plaintiffs by digging down said street by defendants.

The plaintiffs rest their cause of suit substantially upon the facts: That Rosetta Sherlock is the owner of the south half of lot four, in block eighty-one, lying immediately north of said portion of Oak street; that J. B. Price is the owner of lot one, in block eighty, lying immediately south of said portion of Oak street, and that Rines and Newhouse are lessees of said Price, of the rear or river end of said premises, and that they have constructed a wharf in the river opposite said premises and extending north in front of the street to the center line of said Oak street extending into the river, and have built two roadways leading to said wharf; that they built said wharf and roadways by permission of the common council of the city of Portland, as per ordinance No. 1911; that if said portion of Oak street between the east line of Front street and the Willamette river is graded down to the water line of the river, the foundation walls of the buildings occupying the ground on either side of that portion of said street will be injured; that Rosetta Sherlock contemplates building a wharf in the rear of her property, and extending into the river, and if the street be so graded, she, upon the one side, and J. Price and Rines and Newhouse upon the other side of the street, will be deprived of access to their several wharves from the foot of Oak street.

Rines and Newhouse also complain of defendants for attempting to dig and to tear down and destroy said roadways therein and the wharf in front of the south half of said street. It is sufficient to state that no actual damages has been shown to have been sustained by the digging, etc.,

heretofore done by the defendants, the object of defendants in digging, etc., being to test the validity of Ordinance No. 1911, and to ascertain, by the decision of the courts, the respective rights of plaintiffs as adjoining property holders, and the power of the municipality to grant the easement of public streets to the exclusive use and benefit of private individuals. The defendants claim the right to use the foot of the street as a ferry landing, under a charter of the legislature of the territory of Oregon passed January 17, 1852, and as an incident to that franchise, the right to grade down the street so as to make it suitable for such landing. That the accommodation of public travel over the Willamette river requires that they should use the terminus of Oak street as a ferry landing. They also present, as a separate and independent defense, their right as members of the general public to travel over the said street, and they complain that said wharf and roadway so erected are nuisances, and may be abated by any one desiring to use said portion of said street as a highway.

Upon the trial below, the court there found: That Oak street in the city of Portland extending to the Willamette river is a public highway, and that the wharf and roadway situate in the foot of said street is an obstruction to said highway. That defendants are the owners of the ferry franchise, and have good right and authority to land their ferry boats at the foot of said Oak street, and to so grade the foot of said street as to render the same a suitable roadway, between Front street and the Willamette river, for all purposes of public travel, and had the right to remove said wharf and roadways. And thereupon dismissed plaintiff's suit.

Dolph, Bronaugh, Dolph & Simon, and Wm. Strong & Sons, for appellants.

H. T. Bingham, for respondents.

By the Court, BOISE, J.:

The defendants, A. J. and Levy Knott, claim the right to grade the foot of Oak street, in the city of Portland, to

make in convenient to be used by them as a ferry landing for their ferry which plies across the Willamette river, between West and East Portland. They now have one fixed landing for their ferry, at the foot of Stark street, which is the next street south of said Oak street, and about two hundred feet from it. But they claim that the increase of business on their ferry requires additional means of transportation, and that to accommodate the travel, they want to put on another line of boats, and make a landing at said Oak street. The ferry franchise under which the Knotts' claim was granted to James B. Stephens, by an act of the legislature of the late territorial government of Oregon, and they have the right by purchase from Stephens, and claim that under this franchise they have the exclusive right of ferriage for one mile each way up and down the river from their present landing at said Stark street. The appellants claim that the Knotts have a right to only a single ferry and one line of boats, and if they wish to establish another line, they must get the right to do so by a license from the county court under the general law regulating ferries in this state.

It becomes necessary, therefore, for us to construe said act of the territorial legislature to determine the extent of the franchise granted by it. The act is as follows:

"An act to authorize James B. Stephens to establish a horse or steamboat ferry across the Willamette river.

"Section 1. Be it enacted by the legislative assembly of the territory of Oregon: That James B. Stephens, his heirs and assigns, be and they are hereby authorized to establish and keep a ferry across the Willamette river at the city of Portland, in Washington county, to the county of Clackamas, on the east side of said river, opposite, within the following limits: Commencing at a point in said city of Portland, at the junction of —— street, the present ferry landing of said Stephens, and to land on, and deposit, from each shore of said river, as well in the county of Clackamas, due east of said point of commencing, as in the county of Washington, and extending from said points up and down said river, on each side thereof, one mile each way;

and that the said James B. Stephens has the exclusive privilege of ferrying in Washington and Clackamas counties, within the above limits, for the term of ten years from the passage of this act. *Provided*, that said ferry, when so established, shall be subject to the same regulations and under the same restrictions as other ferries are, or may hereafter be, by the laws of this territory fixing the rates of toll, and prescribing the manner in which licensed ferries shall be kept and regulated.

"Sec. 2. That no courts or board of county commissioners shall authorize any person, except as hereinafter provided for in this act, to keep a ferry within the limits set out in this act. *Provided*, that the said James B. Stephens, his heirs or assigns, shall, within eighteen months after the passage of this act, procure for said ferry a good and sufficient horse or steam ferry-boat, which shall be kept at said ferry for the transportation of all persons and their property across said river, without delay, and until said ferry-boat shall be provided as aforesaid, the said James B. Stephens shall keep at said ferry a good and sufficient number of flat boats, with a sufficient number of hands to work the same for the transportation of all persons and their property across said river (when possible) without delay; and should the laws regulating ferries now, or such as may hereinafter be in force, be violated by the said James B. Stephens, his heirs or assigns, or if no good and sufficient horse or steam ferryboat be provided at the time required by this act, upon proof thereof to be made to the satisfaction of the board of county commissioners, or probate courts of the counties of Washington and Clackamas, then this act shall be void.

"Sec. 3. This act to take effect and be in force from and after its passage.

"Passed the house of representatives, January 15, 1852.

"Passed the council, January 17, 1852."

We are not authorized in construing this act to extend the grant in favor of the grantee beyond the fair and natural meaning of the language used, for when the legislature grants a franchise which is in the nature of a monopoly, and which, necessarily to some extent, restricts the powers of

future legislatures, nothing is to be presumed beyond the express words of the grant. Cooley's Constitutional Limitation, 394.

In this case the manifest intention of the legislature was to grant to Stephens a right to keep a ferry from certain fixed points, and provided that said ferry, when so established, should be subject to the same regulations as other ferries are, as to rates of toll. The act grants but one ferry, and if the exclusive right of ferrying for ten years within the limits of two miles, had in that time required more than one ferry to do the business, such other ferry would have been subject to the regulations imposed on other ferries. But this exclusive right does not need construction, for it was limited to ten years, and has long since ceased to exist, and since the expiration of ten years from the date of the act, the Knotts have had but one ferry right under this act, and that is confined to the landing on Stark street. As is said in the case of *Mills v. Learn*, 2 Or. 217: "The ferry is a part of the road and the landings are upon the highway and within its limits," and the proprietor can not change it from one street or highway to another, without the authority of the county court.

So we conclude that under this act the Knotts had no authority to grade down the foot of Oak street, and can not therefore justify under that authority. We will next consider the question whether the plaintiffs, from the facts alleged, have a standing in court to claim an injunction against the Knotts in this suit. They claim, 1. "That being the owners of the adjoining lots, they are thereby made the owners of the street, each to the center; 2. That they have a right to occupy the street or a part thereof under the authority or license from the city authorities; and 3. That if these propositions are not correct, they have the right to have the defendants restrained from altering the grade of the street so as to render access to their property more difficult."

The first of these propositions is simply a question of law and we think it is not necessary to decide it in this case,

and as it was not very fully discussed we will not express an opinion thereon at this time.

As to the second proposition, as to the power of the city to grant a license to occupy the street by the plaintiffs with their roadway, we think the city authorities have under the charter full power to grade down or build up the streets, so as to facilitate travel or contribute to the convenience of landing from boats and vessels. But we do not wish to be understood as holding that the city authorities can confer any rights of property in the streets on private individuals, or incumber them with licenses to adjoining lot holders, to the detriment of the general public, for they hold the control and management of the streets for the benefit of the public. As to the third proposition, that the plaintiffs have a right to claim that the defendants be restrained from altering the grade of the streets so as to render access to their adjoining property less convenient, we think they have that right, and that no one other than the city can alter the grade of the street to their injury, and that any adjoining proprietor may invoke the aid of the court to prevent the grading of a street whereby this property is made much less secure as to his improvements, or made less convenient of access. And we think the acts complained of were such as would injure the plaintiff's property. (High on Inj. 408; *Shurmier v. St. Paul*, 10 Minn. 82; *City of Delphi v. Evans*, 36 Ind. 90.)

We think, therefore, that the defendants should be enjoined from interfering with or altering the grade of the foot of Oak street, and that a decree should be entered to that effect.

DOLLY BENNETT, RESPONDENT, *v.* THOS. STEPHENS, APPELLANT.

PRACTICE—DISCRETION OF THE COURT TO ADMIT EVIDENCE, IN WHAT CASE.—As a general rule, it is a matter resting in the discretion of the judge to receive, at any convenient stage of the trial, any evidence which counsel undertakes to produce and shows will be rendered material by other evidence, and if not subsequently connected with the issue, to be laid out of the case; and the exercise of such discretion is not reviewable.

PLEADING—ACTION FOR WAGES—DEFENSE, WHEN MUST BE PLEADED.—Evidence tending to show that respondent was poor and in indigent circumstances at the time when she entered into the service of the appellant was not admissible, for the reason that the answer contained no such averment as a ground of defense.

SERVICES BY A PAUPER—PROMISE TO PAY NOT IMPLIED.—Where service has been performed for a relative, or by a person who is a pauper or in indigent circumstances, the law will not imply a promise to pay for such service, but an *express* hiring must be *proved* in order to support a claim for wages.

AGREEMENT FOR WAGES PENDING GRATUITOUS SERVICE, WHAT WILL CONSTITUTE.—B., while a minor, entered the service of S. as a member of his family, with the understanding that she was not to have pay for such service; but subsequently she expressed dissatisfaction to S. that she was not receiving pay for her services; whereupon S. told her "he would pay her for her work." *Held*, that this constituted an understanding or agreement of hiring, and that B. was entitled to recover their reasonable value for services thereafter rendered, notwithstanding the agreement under which the services were originally begun.

APPEAL from Multnomah County.

This action was brought by the respondent to recover wages at the rate of twenty dollars a month, for her services rendered to defendant in the capacity of a house-servant and dairy-maid for a period of over nine years. The complaint is the ordinary one for labor and services. The answer of the defendant denies all of the material allegations of the complaint, and also sets up as separate defenses:

1. The statute of limitations in regard to all of the wages that accrued more than six years preceding the commencement of the action; and, 2. That said services had been rendered by plaintiff under agreement as a member of the family, and not as a servant for hire, and that it was understood and agreed that she was to reside in the family of defendant as one of that family, and was to receive no pay for any work she might render, except her support as such member of the family.

Some thirteen years before this action, the defendant, then a girl of seventeen years, entered the service of the appellant, where she remained as a "maid-of-all-work" until July. 1879. The evidence tended to show, that after remaining in the appellant's family some four years, the re-

spondent complained to the appellant that she was not receiving anything for her services, and that the latter replied that "she need not complain; that he would pay her for her work; that he wanted no one to work for him for nothing."

The appellant offered to prove that the respondent was in indigent circumstances when she entered his service, for the purpose of showing that respondent's services were rendered as those of a pauper, but the evidence was not admitted. The appellant also offered to prove a contract for the respondent's services, made between the appellant and a cousin of the respondent, but the testimony was rejected upon the ground that unless the cousin's authority, or a ratification by the respondent, was shown, the respondent would not be bound by any agreement between the appellant and such cousin. Counsel for the appellant then stated that he offered to prove the respondent's assent to the alleged agreement, but took no steps towards the production of such evidence, and no further order was made by the court.

Such other facts as are necessary to an understanding of the points decided are stated in the opinion.

Wm. Strong & Sons, for appellant.

Gibbs & Bingham, for respondent.

By the Court, PRIM, J.:

The first assignment of error is that the court erred in excluding evidence of the agreement made between appellant and respondent's cousin, under which she entered into the household of appellant. This was very properly refused by the court, upon the ground that any arrangement made by the cousin for the respondent would not bind her unless it was shown that the cousin had some authority to bind her, or that she had given or adopted his agency. Upon this ruling of the court, counsel stated that he proposed to prove by said witness and others, to be thereafter produced, that said arrangement or agreement was entered into with the assent of the respondent. It was then discretionary with the judge to admit the evidence, and if not subsequently

connected with the issue, by showing that the arrangement was made with respondent's assent, to be laid out of the case. Thus it will be seen that the court committed no error in making this ruling, as it was a matter resting in the discretion of the court, and not a subject of review by this court. (1 Phillips on Ev. 103; 1 Greenl. Ev. sec. 51.) It appears, however, from the bill of exceptions, that the witness was afterwards allowed, without objection, to state what said arrangement was, which would have cured the error complained of, if there had been any.

The second assignment is, that the court erred in refusing to allow appellant to ask respondent, while on the stand, as a witness, how much money she had at the time she went to appellant's to live. If the answer of appellant had contained an averment that she had been received into appellant's services a pauper, or indigent person, as a ground of defense, this evidence would have been admissible; but as it did not, it was not error to exclude it.

The third assignment of error is, that the court erred in its first instruction to the jury, which reads as follows:

"Where one person renders valuable services for another, the law implies a promise on the part of the party benefited, to pay so much as such services are reasonably worth, and this is the general rule where no express contract for such service exists. There are these exceptions to the rule: If the service has been for a near relative, or by a person who is a pauper, or in indigent circumstances, the law will not imply a promise to pay; in such case the party may recover if there is an agreement to pay, but not otherwise. In the absence of an express contract between the parties, a hiring may be presumed from the mere fact of the service unless the service has been with near relations. If a man, for example, serves a stranger in the capacity of a clerk, or of a menial servant, or servant in husbandry, for a continued period, the law presumes that the service has been rendered in fulfillment of a contract of hiring and service, and if the party has served without anything being said as to wages, the law presumes that there was a contract for customary and reasonable wages. But if the service has been with the parent, or

uncle, or other near relation of the party serving, a hiring can not be implied or presumed from it, but an express hiring must be proved in order to support a claim for wages, for the law regards services rendered by near relations to one another, as gratuitous acts of kindness and charity, and does not presume that they are to be paid for unless there is an express contract to that effect. And if a poor person is taken, out of charity, and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue."

No particular objection is pointed out in the exception taken to this instruction, and we are unable to see any that could have operated to the prejudice of appellant. It is a mere statement of the law applicable to the various propositions presented by the pleadings and evidence in the case

The fifth assignment of error is, that the court erred in its fourth instruction, which is as follows:

"That this case must be decided upon its own circumstances. If you are satisfied from all the circumstances of the case that the plaintiff rendered the defendant valuable services in the expectation that she was to receive so much as such services were reasonably worth, and on the expectation upon the part of the defendant to pay her the reasonable value of the services, then she is entitled to receive such reasonable value in this case, and if the services were originally as a member of the family of the defendant on account of the near relationship between the plaintiff and defendant, or because the plaintiff was a pauper or indigent person, and yet you are satisfied from all the circumstances of the case that the last six years of said service was rendered with the expectation on her part and on the part of Thomas Stephens, the defendant, that she should be paid the reasonable value of her service, in that case the plaintiff will be entitled to recover such reasonable value."

It is assumed, on behalf of appellant, that in effect this was equivalent to instructing that a contract of hiring might be implied from the mere services of the respondent, although rendered as a member of the family and not in the

capacity of a servant. If such were its proper meaning it was erroneous, but we do not so understand it. It must be considered in the light of the evidence and in connection with other portions of the charge. The court had already instructed that "if the service had been with the present uncle, or other near relative of the party serving, a *hiring* could not be *implied* or *presumed* from it, but an express hiring must be proved in order to support a claim for wages, * * * as the law regards such services as gratuitous, and does not *presume* that they are to be paid for unless there is an express contract to that effect." The court had further instructed to the effect that "if a poor person is taken out of charity and provided with food, lodging, clothing, and other necessaries, and set to work, no contract of hiring could be *implied* therefrom, however long the party may continue to serve."

It appears from the evidence that appellant lived upon a farm and was keeping a dairy, and that when respondent went there to live she was not a mere child, but a girl seventeen years old, and able to do a woman's work, and that the services of such girls were worth twenty dollars per month in that neighborhood; that she remained with the family for thirteen years, doing such work as was required of her, such as cooking, caring for horses, cattle, and hogs, milking cows and driving them to and from pasture, etc.; that shortly after she went to appellant's, he told her he would send her to school, but never did so; that upon several occasions she told appellant she was not satisfied; that her sister was getting regular wages while she was getting nothing, to which appellant replied that "she need not complain; that he would *pay* her for her work; that he *wanted no one to work for him for nothing*."

Here was a plain understanding or agreement entered into between the parties that respondent was to be paid whatever her services were reasonably worth, and instruction number four is essentially based upon this evidence. It was to the effect that if the jury were satisfied from all the evidence in the case that the respondent rendered valuable services in the expectation, or with the understanding, that

she was to receive so much as such services were reasonably worth, and upon the understanding on the part of the appellant to pay her the reasonable value of the services, then she was entitled to recover such reasonable value. And if they were further satisfied from all the evidence that the services were originally rendered as a member of the family of the appellant, or because she was a pauper, or an indigent person, and yet if they were satisfied from all the evidence in the case that the last six years of said service was rendered with the understanding on the part of both parties that she should be paid the reasonable value of her service, the respondent was entitled to recover such reasonable value. We are unable to see any objection to this instruction when considered in the light of the evidence and in connection with other portions of the charge.

There was evidence tending to show that she originally entered into the service of the appellant as a member of his family, with the understanding that she was not to receive wages for her service; and there was also evidence tending to show that after she became of lawful age, that agreement or understanding was rescinded and another agreement entered into between the parties, by which she should be paid whatever her services were reasonably worth. Under such evidence, it was proper to instruct the jury that she had a right to rescind the original arrangement and enter into another, by which she should be paid whatever her services were reasonably worth, and that she had a right to recover for any service thereafter performed under said new agreement.

Entertaining the views herein expressed, it follows that the judgment of the court below should be affirmed, which is accordingly ordered.

C. M. ROHR, RESPONDENT, v. S. ISAACS, APPELLANT.

PRACTICE—AMENDMENTS ON APPEAL.—The plaintiff, in an action brought in a justice's court made an oral reply to a counter-claim set up by the defendant in his answer, but such oral reply was not entered by the justice in his docket. The justice proceeded to try the case, and after hearing the testimony of the parties, disallowed the greater portion of the counter-claim, whereupon the defendant appealed to the circuit court: *Held,* that it was not error in the circuit court to allow a reply to be filed in that court, so as to present for trial the same issue which was, in fact, tried in the justice's court.

IBID—SPECIAL FINDINGS—QUESTIONS WITHDRAWN BEFORE VERDICT.—The submission of particular questions of fact to be answered by the jury in addition to their general verdict, is a matter of discretion with the court, and the submission may be withdrawn by the court at any time before the jury have found a special verdict on the particular questions submitted to them.

APPEAL from Multnomah County.

This was an action commenced in a justice's court by the respondent, to recover from the appellant the sum of forty-seven dollars, less a credit of twenty dollars and sixty-four cents, which he allowed to appellant. The balance claimed was twenty-six dollars and thirty-six cents. The appellant filed an aswer, admitting that the respondent had a just demand for forty-five dollars, but claimed a larger credit, amounting to thirty dollars and ninety-six cents. He then, for a further answer, by way of a counter-claim, alleged that the respondent was indebted to him in the sum of two hundred and fifty-five dollars, and demanded a judgment for two hundred and forty dollars and ninety-six cents. No reply was filed by the respondent to the new matter set up in the answer, nor was there any entry made in the justice's docket, to the effect that an oral reply had been made to the new matter, so set forth in the answer. The parties proceeded to the hearing of the cause before the justice.

The respondent and two others testified in his behalf, when he rested his case. The appellant then filed a motion for judgment in his favor, for two hundred and forty dollars and ninety-six cents, for want of a reply, which motion was overruled by the justice. The trial then proceeded, and

the appellant called and examined a number of witnesses in his behalf. After hearing the case, the justice rendered a judgment in favor of the respondent for nineteen dollars and twenty cents, from which an appeal was taken to the circuit court.

The appellant then moved for judgment on the pleadings in that court, which motion was taken under advisement, pending which the respondent moved the court for an order on the justice to supply and perfect the transcript, which order was made. In return to this, the justice certified that after the answer was filed, the respondent replied orally to the new matter set up in the answer, virtually denying the same; and that by inadvertence the same was not entered on his docket. Two or three counter-affidavits were filed by appellant, denying that oral reply was made as certified by the justice. The circuit court overruled the motion for judgment on the pleadings and allowed the respondent to file a reply denying the new matter set up in the answer as a counter-claim.

On the trial in the circuit court, the jury were directed by the court to find a general verdict upon the issues tried, and in addition to find as a question of fact what was the value of certain slaughter-house offal, sold and delivered by appellant to respondent, as set forth in the answer as a counter-claim. The jury rendered a general verdict in favor of respondent, for eighteen dollars and seventy-two cents, but failed to find on the question of fact submitted to them. The court directed them to retire and find on the question of fact. After being out some time, one of the jurors became sick, and they were discharged without finding a special verdict. Judgment was then entered on the general verdict.

E. Mendenhall and John B. Waldo, for appellant.

Moreland & Tanner, for respondent.

By the Court, KELLY, C. J.:

The appellant claims that the court erred in its refusal to render judgment in his favor on the pleadings, as filed in

the justice's court, and in allowing the respondent to file a reply in the circuit court. The statute in relation to the proceedings in justices' courts, section 80, page 473, of the code, provides that "the appellate court may, in furtherance of justice, and upon such terms as may be just, allow the pleadings in the action to be amended, so as not to substantially change the issue tried in the justice's court, or introduce any new cause of action or defense." In justices' courts the pleadings are either made orally or in writing, as the parties to the action may desire. The object which the legislature had in view by so providing, was to enable the parties litigant to try their cases without going to the expense of employing counsel, if they think proper to do so. Often they are so small that the amount in controversy will not justify the employment of attorneys to conduct them, and especially is this so in country precincts remote from the county seats where lawyers usually reside. In justices' courts, where parties try their own cases, formality or exactness in pleading is not expected nor required. And when appeals are taken in such cases, the circuit courts are and always have been liberal in allowing the pleadings to be so amended as to present the issues which were in fact tried in the justice's court, whether they were there made by the pleadings or not.

In this case there can be no doubt that one of the issues tried in the justice's court was, whether the counter-claim of the appellant was a just one or not. It was undoubtedly contested by the respondent, for the greater portion of it was disallowed by the justice after hearing the testimony on both sides. As it was an issue which was in fact tried before the justice, the circuit court very properly allowed a formal reply to be filed, so that the same issue might again be tried in that court. The appellant also contends that the court erred in withdrawing from the jury the particular question of fact upon which they were directed to find, and in discharging them after they had rendered a general verdict in favor of respondent. The submission of particular questions of fact to be answered by the jury, in addition to their general verdict, is a matter of discretion with the

court. Neither of the parties can demand it as a matter of right, and being purely a matter of discretion with the court, we think this discretion may be withdrawn at any time before the jury have found a special verdict on the particular question or questions submitted to them. (*Moss v. Priest*, 19 Abb. Pr. 314.)

Some other exceptions were taken to the refusal of the court to charge the jury as requested by the counsel for appellant. They have not, however, been pressed upon the consideration of the court in the argument of the case, and are therefore presumed to have been abandoned. The instructions asked were mere abstract propositions of law, which the court was under no obligation to give.

The judgment of the court below is affirmed, with costs.

D. P. THOMPSON, RESPONDENT, *v.* ANDREW WOOLF, APPELLANT.

SUIT TO QUIET TITLE—POSSESSION WHEN LANDS ARE WILD.—One owning wild lands which he holds by deed from one seised by deed, is in such possession as to enable him to bring a suit in equity to remove a cloud from the title, under section 500 of the code.

EVIDENCE—PEDIGREE—DECLARATIONS OF DECEASED PERSONS.—Declarations of deceased person or persons out of the state, who were or are relatives of a family, may be received as evidence of pedigree. But before such deslarations can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations.

APPEAL from Washington County.

The complaint alleges, in substance, that respondent is the owner of a certain tract of land, and "by virtue of his title" is in possession thereof. That appellant has a sheriff's deed to said lands, under a tax sale, and that such deed is void and constitutes a cloud on the respondent's title. To prove his title, the respondent offered what purported to be a deed from Green C. Caruthers and eighteen others in the state of Arkansas, dated August 8, 1869, and purporting to convey to B. Goldsmith the interests of the said nineteen grantors in "all the estate, both real, personal, and mixed, of which Finice Caruthers, whose real

name was Finice Thomas, lately deceased, in said county of Multnomah, died possessed." No specific interest is mentioned in said deed, and the lands in controversy herein are described as a part of that estate. Respondent then offered quitclaim deeds from B. Goldsmith to the South Portland Real Estate Association, and from S. P. R. E. A. to respondent, each purporting to convey the same lands as the Arkansas deed.

T. B. Handley, and Thayer & Williams, for appellant.

B. Killen, for respondent.

By the Court, BOISE, J.:

It is claimed by the appellant that the respondent has not shown such a possession of the land as to entitle him to maintain this suit under section 500 of the code. The possession claimed by respondent is constructive and results from deraigning his title by mesne conveyances from the heirs-at-law of Finice Caruthers, deceased. If his title is perfect, we think he would be in constructive possession without making an actual entry, for the heir becomes seised and presented without entry. (1 Washburn on Real Property, p. 48, sec. 81; *Brown v. Wood*, 17 Mass. 68.) And a deed from one in possession confers seisin on the grantee without entry, and such constructive possession has been held sufficient to support a suit in partition. (*Brownwell v. Brownwell*, 19 Wend. 369; *Beebee and wife v. Griffing*, 14. N. Y. 235.) And such possession has been held sufficient in this state in practice in the circuit courts, in cases of partition. And if constructive possession is sufficient to give the court jurisdiction in cases of partition, we do not see any reason why such possession should not suffice in suits under section 500. For the language conferring the jurisdiction is the same in both cases so far as requiring possession is concerned. We think, therefore, that the possession alleged is sufficient.

The appellant claims that the evidence produced by the respondent is not sufficient to show *prima facie* that the persons who claim to be heirs of Finice Caruthers, and from

whom respondent seeks to deraign title, are such heirs. All the evidence on this subject is contained in the deposition of A. C. Gibbs, who testified that he knew Finice Caruthers in his life-time quite intimately, about the fall of 1858, in Portland, Oregon, and was his attorney, and on being asked what was his true name, said, I suppose it was Finice E. Thomas. This answer was objected to, and was incompetent as being merely the opinion of the witness. He also says that he knew the mother of Finice; that he was not acquainted with her, but had seen her. Then, on being asked "what was her name," he answered, "Her name was Elizabeth Thomas, but she went by the name of Elizabeth Caruthers. She and Finice lived together near Portland, and recognized each other as mother and son." His testimony is then as follows:

"Q. 8. What blood relatives did Finice Caruthers have at the time of his death? State fully their relation, names, and places of residence, and your means of knowledge concerning their relationship?

"A. 8. He left relatives on his mother's side who were cousins; none nearer than cousins that I know of. Those whom I have seen and now remember, are Green C. Caruthers; Jackson Caruthers; Mary Ann Mauldin, subsequently married and known by another name; Louisa Caruthers, the wife of a man by the name of Newman, first name I don't remember; also the wife of a man by the name of Chilcoat, all of or near Circe, White county, Arkansas. I also knew John Caruthers, Allen Caruthers, and another man by the name of Caruthers whose first name I don't remember, a brother of the other two, who resided at Waverley, Illinois. I visited this family at Waverley, Illinois, and spent several days with them. I also visited the persons above named residing in White county, Arkansas, at two different times. One time I spent from one to two weeks with Green C. Caruthers. While in White county, I became acquainted with some fifteen or twenty members of the same family, and conversed with them often and freely with reference to their relationship to Finice Caruthers. At the time of some of these conversations, I had

with me the family circle or diagram now presented; I mean, not the same paper, but a copy of the same, which I now present and offer as a part of my answer. From statements made to me by these various persons, and particularly the older ones; and from correspondence that I had had with some of them and others of the family for some six or eight years, I gained the information as to their relationship to Finice Caruthers. I should add, by way of modification of the above, that a part of the family circle above referred to, was made up from information derived on those trips.

"Q. 9. Are any of the persons, whose names you have given above, now residing or in the state of Oregon?

"A. 9. None of the persons I have named, that I know of, reside in Oregon. There are one or two children of Samuel Caruthers, referred to in the diagram, who reside in Oregon.

"Q. 10. How do these cousins of whom you have spoken trace their relationship to Finice Thomas, commonly called Finice Caruthers?

"A. 10. The head of the family were John and Polly Caruthers of Charlotte, Dixon county, Tennessee; Elizabeth Thomas, called Elizabeth Caruthers, was a daughter of John and Polly. The other persons I have referred to are children and descendants from the brothers and sisters of Elizabeth Caruthers.

"Q. 11. When did these aunts and uncles of Finice die?

"A. 11. I can't state; I have information on memorandums and in letters, but I can't state it from memory. A part of it is entered on the diagram.

"Q. 12. Did they die before or after the death of Finice Caruthers?

"A. 12. I think they all died before Finice died; I think Elizabeth outlived all her brothers and sisters.

"Q. 13. Did you have any acquaintance with Alexander B. Caruthers?

"A. 13. No, only from letters; I never saw him. I corresponded with him.

"Q. 14. What was Finice Thomas' father's name?

"A. 14. I suppose it was Joseph Thomas.

"Q. 15. Were you a subscribing witness to the deed marked 'B,' which I now hand you?

"A. 15. I was.

"Q. 16. Did you see the grantors named in that deed execute it, sign, and seal it?

"A. 16. I did, all of them; and I might add, I paid the money.

"Q. 17. What relation to Finice Caruthers were the respective grantors in said deed, Exhibit 'B?'

"A. 17. The following named persons, who executed said deed, are: first cousin, Green C. Caruthers; the others are children of first cousins of Finice."

On cross-examination:

"Question 1. How, if at all, were you interested in the estate of Finice Caruthers while on your visit to Illinois and Arkansas, spoken of by you in your direct testimony?

"Answer 1. I had an interest under a contract with Jeff. Carter and D. B. Hannah in a part of the property purchased before the time I went east as above referred to, and a half interest in all that was purchased by me for B. Goldsmith.

"Q. 2. Did you make the diagram, or furnish the facts on which it was made?

"A. 2. It was commenced (the original diagram) by Chas. W. Parrish and myself from information derived through D. B. Hannah, who had been east; and from affidavits and letters to which I have referred above. That diagram was taken east by me on the trips I referred to, and was extended and added to, as I got further information concerning the family.

"Q. 3. How much of it was made before you went east, and how much afterward?

"A. 3. All of the first, or inner circle, was made before I went; and all of the second circle from the center, excepting, perhaps, a few dates therein; and, as near as I now recollect, from a third to a half of the third circle.

"Q. 4. Had you any other information from which to form that diagram, and on which to base the testimony you have just given, than the statement of the persons whose claims you were buying?

"A. 4. I had their statements and some affidavits and letters that I have referred to in my direct examination; in addition, I had the statement of D. B. Hannah that he had visited other members of the same family.

"Q. 5. Do you base your supposition as to the name of Finice Caruthers, or Thomas, and of his father, upon the same grounds you have given in your last answer?

"A. 5. Only in part. I was acquainted with Finice Caruthers; I learned his name from what he said. In the land office, Elizabeth Caruthers made affidavit with reference to her name and where she was born.

"Q. 6. Did Finice Caruthers ever tell you that his name was Thomas?

"A. 6. He did not, that I recollect of.

"Q. 7. Did he ever inform you of any of the relationships you have testified to in this examination?

"A. 7. No, excepting as I heard him speak of his mother.

"Q. 8. With how many of the signers of this deed, Exhibit B, did you converse regarding their relationship to Finice Caruthers, deceased?

"A. 8. On Saturday and Sunday preceding the date of the deed, there was a two-days' meeting held near Circe. On Saturday, after the meeting, I met all the persons named in that deed, made explanations in connection with what I had said to some of them before; and I think, on the Monday following, the deed was executed. If I did not talk with all personally, I talked with them all within my hearing.

"Q. 9. With how many of those persons had you talked previously?

"A. 9. With Green C. Caruthers, Jackson Caruthers, Mr. Newman and his wife, and the wives of Green C. and Jackson, and with Louisa Caruthers, William Chilcoat and his wife, Elizabeth Adcock.

"Q. 10. To whom did you pay the consideration of that deed?

"A. 10. I paid four hundred dollars of it to Green C. Caruthers; part of it to Louisa Caruthers; the balance was handed to Geo. W. Newman and Jackson Caruthers, for

them to divide among the others, as it was not convenient to make change from the size of the bills I had. It was paid in the presence of all.

"Q. 11. What was the estimated value of the property conveyed by that deed?

"A. 11. I can't now state, as I don't remember their fractional interests; their fractional interests were not alike. It would take considerable time to make a calculation of it. I suppose the value of all the property referred to, and mentioned in the deed, was at the time $100,000 and more.

"Q. 12. State as near as you can the proportionate share of the aggregate interest of the signers of that deed in the entire estate of Finice Caruthers, deceased?

"A. 12. It might have been one-twentieth perhaps, of the estate; this is a rough calculation."

On redirect examination:

"Question 1. What did Green C. Caruthers tell you about the family history? State it all, as near as you can.

"Answer 1. I first met Green C. at Sulphur Springs, Arkansas, in company with Jackson Caruthers and the families of both. I spent two days with them there; during that time we talked a great deal about the family. I don't remember near all he said, but I remember that he said, in substance, that he had been acquainted with Elizabeth Thomas and Finice; that he knew them in Washington county, Arkansas; that she said, and it was reputed by the family, that she came there from Dixon county, Tennessee; and that she was married to a man by the name of Thomas, whom he had never seen, and who had never been heard from by her or any of the family since she left Tennessee. He said that during the war, the fore part of the war, he was a Union man, and it wasn't safe for him to stay in that country; that he went north; that he had corresponded with this branch of the family in Waverley, Ill.; and that he went up to his relatives there and stayed with them during the most dangerous period of the war; that while there, he talked over the relationship of the family; that some of the relations at Waverley he had never seen before. He said that Samuel Caruthers and William Car-

uthers, of Texas, and Alexander B. Caruthers, of Arkansas, were own cousins of his; that they were in sympathy with the other side; that he corresponded with them while he was north; and that since he heard of the death of Finice, and his leaving an estate in Oregon, he had taken more pains to trace and find out the relationship, and find how many were entitled to share in the estate. I then showed him the family circle before referred to, as far as it was then made up, in the presence of Jackson Caruthers and their families. He said it was correct; he added, however, that there were some members of the family in Tennessee that he did not know of until I showed him the family tree; but that he was personally acquainted with Elizabeth Caruthers, and knew, or knew of, all of her brothers and sisters. Those that he had lost the run of, were children of his cousins; he (Green C.) is a man of about sixty-eight years old."

From this testimony it appears that the witness did not derive this knowledge of the relationship of the persons of whom he speaks as relatives of Finice from any declarations made by Finice or his mother. He says on the subject of their declarations: "I was acquainted with Finice Caruthers. I learned his name from what he said. In the land office Elizabeth Caruthers made affidavit with reference to her name and where she was born." The governor then says that Finice never told him his name was Thomas, or spoke of any relatives except his mother. He does not state the contents of the mother's affidavit, as to what her name was, or where she was born; nor would such evidence been competent, for the affidavit was the best evidence of the declarations on these subjects. So there is no evidence of any declarations, coming from Finice or his mother, tending to show that their names were Thomas, or from what country they came, or where they were born, or who were their kindred. Nor is there any evidence in the case tending to show that they came from Arkansas, except that they bore the names of Elizabeth and Finice Caruthers. The only evidence tending to prove their identity with the Finice and Elizabeth Thomas, who are spoken of by Green C. Ca-

ruthers, is that persons of that name, who were reputed as relatives, came to Arkansas from Dixon county, Tennessee. But the declarant, Green C., does not state that they left Arkansas for Oregon, or where they went. If he had stated that in a certain year, or about such a time, they had left for Oregon or the Pacific coast, or that he had heard of them or corresponded with them, it might be some evidence of identity. Or if the respondent had produced an affidavit of Elizabeth Caruthers from the land office, declaring that her true name was Thomas, or that she had been born in Tennessee, or had relatives there or in Arkansas, this, then, would have been evidence tending to show that Finice Caruthers was the same person of whom Green C. Caruthers speaks.

The declarations made to Governor Gibbs might be evidence to show that the parties who executed the deed were the kindred of the Finice and Elizabeth Thomas who came to Arkansas and who were entitled to a place in the family circle. But they could have no tendency to prove their identity with Finice and Elizabeth Caruthers, who died in Oregon, for the declarations were not in any way descriptive of the persons, except so far as the names are identical. We think this evidence is insufficient to show that the parties who signed the deed were the heirs of Finice Caruthers. Respondent claims that the evidence in this case is as full and conclusive as in the case of *Jackson v. Cooley*, 8 Johns. 127. In that case the witness testified that he was acquainted with William Wilson, the ancestor, when he resided in New York. That he removed from this country to England prior to the year 1783. That he was his agent, after he left, for managing the land in controversy. That he understood that he died, leaving no children, brother, or sister, and that John Wilson was his only nephew and heir-at-law. That after the death of William Wilson, John Wilson represented himself as heir, and witness was his agent in relation to the lands in question, and that he always understood, from the acquaintances of the family and people who claimed an interest in the lands, that John Wilson was both devisee and heir. Witness in that case also stated that his in-

formation was derived from the several powers of attorney he received, and correspondence with the parties, and conversations with Banjer Corp, and other acquaintances of the family. The question in that case seems not to have been one of identity, but rather who of the Wilson family survived. In that case the witness testified of the declarations of those who knew the family, both the ancestor and the one who claimed as heir. In this case there are no declarants referred to who pretend in their declarations to have known Finice Caruthers in Oregon, or that he was the same person who, many years before, had been in Arkansas. The cases are not parallel.

Declarations of a deceased person or persons out of the state, who are related to a family, may be admitted to prove pedigree. But before such declarations can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations. (Wharton's Evidence, c. 4, sec. 218.) And there is no other evidence adduced in this case to show that Green C. Caruthers was a relation of Finice Caruthers than as above stated. Governor Gibbs in his testimony speaks of deriving a part of his information as to this relationship from D. B. Hannah. But Hannah was not a relative or acquaintance of the Caruthers family, except as he had been in Arkansas and elsewhere to hunt them up, and gather evidence of such relationship. If he had found such evidence, it should have been produced, for an agent can not go forth to hunt an heir to a large estate, and when he has found the supposed heir, and evidence enough to convince them of the genuineness of the relationship, come before a court and on his oral testimony, without producing the evidence which has convinced him, establish the pedigree. The whole testimony in this case amounts to simply this; that Governor Gibbs, in his correspondence, travels, and searches, has found enough evidence to convince him that these persons who signed the deed are the relatives of Finice Caruthers. But his opinion on this subject is not sufficient. The opinion of the witness is not evidence; we must go behind

the opinion and look at the facts and judge for ourselves of their weight.

We think, therefore, that there is not sufficient evidence to support the respondent's title in this suit; that it is not proved that the persons who signed this deed are the heirs of Finice Caruthers, who was the owner of the land in question at the time of his death.

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*M. LICHTENSTEIN, APPELLANT, v. MELLIS BROS., RESPONDENTS.

TRADE MARK, INFRINGEMENT OF.—L. recorded the following as a trade-mark: "I X L General Merchandise Auction Store," and used the same as a sign over his place of business. M. afterwards used as a sign over his store: "Great I X L Auction Co." *Held*, that the court will not suppress the use of the latter as an infringement of L.'s trade-mark.

APPEAL from Multnomah County.

This is an action for damages for violation of plaintiff's rights to a trade-mark, commenced in the circuit court and decided against appellant on demurrer to the amended complaint. The complaint shows, by proper allegations, that the plaintiffs have the exclusive right to use as a trade-mark the name "I X L General Merchandise Auction Store," and that the respondents, knowing the fact, fraudulently, and for the purpose of deceiving the public, use the name "Great I X L Auction Company." The court below sustained the demurrer to the complaint, upon the ground that the facts stated did not show an infringement of the plaintiff's trade-mark.

O. P. Mason and E. T. Howes, for appellant.

Johnson, McCown and Macrum, for respondents.

By the Court, BOISE, J.:

It is conceded that the first ground of demurrer, to wit, that the court has not jurisdiction of the case, is not tenable; and the appellants now rely on the second ground of demurrer, to wit, that the complaint does not state facts sufficient to constitute a cause of action. In determining

*See 34 Am. Rep. 592 and Note.

this cause of demurrer, we will first consider the matter as to whether or not the letters and words "I X L General Merchandise Auction Store," which constitute the trade-mark of the plaintiff, are so nearly identical with or similar to the words and letters used by defendants, to wit, "Great I X L Auction Co.," as to be likely to mislead the public, and cause the one to be taken for the other, and thereby draw the customers of the appellant to the store of the respondents, and thereby injure the business of the appellant. We do not think the letters and words used by the parties are so nearly identical in appearance or meaning as to mislead the public. The words used by the appellant, "General Merchandise Auction Store," suggest that the store contains a general assortment of merchandise, and that goods are there sold at auction. The words "Great Auction Co." would suggest that the Co. sold goods and other property, such as lands and such other things as are embraced under the head of general merchandise. All the words are different in these respective signs except the word *auction*, and this is a word that is generally used over all places where auctions are conducted, and can not be appropriated by any one as a trade-mark without being used with other words.

It is claimed that the letters "I X L" could not be used by the respondent after being appropriated by the appellant. These letters have been used by many manufacturers to denote their wares, as on cutlery and on bitters, and were not the invention of the plaintiffs, but taken by them from former proprietors and inventors thereof, and do not by themselves make a trade-mark any more than the word *excelsior*, which is often used with other words to make a trade-mark or sign. And in this case, the appellants have recorded all the words above with these letters as their trade-mark, and can not now claim these letters alone constitute it. We think the signs of the parties are not sufficiently similar to warrant the court in interfering to restrain the respondents, or to entitle the appellant to damage.

The judgment of the circuit court will be affirmed, with costs.

L. BOIRE AND ADILE BOIRE, RESPONDENTS, v. CHAS. MCGINN AND ANNIE MCGINN, APPELLANTS.

PARTNERSHIP BUSINESS, PROFITS OF, HOW DETERMINED.—A referee appointed to ascertain and state an account between partners should ascertain what the real and actual profits were, and not what they ought or might have been.

IDEM—EXPERT TESTIMONY NOT ADMISSIBLE.—Where the books of a partnership fail to show the true state of its business, resort may be had to a calculation of the profits from the amount of merchandise proven to have been sold by said firm at the rate per cent. profit proven to have been made on said merchandise in that particular business, but not to expert testimony of witnesses engaged in a similar business, to prove that profit was made by this firm in their business, for the purpose of charging one of the partners therewith.

IDEM—ENTRIES IN PARTNERSHIP BOOKS, EFFECT OF.—In stating the accounts of partners, as between themselves, the rule is that the entries on the partnership books, to which both partners have had access at the time when those entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries; subject, however, to the right of either party to show a mistake or error in the charge or credit.

APPEAL from Multnomah County. The facts are stated in the opinion.

H. B. Nicholas, for appellants.

W. H. Effinger and J. R. Stoddard, for respondents.

By the Court, PRIM, J.:

This is a suit in equity to dissolve a partnership and settle up its business. It appears that on April 9, 1877, the plaintiff L. Boire and Charles McGinn formed a partnership for the purpose of carrying on the bakery and retail grocery business in the city of Portland. That at the commencement of said business its capital stock consisted of machinery and utensils for carrying on said business, and a small stock of groceries estimated at five hundred dollars, amounting in all to two thousand four hundred dollars, and that each owned one-half interest therein. That afterwards, on May, 1877, they purchased a house and lease of lot from one Winter for one thousand and fifty dollars, into which

they then moved and continued to carry on their said business until the thirteenth day of June, 1877. At the date last mentioned, defendant McGinn owing an individual debt to some one, and fearing that proceedings would be taken against him to collect the same, a pretended dissolution was entered into, which arrangement proved to be void and of no effect. The case was referred to O. P. Mason, Esq., to take the testimony and state the account between the parties, and report the same to the court.

The referee having taken the testimony, among others, reported the following findings of fact and conclusions of law:

"6. That from June 13 to December 14, following, Boire had the exclusive control of the entire business, the purchase of merchandise, the payment of debts, the handling of all cash, and the keeping of the books, and that most of the time McGinn was not about the place of business at all, but sick; that during that time, the upper story of the building was rented and Boire received the rent therefor. 7. That the books of the concern are incomplete, imperfectly kept, and do not show a full history of the business during said period; do not show the amount of merchandise sold, the amount of cash sales, nor the amount of profit and loss, nor the correct account of the individual partners. 10. That nine tenths of the sales were baked stuffs and one tenth groceries and other merchandise; that the gross profit on baked stuffs averaged one hundred per cent., and on groceries and other merchandise, twenty-five per cent.; that after making deductions for what was used in their families, the profits on all sales averaged seventy-five per cent., and that such profits would be five thousand eight hundred and seventy dollars and thirty-two cents, from which expenses and losses are to be deducted."

The seventeenth finding charged "Boire with eight months' rent of up stairs, and McGinn fifteen months, at twenty dollars—which, added to the profits named in the tenth finding, makes a total of six thousand three hundred and thirty dollars and thirty-two cents; and after deducting loss and expense, leaves a net profit of two thousand five

hundred and eighty-nine dollars and fifty-seven cents to be divided between the two parties, 18. That while the said business was paying a profit, Boire, having the management and control, allowed an indebtedness of six hundred and forty-one dollars and ninety-six cents to accumulate, and McGinn is entitled to receive one-half of that sum from Boire."

As conclusions of law: That "1. Where the books of a firm do not show the true state of the business, resort may be had to a calculation of the profits from the amount of merchandise sold, at the per cent. of profit proved in such business to be made on such merchandise. 2. Where one partner has full charge of the business, control of the cash and books, and buying and selling, and his books are kept so imperfectly and incorrect that an accounting can not be had therefrom, he is charged with the amount of profits proved to have been made on such business generally, and his books are to be taken in evidence only so far as they prove themselves to be correct. 3. The presumption of law is, that the books contain a full history of the business; but when it has been proven or admitted that the books are incomplete and incorrect, resort may be had to the next best evidence for an adjustment of accounts between the partners; and that books may be aided, explained, or impeached by other evidence. 4. The burden of proof is on the plaintiff; and when a certain amount of profits has been proved, he is charged therewith, unless he can show that the expense and losses have equaled the profits. It is not sufficient for him to say that there have been losses; it devolves on him to show the losses, and how and where they are."

The above findings, together with some others not herein set out, having been excepted to, were set aside by the court upon the final hearing of the cause, as being against the evidence and law applicable to the case.

The court then finds and holds that said parties were partners in said business, from the organization of said partnership up to the present time, and that the books were kept by the firm, or by its employes, and under the inspec-

tion of both parties; also that a computation of profits in said business, based upon the percentage usually realized in such business by other parties, and upon the amount of flour used each day, the number of bucketfuls of water used in mixing it, the aggregate number of loaves produced and the profits made on each, is unsafe; and that since the books of the partnership kept by the employes, under the inspection of both parties, do not show any profits, the court will not presume any more made over and above what the partners drew, and what remains in uncollected bills, in which both parties are entitled to share alike; and since said books do not charge Boire with having received any profits, a court of equity will not so charge him, unless satisfactorily shown by sufficient evidence, and it will not be sufficient to show that the business ought to have been profitable, and conclude from the fact that it was profitable, and that Boire got the profits, or that McGinn took, by the same reasoning, profits while he held exclusive possession; nor will it be sufficient to compute the net profits from the amount and cost of material, labor, etc., used, and the price for which it sold when manufactured; nor can McGinn be construed to be so far absent from said business as to hold Boire liable as a trustee. Also, that said matters in relation to the renting of rooms and indebtedness, were partnership matters, and should be treated as such,

These conclusions and findings of facts and law by the court, in our opinion, are correct, and are supported by the evidence produced in the case and the law applicable thereto. It was the duty of the referee to ascertain and report what the real and actual profits of this partnership were, and not what they ought or might have been.

It appears that both parties were in Portland all the time when the business was carried on, and were not deprived of the opportunity of looking into the books whenever they desired to do so; consequently, one can not be held to be the special agent and trustee of the other, so as to charge him with profits, whether any were realized or not.

Where the books of a partnership fail to show the true state of its business, while resort may be had to a calcula-

tion of the profits from the amount of merchandise proven to have been sold by said firm at the rate of per cent. profit proven to have been made on said merchandise in that particular business, resort can not be had to *expert* testimony of witnesses engaged in a similar business, to prove what profit was made by this firm in their business, for the purpose of charging one of the partners therewith, in a settlement of their accounts. "In stating the accounts of partners, as between themselves, the rule is that the entries on the partnership books, to which both partners have had access at the time when those entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries, subject, however, to the right of either party to show a mistake or error in the charge or credit." (*Heart v. Corning*, 3 Paige's Ch. 566.)

The decree of the court below is affirmed.

THOMAS MOUNTAIN, RESPONDENT, *v.* THE COUNTY OF MULTNOMAH, APPELLANT.

COUNTY COURT—WRIT OF REVIEW LIES TO CORRECT ERRORS OF, IN COUNTY BUSINESS.—Under section 875 of the code, no appeal lies from the decisions of the county court in the transaction of county business, but such decisions may be reviewed upon writ of review.

IDEM—MILITIA COMPANIES—DUTY OF COUNTY COURT TO PROVIDE ARMORY.—It is the duty of the county court of each county in which there shall be an organized volunteer company, upon application to the commanding officer thereof, to provide an armory and armorer, and to audit, allow, and cause to be paid the necessary expense of the same to an amount not exceeding fifty dollars per month; and if the county court shall refuse so to do, its proceedings may be reviewed, by writ of review, as provided for in the code.

APPEAL from Multnomah County.

In May, 1872, the Portland Light Battery was organized in Multnomah county, according to the laws of the state of Oregon, and was listed in the office of the adjutant general of the state, and became, and has continued ever since, a part of the organized militia of the state. Thomas Mountain aforesaid was elected and duly commissioned captain,

and as such, gave the necessary bonds required by statute. He has been ever since, and is now such captain, duly qualified and commissioned according to law. The said battery is a sectional one, having two guns of cannons without caissons, that being the total amount of ordnance belonging to the state of Oregon. From the time of its organization until the first day of July, 1879, the county court of Multnomah county has paid to Mountain, as Captain of said battery, the sum of fifty dollars monthly, that being the limit imposed by law to be allowed such an organization for monthly necessary expenses. Since that time nothing has been paid. In October, 1879, Mountain petitioned said county court to allow the necessary expenses of the said battery for July, August, and September, alleging that they were forty-one dollars and fifty cents for each of said months, itemized as follows: Thirty dollars for rent of armory; ten dollars, pay of armorer; and one dollar and fifty cents for lights; total, one hundred and forty-one dollars and fifty cents. In his petition he set out at length the above facts, and duly verified them by affidavit. The county court, after hearing the petition, made an order disallowing all of said account. Whereupon, Mountain brought a writ of review to the circuit court, alleging as grounds of error: That there was no other evidence before the court than said petition, and there was no controversy or dispute about the matters and things set forth in said petition; that said court had no jurisdiction to disallow said petition, for the reason that it is the duty of said county court to audit, and allow, and cause to be paid the necessary expenses of a duly organized volunteer company of the state; and that said court refused to audit and allow, or cause to be paid, the necessary expenses, and without cause disallowed the same. A motion was made on behalf of the county court to dismiss the writ of review for want of jurisdiction, which was denied.

After argument, the circuit court made an order finding "that the Portland Light Battery is a duly organized volunteer company; that its necessary expenses for an armory and armorer for and during the months of July,

August and September, 1879, are one hundred and forty-one dollars and fifty cents, and that it is entitled to said sum, and ordered that the county court allow the same." From which judgment and allowance the county court appeals to this court.

J. F. Caples, District Attorney, and M. F. Mulkey, for appellant:

The county commissioners are the financial agents authorized to audit claims against the county, and when the plaintiff made his demand by presenting his petition, and the same was refused and rejected, the plaintiff had his right of action. The plaintiff did not have any right of appeal, as the county commissioners were only exercising functions of a non-judicial character. (5 Or. 273, and cases cited.) The party asking a writ of review must be concluded by the action of the inferior court or tribunal before it will lie. (Id. 280.) In this case, by the refusal of the county commissioners to audit or allow the claim of the petitioner, he was not concluded in any sense, as his right of action remained intact and the action of the county commissioners amounted to nothing more than a refusal to pay upon demand, and it left the plaintiff really in a better condition to pursue his plain remedy by an action in the proper form.

Fred V. Holman, for respondent:

"From the necessity of the case, supervisors exercise judicial legislative, and executive powers in matters relating to the police and fiscal regulations of counties." (8 Cal. 61; 14 Id. 479.) A board of supervisors of a county, in allowing or disallowing a claim, exercise judicial functions." "A writ of mandate [mandamus] will not be issued to reverse or review its judgment." (16 Cal. 209; 41 Id. 68; *People v. Supervisors*, 51 N. Y. 444; Gen. Laws or Oregon, p. 284, sec. 875; *Chase v. B. Canal Co.* 10 Pick. 244; *Stone v. Mayor of N. Y.*, 25 Wend. 167; *M. I. Co. v. Schubal*, 29 Wis. 444.)

By the Court, PRIM, J.:

The first and second assignments of error are not well taken, and are therefore overruled, as it appears there was no dispute as to facts found by the court. The facts found by the court, to which exceptions are taken, were as follows, to wit: 1. That the Portland Light Battery was a duly organized volunteer company. 2. That its necessary expenses for an armory and armorer for and during the months of July, August, and September, 1879, were one hundred and twenty-one dollars and fifty cents. These facts are fully set out in the petition of Captain Mountain and duly verified by him; Mountain was captain of the company and had charge of the battery, and consequently had personal knowledge of the facts set out in the petition.

The petition was the only evidence before the county court, and it appears there was no controversy or dispute about matters and things set out therein. It appears that the county court, after hearing the petition, made an order disallowing the whole of said account. This being an order made by the county court in the transaction of county business, there was no remedy by appeal. Sec. 875 of the code provides that "the provisions of title 4, of chapter 6, relating to appeals," do not apply to the decisions of the county court "given or made in the transaction of county business," but that in said matters the "decisions of the court shall *only* be reviewed upon the writ of review provided by this code."

Section 19, Misc. Laws, page 668, provides as follows: "It shall be the duty of the county court of each county in which there shall be one or more organized volunteer companies, upon application of the commanding officer of the same, to provide for each company in said county an armory, safe and suitable for the drill of squads in the school of the soldier; and an armorer, to take charge of the same; and said court shall also, at each of its sessions, audit and allow, and cause to be paid, the necessary expenses of the same; *provided*, That the total amount for all the pur-

poses above mentioned shall not exceed fifty dollars in money per month for each company."

It will be seen that by the provisions of this section it is made the special duty of the county courts to audit, allow, and cause to be paid, the necessary expenses of organized volunteer companies within their respective counties. And as the county courts, as a matter of necessity, in allowing or disallowing these accounts, have to exercise judicial functions, their action may be reviewed by the writ of review provided for in the code. (*Tilden v. Sacramento County*, 41 Cal. 68; *People ex rel. v. Supervisors of Madison County*, 51 N. Y. 442; *El Dorado County v. Elstner*, 18 Cal. 148.)

There being no error in the judgment of the circuit court, it is affirmed.

ARTHUR FAHIE, PLAINTIFF AND RESPONDENT, *v.* S. A. LINDSAY, APPELLANT, AND A. B. LINDSAY, F. W. GODFREY, B. LATHAM, JAMES WILSON, DENNIS CORCORAN AND FISHBURN & KENNEDY, DEFENDANTS AND RESPONDENTS.

BILL OF INTERPLEADER.—An action was brought in the county court by a husband and wife against the maker of a promissory note payable to the wife, and while the action was pending, the money due upon the note was garnished in the hands of the maker by certain creditors of the husband, who claimed that the same was the property of the husband, and who alleged that the note was taken in the wife's name to delay and defraud the husband's creditors. *Held*, that the maker of the note could properly file a bill of interpleader to determine the conflicting claims of the wife and the garnishing creditors to the money.

IDEM—MATTERS AFFECTING THE GOOD FAITH OF THE PLAINTIFF ARE NOT ADMISSIBLE AFTER THE ORDER IS MADE.—Where the plaintiff in a bill of interpleader stated under oath that there was no collusion between himself and either of the defendants, and an order was made by the court requiring the defendants to interplead with each other, evidence to prove collusion could not be received after the making of such order.

FINDINGS OF FACT BY REFEREE—WHAT EFFECT GIVEN THEM.—In a suit in equity, where the court appoints a referee to take the testimony and report the facts and the law to the court, this court will not reverse the findings of facts by the referee unless the same are clearly against the weight of the testimony.

APPEAL from Multnomah County.

On the tenth day of October, 1878, the respondent executed and delivered to the appellant a promissory note, of which the following is a copy:

"$300. Thirty days after date, for value received, I promise to pay S. A. Lindsay or bearer the sum of three hundred dollars, in U. S. gold coin, and one per cent. until paid.

"Portland, October 10, 1878. ARTHUR FAHIE."

On the twentieth day of November, 1878, the defendant, A. B. Lindsay, and the appellant, S. A. Lindsay, his wife, commenced an action in the county court against the respondent, on the said promissory note, and before judgment was obtained in the action, to wit, on and between the twentieth and twenty-seventh days of November, 1878, the defendants, Godfrey, Latham, Corcoran, Wilson, Fishburn, and Kennedy, severally caused garnishee process to be served on the respondent, Arthur Fahie, by virtue of sundry executions issued by them respectively on judgments which they had obtained in justices' courts against the defendant, A. B. Lindsay, and one Brandstetter. These defendants, who garnisheed the respondent, claimed that the money due on the three hundred dollar note in controversy belonged to the defendant, A. B. Lindsay and not to his wife, S. A. Lindsay, the appellant, and that the note was made payable to her with intent to defraud the creditors of A. B. Lindsay. On the fourth day of December, 1878, the respondent commenced a suit in the circuit court by filing a bill of interpleader, making A. B. Lindsay, S. A. Lindsay, and all the garnishee claimants parties defendants in the suit.

In the complaint, the respondent alleges that he made, and delivered the note in controversy to S. A. Lindsay on the tenth of October, 1878; that an action was commenced on it by A. B. Lindsay and S. A. Lindsay, in the county court, against the respondent; that afterwards the defendants Godfrey, Latham, Corcoran, and others caused notice of garnishment to be served on him (respondent) by virtue of executions issued upon judgments rendered in their favor

in justices' courts against A. B. Lindsay and others; that said defendants claim that the money due on the said promissory note is the property of A. B. Lindsay, and was made in the name of S. A. Lindsay, the wife of A. B. Lindsay, with intent to cheat and defraud his creditors. The respondent then alleges that he is wholly ignorant of the respective rights of said several defendants to the money due on the note, and prays that said defendants may be required to interplead between themselves concerning their claims to the money.

After the pleadings between the several claimants were perfected, and the case at issue, William M. Evans was appointed a referee, to take the testimony and report the facts and the law to the court. In his report the referee, among other things, finds, "that said note was made by said Arthur Fahie to said S. A. Lindsay, for the purpose of hindering, delaying, and defrauding the creditors of said A. B. Lindsay, and that the money secured by said note was his property." The report of the referee was confirmed, and the money adjudged to belong to the creditors of A. B. Lindsay, who had garnisheed it in the hand of respondent.

B. Killen and H. B. Nicholas, for appellant.

Northup & Gilbert, for respondents Fishburn and Kennedy.

Yocum & Clarno, for respondent Fahie.

By the Court, KELLY, C. J.:

The first question raised by the appellant is one of jurisdiction. He claims that the matters in controversy between the several parties in this suit were not the proper subject of interpleader. Judge Story says: "A bill of interpleader is ordinarily exhibited where two or more persons claim the same debt, or duty, or thing from the plaintiff by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty, or other thing, fears that he may suffer injury from their conflicting claims, and therefore he prays that they

may be compelled to interplead, and state their several claims, so that the court may adjudge to whom the same debt, duty, or other thing belongs." (Story's Eq. Pl., sec. 291; Daniell's Ch. Pl. and Pr. 1560.)

We think the subject-matters in controversy in this suit come clearly within this rule, laid down in the books on equity pleading. The respondent admitted that he was indebted in the sum of three hundred dollars on the note given by him. Apparently the debt was due to S. A. Lindsay, the appellant, and it was claimed by her. This claim or right was denied by the creditors of her husband, who had garnisheed the debt in the hands of respondent. They alleged that there was collusion between the husband and wife to hinder, delay, and defraud them by taking the note in the name of the wife, when, in fact, the amount specified in it belonged to the husband. To try and determine this question of alleged fraud was within the peculiar province of a court of equity. A court of law had no jurisdiction of it, and the county court, in which the action on the promissory note was pending, had no equity jurisdiction conferred upon it by law to try questions of fraud.

The appellant contends that the respondent ought to have made the defense to the action, if any he had, in the county court, and that having failed to do so, he should not now be permitted to come into a court of equity for relief. But it is difficult to perceive what defense he could have made in the county court to the action against him, as he did not deny the validity of the note on which the action was brought. On the contrary, he averred his readiness to pay the amount due on it, to whomsoever it should be adjudged to belong. And that was a matter which could not be tried there, as the determination of it was cognizable only in a court having equity jurisdiction. Those who had garnisheed the money due on the promissory note, claiming that it was the property of A. B. Lindsay, had a right to establish their claim to it as against the appellant, but they could not interpose this defense in the action against the respondent in the county court. And the fact that the appellant obtained a judgment in her favor in that court after the garnishee

notices were served on the respondent, can not destroy their right to contest the validity of her claim to it. And we hold that the proper may to settle and adjust these conflicting claims to the money was by a bill of interpleader.

It is also claimed by the appellant that she should have been allowed to prove that there was collusion between the respondent and the defendants, who garnisheed the money on the note. There was an averment in the complaint that the suit was not brought by collusion with either of the defendants. The appellant demurred to the complaint, and the demurrer having been overruled, she did not ask leave to answer before the order of interpleader was made by the court. We think it was then too late to raise any question of collusion between the respondent and any of the defendants. Under the old system of equity practice, when the bill was not required to be sworn to, the plaintiff was required to file, with a bill of interpleader, an affidavit that there was no collusion between himself and any of the other parties to the suit; but the court would not permit any evidence to be adduced to contradict the affidavit. (2 Daniell's Ch. Pl. & Pr. 1563.)

There is another reason why this point can not be considered here. The report of the referee is silent upon the question whether there was or was not any collusion between the respondent and any of the defendants, and no exception was taken to it on this account, and as this ground of defense was not taken in the court below, it can not be made here for the first time.

The other points relied upon for a reversal of the decree of the circuit court are mainly questions of fact, as to whether the promissory note was taken in the name of the appellant for the purpose of defrauding the creditors of her husband, and whether the claims of the defendants, who garnisheed the money due on the note, were just and legal demands against the defendant, A. B. Lindsay. These were controverted and contested matters before the referee, upon which a great deal of testimony was taken on both sides. And after hearing it, the referee found, on all these questions, adversely to the appellant.

Exceptions were taken by her to the findings of fact in this respect, and the exceptions were not sustained by the court. In such cases this court will not reverse a decree, unless the findings of the referee are clearly against the weight of testimony, which we think is not so in this case.

The decree of the court below is affirmed with costs.

JULY TERM, 1880.

JUSTICES

OF

THE SUPREME COURT

WM. P. LORD (Chief Justice).
E. B. WATSON,
JNO. B. WALDO.

T. B. O'DNEAL, Clerk.

THE SUPREME COURT

OF

JUSTICES

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JULY TERM, 1880.

THE STATE OF OREGON, EX REL. J. H. MAHONEY, RESPONDENT, *v.* J. D. McKINNON, ALVA PIKE, JOHN H. SHUPE, E. J. PAGE, AND GEORGE SACRY, APPELLANTS.

THE DISMISSAL OF AN APPEAL by order of the appellate court, for defects in the undertaking of appeal itself, does not operate as an affirmance of the judgment appealed from.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman and Ball, for appellant.

Wm. R. Willis, for respondent.

By the Court, WATSON, J.:

The respondent has filed a motion to dismiss the appeal in this case, upon the ground of a former appeal having been taken from the same judgment, and dismissed at a previous term of this court. The record shows that this former appeal was dismissed on motion of the respondent, at the last January term, for defects in the undertaking, while appellants were present by their counsel, prosecuting the appeal, and after their request to file a sufficient undertaking made on the hearing of the motion to dismiss had been denied by the court. The respondent contends that upon this state of facts there was an abandonment of the appeal, and that the order of dismissal operated as an affirmance of the judgment appealed from. We think otherwise.

The appeal had not been perfected by the filing of an undertaking conforming to the requirements of the statute regulating the mode of taking appeals to this court, and the court had not acquired sufficient jurisdiction of the case to proceed and try it upon its merits, and render a final decision, either affirming, modifying, or reversing the judgment appealed from; and this degree of jurisdiction we hold to be essential to give the mere order of dismissal the effect of affirming the judgment appealed from, and terminating the appeal.

The appeal is perfected by filing an undertaking therefor conforming to the statute, within the time fixed in the statute, or such further time as may be allowed by the court. (Code, secs. 527, 528.) Until thus perfected, the appeal is wholly ineffectual. (*Canyon Road Company v. Lawrence*, 3 Oregon, 519.) The appeal must be perfected, and the transcript filed within the time allowed by law, before the appellate court has any jurisdiction of the cause. (Code, sec. 531.)

The appellate court, upon an attempted appeal as defective as this one was, had no other jurisdiction over the case than to dismiss it without affirming the judgment or decision appealed from. (*Fassman v. Baumgartner*, 3 Or. 469, *Long v. Sharp*, 5 Or. 442.)

We have examined the authorities cited by the respondent carefully, and find no case among them where it has been held that an order dismissing an appeal for jurisdictional defects amounted to an affirmance of the judgment appealed from, and terminated a party's right to take another appeal within the time fixed by law. They seem to have been cases where the appeal had been perfected, and jurisdiction acquired by the appellate court, but their prosecution had been abandoned by appellants. (*Simpson v. Praytherr*, 5 Or. 86, and cases there cited.)

Such being the view entertained by the court, the motion to dismiss will be denied.

THE STATE OF OREGON, EX REL. J. H. MAHONEY, RESPONDENT, v. J. D. MCKINNON, E. J. PAGE, J. H. SHUPE, AND GEORGE R. SACRY, APPELLANTS.

NOTICE OF APPEAL—ERROR NOT ASSIGNED.—No error not specifically assigned in the notice of appeal will be considered; but the court will take judicial notice of the lack of jurisdiction in the court below, appearing on the face of the record.

IDEM.—A statement in the notice that "the decision and judgment are against law," is not specific under the statute, and should be disregarded.

PROCEEDING FOR CONTEMPT—AFFIDAVIT MERELY EVIDENCE.—A counter affidavit filed in a proceeding for contempt is not a "pleading," but evidence merely, and the facts stated in it may be rebutted by other evidence without a formal replication.

IDEM—QUESTIONS OF FACT NOT EXAMINED ON APPEAL.—The question upon the hearing of a rule to show cause, as well as the question on the trial of a proceeding for contempt, are those of fact merely, to be determined on all the evidence taken by the court below, and this court will not disturb such determination, unless for errors of law or want of jurisdiction appearing upon the transcript.

IDEM—JURISDICTION ONLY EXERCISED DURING TERM.—The judge of the circuit court, in vacation, has no power to hear and determine charges of contempt for disobeying judgments or orders of court. The exclusive jurisdiction over such charges belongs to the court whose judgments or orders have been disobeyed, and can only be exercised during term.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman and Ball, for appellant.

Wm. R. Willis, for respondents.

By the Court, WATSON, J.:

It appears from the transcript that this was a proceeding for contempt, under tit. 4, of chap. 7, of the Civil Code, based upon the following affidavit and motion:

"In the circuit court for the county of Douglas, State of Oregon.

"STATE OF OREGON, EX REL. J. W. Mahoney, Plaintiff, v. J. D. MCKINNON, ALVA PIKE, J. H. SHUPE, E. J. PAGE, and GEO. R. SACRY, defendants.

"Action at law to prevent the usurpation of office.

"State of Oregon, County of Douglas, ss.:

"I, William R. Willis, being duly sworn, say I am attorney for plaintiff above named; that said plaintiff did, on the twenty-fifth day of June, 1879, recover judgment in the above entitled court and cause against the said defendants, J. H. Shupe, E. J. Page, and George R. Sacry; that they were guilty of usurping and unlawfully exercising the office of trustees of the city of Oakland, and that they be excluded therefrom; that I am informed and believe that the said defendants, E. J. Page and John H. Shupe, in disobedience of said lawful judgment, continue to and do now usurp and exercise the office of trustees of said city of Oakland, and refusing and neglecting obedience to said judgment. WILLIAM R. WILLIS.

"Subscribed and sworn to before me, August 26, 1879.

"T. R. SHERIDAN, Clerk.

"Now comes the plaintiff above named, and moves the Hon. J. F. Watson, judge of the above-entitled court, upon the foregoing affidavit, for a warrant of arrest against the said defendants, E. J. Page and John H. Shupe, to answer for contempt in neglecting and refusing to obey said judgment. W. R. WILLIS, Plaintiff's Attorney."

Upon this affidavit and motion, the judge of the circuit court made an order, requiring said Page and Shupe to appear on September 4, 1879, and show cause why they should not be arrested to answer said charge of contempt.

At said date they appeared and filed a counter-affidavit, denying any violation of the judgment described in the affidavit of Willis, and any intentional contempt of the court, and setting up an alleged legal title or right to exercise the office of trustees of the city of Oakland, acquired subsequent to the rendition of the judgment of exclusion above referred to. This showing was held insufficient, and on September 16, 1879, said judge made an order that a warrant for the arrest of said defendants be issued, returnable on the nineteenth day of the same month.

At said date, said proceeding was finally heard and determined. Defendants Shupe and Page were adjudged

guilty of contempt of court, as charged, and fined one dollar each, and ordered to pay the costs and disbursements of the proceeding. And the said defendants Shupe and Page appealed, and in their notice of appeal assign the following errors:

1. That the decision and judgment are against law.

2. That the decision and judgment of the court are against the facts admitted in the pleadings, and are contrary to law.

3. That the court erred in its order made on the twenty-seventh day of August, 1879, on the defendants to show cause why a warrant should not be issued to arrest them to answer said charge, for the reason that the affidavit of Wm. R. Willis, and the motion of plaintiffs filed therewith, designed as the complaint in said proceeding, is insufficient to give the court jurisdiction to make the said order.

4. The court erred in its order for a warrant of arrest against the said appellants, made and entered on the sixteenth day of September, 1879, to answer said charge, for the reason that the answer and affidavit of the appellants, filed in said proceeding on the fifth day of September, 1879, is in all things a sufficient showing that said defendants (appellants) were not acting in contempt of the previous decision and judgment of said circuit court, in exercising the office of trustees of the city of Oakland, but under and in pursuance of an allotting and certificate of election, had and issued by the inspectors of said election, under and in pursuance of and according to the written opinion of said circuit court, made and filed with its decision, in the said action, according to the statute in such cases made and provided.

Section 527 of the Civil Code, which provides what a notice of appeal shall contain, declares that such notice shall state that the appellant appeals from the judgment or decree of the circuit court, or some specified part thereof, and in case the judgment be one rendered in an action at law, shall specify the grounds of error, with reasonable certainty, upon which the appellant intends to rely upon the appeal.

It is plain that the first assignment in the notice does not comply with this requirement of the statute. It is too vague and general to notify the respondent of the particular issues to be tried on appeal, and thus afford him proper guidance in the preparation of his defense.

If one objection can be urged against the judgment appealed from under an assignment of error so general and indefinite as this one is, then all objections can be made under it, and the requirements of the statute be wholly disregarded. But neither reason nor authority leads in this direction. On the contrary, wherever a statute has provided for a specific assignment of grounds of error on appeal, it has been held necessary to comply with such requirement. (*Derby v. Hannin*, 15 How. Pr. 32; *Christman v. Posh*, 16 Id. 17; 25 Cal. 478; 30 Cal. 509; *Dolph v. Nickum*, 2 Or. 202; *Rickey v. Ford*, Id. 251.)

We can not regard this assignment, because it does not specify any particular ground of error upon which appellants intend to rely on this appeal.

The second ground of error assigned in the notice is upon a supposed admission in the "pleadings," by which we understand is meant the affidavit and counter affidavit before referred to; but these are not "pleadings" in the proper sense of the term, and the ordinary rules of law governing the construction of pleadings in an action at law are not applicable.

The counter affidavit was nothing more than evidence offered by defendants to rebut or explain away the charge of contempt, on the hearing of the order to show cause, and was in no sense a pleading.

It was a question of fact whether they made a sufficient showing of cause upon said hearing or not, in view of all the evidence produced on that occasion, and the decision thereon, unaffected by any error of law, would not in any case be appealable to this court; but this ruling or decision was not the final judgment in the proceeding from which an appeal is given by the statute, or from which this appeal was in fact taken.

It was a mere preliminary to issuing the warrant to arrest

the defendants to answer said charge, and the trial and final judgment upon the hearing was had on the nineteenth day of September, 1879, and could not have been affected by such preliminary decision.

The third ground of error is not well taken. The affidavit of Mr. Willis, we think, sufficiently shows the facts constituting the contempt, and any person having knowledge of the facts is competent to make the affidavit under section 643 of the Civil Code. Whether Willis should be deemed the relator or Mahoney, is wholly immaterial, so far as the jurisdiction of the court is concerned, to make the order on defendants to show cause.

The fourth ground of error assigned in the notice of appeal rests upon the proposition that the counter-affidavit of defendants, filed September 5, 1879, under the order to show cause, established a full defense to the proceeding. But as we have already stated, we do not so regard it. At most it was but evidence on the hearing of the order to show cause, and it could not be used as evidence even on the final trial, except by consent of parties, and the record does not show that it was so used; but, be that as it may, it was the duty of the court, upon the return of the warrant, under section 648 and 649, to proceed to investigate the charge by taking the evidence, and upon that evidence to determine the guilt or innocence of the parties charged, and give judgment accordingly. Obviously the counter-affidavit previously filed could only be introduced as evidence at most, upon this investigation, with any other evidence produced at that time by either party.

But the determination was one of fact, and unless some error of law, calculated to affect that determination, is shown by the record, this court will hold it like all other decisions of fact in proceedings at law, conclusive on appeal. What evidence, if any, was taken on the final trial of this proceeding in the court below, does not appear from the record, and we must conclude that it was sufficient, in legal effect, to justify the judgment.

It was urged by the counsel for the appellants on the argument here that the judge of the circuit court had no

power to hear and determine this proceeding in vacation, although this was not assigned as error in the notice of appeal, and does not seem to have been questioned during the proceeding below.

The transcript discloses the facts that the judgment, in respect of which the disobedience is charged as a comtempt, was a judgment rendered by the circuit court for Douglas county, at its May term, 1879, while the proceeding for contempt was taken wholly before the judge of the court in vacation after said term. If this was an error it goes to the jurisdiction, and as it appears from the record itself, this court is bound to take judicial notice of it, although not assigned, or not even appearing in the argument. If this want of jurisdiction appeared to the judge before whom the proceeding was had, at any stage, he should, of his own motion, have dismissed the cause, and this court, on appeal, stands in the same position. (*Hollingworth v. The State*, 8 Ind. 258; *Heyer v. Berger*, 1 Huff. Ch. 17; *Evan v. Christian*, 4 Or. 376; *McKay v. Freeman*, 6 Or. 453.)

While every court and every judicial officer is, under our statute, invested with authority to investigate charges of contempt arising from disobedience to its or his lawful judgments, or orders, in the manner provided by the code, and punish those found guilty, it does not follow as a logical, necessary consequence that either without express statutory authority can take cognizance of such offenses against the dignity or authority of the other. Each has the power to enforce obedience to its or his own lawful judgments, or orders, in the cases and manner provided, by proceedings for contempt, but has no such power in reference to the judgments or orders of the other (except when the judge's order is made in some cause pending in the court), unless the statute expressly gives it.

Section 888 of the Civil Code declares: "A judge may exercise out of court all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise."

Title 4 of chapter 7, under which this proceeding was taken, never speaks of "a court or judge thereof," but

of "a court or judicial officer," and the line of separation is plainly marked throughout.

We can not find any authority given by the statute for holding a proceeding like this for contempt, in disobeying a judgment of the court, before the judge of the court, in vacation, and he had no such power at common law. (*Taylor v. Moffatt*, 2 Blackf. 305.)

In our judgment the judge who tried this proceeding below, in vacation, had no jurisdiction in the premises, and the judgment rendered by him was void.

Such judgment must be reversed, with costs, and the proceedings in the court below dismissed.

STATE OF OREGON, EX REL. J. H. MAHONEY, RESPONDENT, *v.* J. D. McKINNON, E. J. PAGE, J. H. SHUPE, AND GEORGE R. SACRY, APPELLANTS.

MUNICIPAL CORPORATION—BOARD OF TRUSTEES—JURISDICTION IN ELECTION CONTEST NOT EXCLUSIVE.—The provision in a city charter that the board of trustees "shall judge of the qualifications and election of their own members," does not oust the jurisdiction of the circuit court over usurpations of such office. It will still entertain an action under section 354 of the civil code against a person unlawfully exercising the office of trustee of such city, and the provision in the city charter will be held as affording merely a preliminary or cumulative tribunal.

A BALLOT WRITTEN OR PRINTED ON COLORED PAPER IS ILLEGAL, and should be rejected at any election held under the general laws of this state.

IN CASE OF A TIE THERE IS NO ELECTION.—Where, at an election held under the laws of this state, two or more candidates receive the highest and an equal number of votes for the same office, neither is elected, nor can either rightfully exercise the duties of such office until the matter has been decided by lot, and he has been declared duly elected in the manner provided in the code.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman & Ball, for appellants:

In order to put the charter of the city of Oakland in successful operation, the act of incorporation has wisely provided that the inspectors of the first election shall give

certificates of election to the successful candidates; and that the trustees thus elected shall judge of the qualification and election of their own members, and decide contested elections of all town officers; and their action is conclusive against this proceeding. (Session Laws 1878, 121-125; *The Commonwealth, ex rel. McCurdy, v. Leach*, 44 Penn., sec. 332; *The Commonwealth, ex rel. Yard, v. Messer*, 44 Penn., sec. 341-343.)

If the trustees under the charter are not the sole judges of the election and qualification of their own members, and the court has jurisdiction to inquire into the legality of their appointment, it will determine what was the will of the legal voters as manifest by their ballots; and the colored ballot was cast by a qualified elector and received by the inspectors without objection or protest, and it should be counted. (Cooley's Const. Lim. 74, 75, 605, 618, 624; *Kent v. Day*, 1 Or. 130; *The People v. Cook*, 14 Barb. 259, 293, 294; *The People, ex rel. Brewster and Jones, v. Kilduff*, 15 Ill. 500; Civ. Code, 572, sec. 30.)

The finding that A. C. Young received a greater number of votes than each of the appellants is against the admitted facts by the pleadings; and the court could not decide upon his right to the office. (Civ. Code, p. 184, sec. 354; p. 185, sec. 358.)

While Young may have held a constructive residence within the corporate limits, he was not an actual resident of the town during the six months next preceding the election, and was not qualified to take the office. (Session Laws 1878, 122.)

Wm. R. Willis, for respondents:

The irregularities found in the third finding of facts herein are sufficient to avoid this election. (Session Laws 1878, p. 123, sec. 4; Civ. Code, p. 569, sec. 18; Id. p. 570, sec. 22.) But if the election be held regular, then J. D. McKinnon and Alva Pike were the only defendants who received a majority of the votes cast. (See fourth finding of fact.) A candidate is not elected if he receives no more votes than others. (Code, p. 573, secs. 35 and 36; *People v.*

Moliter, 23 Mich. 341.) If A. C. Young was not eligible, then the office was vacant. (Dillon on Municipal Corp., sec. 135.) Or if he failed to qualify. (Code, p. 576, sec. 48, sub. 6.)

It follows, then, that three of the defendants, E. J. Page, J. H. Shupe, and George R. Sacry, received the highest and an equal number of votes for the office of trustee, and but two trustees to be elected—three of the five having been elected—so neither of them was elected. It appears on the face of this answer that defendants are claiming to hold their office by virtue of the same election and certificate of the same inspectors, as they claimed when the judgment of ouster was rendered against them. The inspectors of this election had no right to decide a tie vote by lot. (*Hancock v. Barnes*, 4 Bush. Ky. 390; Sess. Laws, 1878, p. 123, sec. 4; Id. p. 125, sec. 12.)

The said inspectors having canvassed the votes and given certificates of election, have exhausted their power over the subject, and can not afterwards reverse their decision by making a different determination. (*Hadley v. Mayor*, 33 N. Y. 603, 606; *Clark v. Buchanan*, 2 Minn. 298, 300, 301, 302; *The People v. Supervisors of Greene*, 12 Barb. 217, 221, 222.) It appears by the pleadings herein that the inspectors had long before this sitting canvassed the vote and issued certificates. Disobedience of this judgment is a contempt. (Code, p. 241, sec. 640, sub. 5.)

By the Court, WATSON, J.:

It appears from the transcript that this was an action commenced in the circuit court for Douglas county, upon the relation of J. H. Mahoney, for usurpation of office, under section 354 of the Civil Code.

The amended complaint alleges: That the plaintiff, James H. Mahoney, private party, is a resident voter and taxpayer in the city of Oakland, Douglas county, Oregon; that on the fourteenth day of December, 1878, in Douglas county, Oregon, the defendants, without any legal right, usurped and intruded into the office of trustees of the city of Oakland, a public corporation created by the authority

of this state, and still unlawfully hold and exercise the same, and prays judgment that defendants are not entitled to the said office, and that they be ousted therefrom, and for plaintiff's cost and disbursements in this action. The complaint is verified by the relator.

The answer of the defendants denies specifically each material allegation in the complaint, except the due incorporation of the city of Oakland by state authority, and alleges: The passage and approval of the act of incorporation, October 17, 1878; the provisions in said act for the election of five trustees and other city officers; their election as trustees under the provisions thereof, on November 4, 1878, by receiving a higher number of votes than any other candidates; the receipt of certificates of election from the inspectors appointed by said act; and their subsequent qualification for and entry upon the duties of said office of trustees of said city, under and by authority of their said election, December 14, 1878.

The replication denies the conduct of said election according to the laws of Oregon, and alleges many instances of irregularity. Denies that, at the said election, any of the defendants, except J. D. McKinnon and Alva Pike, received a higher number of votes for said office of trustee than any other candidate thereat; and alleges that A. C. Young, E. J. Page, John H. Shupe, and John R. Sacry, as counted, received each an equal number of votes for said office; and denies that it is under and in pursuance of any election or qualification that defendants exercise the office of trustee, or that they have any lawful right so to do.

By the consent of parties, made in open court, and entered on the journal, trial by jury was waived, and the issues of fact as well as of law, were tried by the court at its May term, 1879. After hearing the evidence, the court, on July 14, 1879, and during the term, filed its finding of fact and conclusions of law, in writing, as provided in section 216 of the Civil Code. The findings, some nine in number, are quite lengthy, but in substance: That an election for trustees and other city officers was held in the city of Oakland, Oregon, on the first Monday in November,

1878, and was, in all respects, conducted in accordance with the laws of Oregon, with the exception of certain irregularities, particularly set forth in the "third finding," which did not affect the result or render the election invalid, and occurred wholly through mistake; that during the election one ballot was received under protest, the name of the voter written upon it, and placed in the ballot box; also one ballot, written on colored paper, was received and placed in the ballot-box.

After the close of the election, and before the result was declared, both these ballots were taken out by the inspectors and rejected from the count. The first, on the ground of the voter's want of qualifications; the second, for not conforming to the statute, which requires the ballot to be "written or printed on plain white paper." That the persons voted for on the colored ballot were J. D. McKinnon, Alva Pike, E. J. Page, John H. Shupe, and Geo. R. Sacry. That after the close of the count, the inspectors declared the result to be that J. D. McKinnon had received fifty-one votes; E. J. Page, twenty-seven votes; Alva Pike, fifty-three votes; John H. Shupe, twenty-seven votes; George R. Sacry, twenty-seven votes; and A. C. Young, twenty-eight votes. That after the result of the election was declared, it being claimed that A. C. Young was ineligible, he formally withdrew his name as a candidate, and the inspectors thereupon issued to the defendants the certificates of election alleged in the answer, and that it was under and in pursuance of said election and qualification the defendants exercised the office of trustees of the city of Oakland.

The conclusions of law filed by the court were in effect: That the irregularities found did not invalidate the election; that said defendants J. D. McKinnon and Albert Pike were duly elected, and rightfully exercise the office of trustees of the city of Oakland; that the two ballots were rightly rejected by the inspectors; that A. C. Young was duly elected at said election to the office of trustee of the city of Oakland; that neither of the defendants E. J. Page, John H. Shupe, or George R. Sacry was elected to said office; that defendants J. D. McKinnon and Alva Pike are enti-

tled to judgment; that they are not guilty of usurping or intruding into said office, and for their costs and disbursements, and that plaintiffs are entitled to judgment against the defendants E. J. Page, John H. Shupe, and George R. Sacry; that they are guilty of unlawfully holding and exercising the office of trustees of the city of Oakland, and that they be excluded therefrom, and for costs and disbursements. Judgment was rendered accordingly, but not entered until August 1, 1879.

From this judgment, the defendants John H. Shupe, E. J. Page, and George R. Sacry bring this appeal.

In the notice of appeal several grounds of errors are stated out of which many questions arise. We shall consider such only as are deemed important to a proper decision of the case.

The appellants claim that under section five of the act of the legislative assembly incorporating the city of Oakland, the board of trustees has exclusive jurisdiction over all questions touching the election and qualifications of their own members, and consequently the circuit court erred in entertaining this action.

The portion of section five relied on by appellants to sustain this proposition is as follows: "Sec. 5. That the board of trustees shall elect a president, keep a record of their proceedings, and meet at stated times, and at such other as the president shall appoint. They shall judge of the qualification and election of their own members, and decide contested elections of all town officers." (Session Laws 1878, page 123.)

The authorities upon the effect of such provisions in city charters are conflicting, but the weight of authority is against the proposition contended for appellants. In Pennsylvania, it was held in *Commonwealth, ex rel. McCurdy, v. Leach*, 44 Penn. St. 322, and *Commonwealth, ex rel. Messer*, Id. 341, that a similar provision in the charter of Philadelphia excluded the jurisdiction of the courts; and the same doctrine is held in *Peabody v. School Committee of Boston*, 115 Mass. 383. The decisions in these cases are evidently based upon the seeming analogy between those

bodies which, under city government, are commonly empowered to pass such ordinances as the public needs or interests of the city may require, and the respective houses, constituting the state and national legislatures, and the similarity of the words used in the city charters and state and national constitutions, in defining the powers of these respective bodies, to decide upon questions concerning the election and qualifications of their members.

In the more recent case of the *Commonwealth v. Allen*, 70 Penn. St. 465, this asserted analogy is ably refuted, and propositions announced, if not a decision made, in evident opposition to the doctrine laid down in the earlier Pennsylvania cases above cited. In rendering the decision, the court says: "The right of this court to issue the writ of *quo warranto* to determine questions of usurpation and forfeiture of office, in a public corporation, can not be questioned."

But the true principle is to first ascertain the intention of the legislature in the particular case, and then follow it; and the great preponderance of the authorities hold "that the jurisdiction of the courts remains in such cases, unless it appears with unequivocal certainty that the legislature intended to take it away; and that language" (like that quoted above from the Oakland city charter) "will not have that effect, but be construed to afford a primary or cumulative tribunal only, and not an exclusive one." (1 Dillon on Corporations, sec. 141, and cases cited in note 2.)

People v. Hall, page 479 of the Reporter for April, 1880, decided by the New York court of appeals, is to the same effect, and contains an exhaustive and very able discussion of the whole subject. In this view we fully coincide, both on the ground of authority and sound reason.

Appellants make no objection to the action of the inspectors in rejecting the ballot for disqualification of the voter; but claim that the court below erred in holding that the inspectors rightly rejected the colored ballot. The authorities cited to sustain this proposition are not in point. They, perhaps, sufficiently illustrate the principle governing the construction of statutes defining the duties of public officers

as to their being mandatory or directory merely, and the reluctance of the courts to construe statutes providing the manner of elections, so as to defeat the public will as expressed through the ballot-box; but disclose no instance where a voter has been accorded the privilege of disregarding a plain provision of law, intended to promote the purity and secure the independence of elections, even in depositing his vote.

Section 30, page 572 of the code, provides that "all ballots used at any election in this state shall be written or printed on plain white paper, without any mark or designation being placed thereon, whereby the same may be known or designated."

The voter in this instance is conclusively presumed to have had knowledge of this requirement, and to have had it in his power to comply with it, by using a proper ballot. It was a matter entirely under his own control, and if he chose to disregard the law, he can not complain if the consequence was that his vote was lost.

It may be contended that, as the protection of the voter is the object of the law, he might waive it. But this practice might be carried to such an extent as to expose others and deprive them of the benefits of that secrecy which the law has endeavored to throw around the ballot-box. (*Commonwealth v. Wallper*, S. & R. 29, cited in American Law of Elections, secs. 401 and 402.)

The correct principle is announced in the case of *Kerr v. Rhodes*, 46 Cal. 398, which holds "that a ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control, such as the exact size of the ticket, the precise quality of the paper, or particular character of type or heading used, where the law has provisions to that effect; but if the elector wilfully neglect to comply with requirements over which he has control, such as seeing that his ballot when delivered is not so marked that it may be identified, the ballot should be rejected." (American Law of Elections, sec. 403.)

The case under consideration is clearly within the princi-

ple of the case just cited, and as clearly without the statutory requirements contained in the section of the code above quoted, and we think the colored ballot was properly rejected.

It is claimed that the court below erred in finding that A. C. Young was elected as one of the trustees of the city of Oakland. Young not being a party to the action, the finding of the court was not conclusive as to his right, yet it was a fact to be ascertained by the court, in order that it might be enabled to decide the real question in issue, whether appellants had or had not been elected. If Young had been elected, they had not. Upon the facts found by the court below, Young was elected, and it was properly so held by that court.

The only remaining question material to be considered is, whether there was any error in the holding of the court below, that upon the facts found neither of the appellants was elected to the office of trustee of the city of Oakland. Upon the facts as found by the court, these three candidates received twenty-seven votes each, but there were only two offices to fill. It was a case of a tie vote.

Section 16, article 2, of our State constitution, provides that in all elections held under it the persons receiving the highest number of votes shall be declared duly elected; and our civil code, section 36, page 573, provides the mode of proceeding where the requisite number of county or precinct officers shall not be elected by reason of two or more persons having the highest and an equal number of votes for the same office. Upon such proceedings the successful party is declared duly elected, and this is equivalent to receiving the highest number of votes. But until this is done, in accordance with the statute, neither is elected. (American Law of Elections, secs. 169 and 170; *People v. Moliter*, 23 Mich. 341; *Hancock v. Barnes*, 4 Bush. Ky. 390.)

Whether A. C. Young was eligible or not is not for us to consider, as that was a fact found by the court below upon the evidence, which is not before us; but that his formal attempt to withdraw his name as a candidate, after the result was announced by the inspectors, was ineffectual, we have

no hesitancy in declaring, and it follows that the certificates of election thereupon issued to appellants were illegal and void.

If it should be held that the inspectors had the power under the charter to take the proceeding provided for in section 36, page 573 of the code, and decide by lot in a case like this, between the different candidates, and declare the successful candidates duly elected, it could not aid the appellants in this case, for the simple reason that those steps were not taken when they attempted to exercise the duties of the office of trustees, and the court below properly held such acts unwarrantable by law.

The judgment must be affirmed, with costs.

W. H. REMDALL, RESPONDENT, v. S. O. SWACKHAMER, APPELLANT.

SHERIFF'S JURY—EFFECT OF VERDICT.—The verdict of the jury, rendered in writing and signed by the foreman, under section 284 of the Civil Code, operates as a full indemnity to the sheriff proceeding in accordance therewith.

IDEM.—Where the verdict is against the claimant, he can not afterwards maintain an action against the sheriff for the recovery of the possession of the property, or for damages for taking it, so long as the sheriff proceeds in accordance with the execution under which the property was seized.

APPEAL from Union County. The facts are stated in the opinion.

Baker & Eakin, and Dolph, Bronaugh, Dolph & Simon, for appellant:

It will be at once perceived that the correctness of the ruling and judgment of the court below, in deciding that the facts stated in said portion of the answer which was stricken out are insufficient to constitute a valid defense in this action, depends upon the proper construction of the meaning and effect of sections 283 and 284 of title 1, chapter 3, page 166 of our civil code. What is meant by the language used in said section 284, wherein it is declared that "the

verdict of such jury being rendered in writing, and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property or for damages for taking the same?"

We believe and maintain that the only possible, rational interpretation of this statute is that the sheriff is fully exonerated by such verdict, leaving the claimant to seek redress by maintaining his action for the recovery of the property, or its value, and for damages for taking the same against the plaintiff in the execution or the purchaser at sheriff's sale. We are at a loss to perceive how or in what sense the verdict can be at all an indemnity, much less a "full indemnity" to the sheriff, if he is nevertheless still liable for the return of the property, or its value, to the claimant, and for damages for taking the same, which is all that could be recovered if the verdict were no indemnity whatever to him, or if he occupied the position of a private person, found guilty in replevin in the *cepet* and *detinet*.

A construction similar to that for which we thus contend has been placed upon analogous statutes in the following cases: *Storms v. Eaton*, 5 Neb. 453; *Patty v. Mansfield*, 8 Ohio, 369, 370; 11 Ohio St. 532; *Abbey v. Searls*, 4 Id. 598; *Ralston v. Ourslor*, 12 Id. 111; 18 Ind. 439; *Jones v. Carr & Co.*, 16 Ohio St. 420; *Fisher v. Gordon*, 8 Mo. 387; *Canifax v. Chapman*, 7 Id. 175; *Rowe v. Bowen*, 28 Ill. 117.

The California decisions are based upon an entirely diferent statute, which does not make the verdict of the sheriff's jury any protection whatever to the officer, but only advisory to him. (See *Perkins v. Thomburgh*, 10 Cal. 189-192.)

Frank M. Ish and Shattuck & Killin, for respondent:

The sole point presented by this transcript is, whether the verdict of a sheriff's jury constitutes an adjudication or judgment which bars the claimant thereafter to set up title to the property. Section 283 of the Civil Code provides that "when personal property shall be seized by virtue of

any execution, and any person other than the defendant shall claim such property or any part thereof, and shall give notice thereof in writing, the sheriff may summon from his county six persons qualified as jurors between the parties to try the validity of the claim, giving five days' notice of the time and place of the trial to the plaintiff in the execution, or his attorney."

And there are in section 284 the following provisions: "On the trial, the defendant and claimant may be examined by the plaintiff as witnesses, and the verdict of such jury being rendered in writing and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property, or for damages for taking the same." Section 286 provides that notwithstanding the verdict may be for claimant, the plaintiff may have the property sold by indemnifying the sheriff. There is no provision for notice to claimant of the time and place of trial and no provision for appeal.

This verdict can not be pleaded as a bar unless it is "the final determination of the rights of the parties." (Civil Code, sec. 240.) This is not a judgment, because not rendered by any court. There are no courts under our constitution except supreme, circuit, county, and justice courts. (Constitution, art. 7, sec. 1, p. 87.)

The plea is bad for uncertainty. *Jacob Bros. & Co. v. James Remdall et al.* is not a sufficiently definite description of the parties to the judgment. The greatest effect such a verdict can have is as evidence on the measure of damages.

Herman on Executions, sec. 189, in speaking of these inquisitions, says: "Which action by the officer may be given in evidence to prove that he acted without malice and will mitigate damages in an action against him for taking the goods from a third person." "And as it is not a proceeding immediately from the tribunal from which the process issues, but merely to indemnify the officer in making his return to the writ, they will not set aside the verdict of a jury, summoned by an officer to inquire in whom the property, in

the goods seized by him under an execution, is vested." "But this proceeding is not conclusive in any case * * * and the verdict is admissible neither for the claimant nor the officer in an action against him for trespass." (Freeman on Executions, 254, 275; 12 Ill. 387; 28 Id. 116; 10 Cal. 190; 28 Id. 123.) At common law plaintiff had the right to bring his action against the sheriff. (9 Am. Dec. 104 and note; 2 N. H., 412; 12 Am. Dec. 393; 2 A. K. Marshall, 268; 3 Cal. 369; 14 Id. 194; 30 Id. 190; 14 Johns. 84; 20 Id. 465; 3 Wend. 280.)

The plea in this case was certainly bad unless the right of action was gone, unless the verdict was an adjudication between the parties. It could not be an adjudication because it was not in any court, and because the statute expressly declares that it shall not preclude the claimant.

By the Court, WATSON, J.:

This is an action against the sheriff of Union county, for the recovery of certain personal property seized by him on execution, and damages for the taking.

After the sheriff had taken possession of the property as the property of James Remdell, defendant in said execution, the respondent served a notice, in writing, upon him, claiming the property. Thereupon the sheriff summoned a jury to try the validity of the claim, gave notice to plaintiff in the execution, and a trial was had in substantial conformity to the provisions of sections 283 and 284 of the code, resulting in a verdict adverse to the claimant. Notwithstanding the verdict of the jury, and while the property was yet in the sheriff's hands, the respondent brought this action.

The defendant pleaded the verdict as a defense to the action, which plea and defense was stricken out of the answer by the court, on the motion of respondent, as irrelevant, and this order of the court below is assigned as error on this appeal.

The particular question presented to this court for determination is, whether the verdict of a sheriff's jury against the claimant, under sections 283 and 284 of the Civil Code, can be pleaded as a full defense by the sheriff to an action

brought by the claimant against him for the recovery of the property, and damages for taking it.

Section 284 declares that the "verdict of such jury, being rendered in writing and signed by the foreman, shall be a full indemnity to the sheriff proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property, or for damages for taking the same." The question is upon the meaning and validity of this section. If the legislature had simply mooted that "the verdict of the jury, rendered in writing and signed by the foreman, should be a full indemnity to the sheriff proceeding in accordance therewith," there would be no difficulty in ascertaining the meaning.

If the verdict should be for the claimant, the sheriff would be justified in delivering the property to him, unless the plaintiff in the execution tendered the written undertaking of indemnity provided for in section 286, and thereby made it his duty to proceed and sell the property notwithstanding the verdict, or if it should be against claimant, the sheriff would be fully protected by it in retaining possession of the property, and disposing of it according to the commands of the execution.

In either case he would be proceeding in accordance with the verdict, and no action would lie against him either to recover possession of the property or for damages. Such would be the obvious and natural import of the words employed. But by the succeeding clauses of this section it is declared that "the claimant shall not be precluded by the verdict from maintaining his action at law for the recovery of the property, or for damages for taking the same."

Do these clauses mean that the claimant may, notwithstanding the verdict against him, maintain his action against the sheriff for the possession of the property, or for damages for taking it? If this is the true meaning, it is obvious that the "full indemnity" provided for the sheriff in the preceding part of the section is greatly impaired; in fact, for all practical purposes, destroyed. There would be no "full indemnity," practically no indemnity at all. It would

be in the power of the claimant, in every case, after a verdict adverse to him, to bring his action against the sheriff while the property still remained in his hands, to recover possession of it, with damages for the taking and detention, and if he proceeded in accordance with the verdict to retain possession of the property, and dispose of it in obedience to the commands of the execution, it would be at his peril.

By the common law a sheriff might, upon his own motion, summon a jury to inquire into the right to property, and the verdict, while it did not determine the right of property between the litigating parties, protected the sheriff against an action for a false return by the plaintiff in the execution, when the return was *nulla bona* in accordance with the verdict of the jury. (*Fisher v. Gordon*, 8 Mo. 386; *Bayley v. Bolis*, 8 Johns. 185; Crocker on Sheriffs, sec. 446.)

This is the original of our statute, and the statutes of other states upon the subject, where the consequences and effects of such verdicts have been extended and rendered more important. In some of the states, under their peculiar statutes, the proceeding has become judicial, and the verdict and judgment thereon is a final and conclusive determination of the right of property. (Act of Penn. of April 10, 1848; 1 Purden's Digest (10 ed.), 643; 68 Penn. St. 60.)

In Missouri, Ohio, and Illinois, the proceeding has been held not judicial, and yet the courts of those states have uniformly held that the sheriff was entitled to whatever protection their peculiar statutes declared he should have under this proceeding, and that those statutes did not conflict with the provisions of their state constitutions, in every respect similar to our own. (*Fisher v. Gordon*, 8 Mo. 386; *Schroeder v. Clark*, 18 Id. 184; *Patty v. Mansfield*, 8 Ohio 370; 16 Ohio Stat. 420; *Rowe v. Bowen*, 28 Ill. 116.)

We think these, and numerous other authorities, not necessary to cite, settle the question as to the validity of these proceedings, and fully entitled the sheriff to whatever measure of protection the particular statute under examination intended he should have. But the question still remains as to the extent of the protection intended to be afforded the sheriff by our own statute.

In *Patty v. Mansfield*, 8 Ohio, 370, above cited, on a statute which provided that "such judgment for the claimant as aforesaid, shall be a justification to the officer in returning *nulla bona* to the writ of execution, by virtue of which the levy had been made as to such part of the goods and chattels as were found to belong to such claimant," the court held that the decision being adverse to the claimant, protected the sheriff against an action of replevin by the claimant for the property, and a plea thereof a full defense to such action. In rendering this decision Judge Hitchcock says: "As the statute does not specifically declare that in such case the officer shall be protected, it seems to be supposed by the plaintiff in the present case that he may be subsequently subjected to an action at common law for the property, or to respond in damages for its value. We think, however, that such is not a proper construction of this statute. We suppose that in the enactment of this law the legislature had two objects in view; one was to enable an individual whose property had, through mistake, been levied upon, to recover the possession in a summary manner. The other, and the principal, was to furnish protection to an officer of the law, who should make a mistake in the discharge of his duty. This latter object would not be effected, if, after a trial of the right of property, and a decision against the claimant, the officer could still be subjected to an action at his suit."

A construction almost as broad was adopted by the supreme court of Missouri in the case of *Schroeder v. Clark*, 18 Mo. 184, cited above. The statute provided that "if the jury find the goods and chattels to be the property of the defendant in the execution, the verdict, as against the claimant, shall justify the officer in selling such goods and chattels." The court held upon this statute that a verdict adverse to claimant was a bar to an action by him against the officer for the possession of such property.

Adapting the liberal principles of construction observed by the highest courts in many of the other states, in determining the meaning and intention of similar statutes upon the same subject, we feel bound to so construe our own as

to give the sheriff acting in good faith, and in the line of official duty, the fullest indemnity which a due regard for established rules of construction will allow, keeping in view the object of the statute, and in order to give every part of it a reasonable effect, to reconcile all its provisions, and escape any repugnancy which would render any part void, or the whole ineffectual for the fulfillment of its evident purpose and design, we hold that the effect of the verdict of the sheriff's jury under consideration was to fully indemnify and protect the sheriff against any action by the claimant, for acts done by him under and by virtue of the execution; that the clauses in said section 284, succeeding the one giving "full indemnity," and formally declaring the right of the claimant to still maintain his action to recover possession of the property, or for damages for taking the same, notwithstanding the verdict, should not be construed as referring to the sheriff, or in any manner affecting his "full indemnity," but as referring to other parties than the sheriff, who are neither bound by the result in this proceeding, nor derive any immunity therefrom. (Dwarris on Stats., 660, 706; Sedgwick on Stat. and Com. Law, 57, 60, 62, 63.)

If this view of the law is correct, it was error in the circuit court to strike out the portion of appellant's answer setting up the respondent's claim and adverse verdict of the sheriff's jury thereon as a defense to the action, and for this reason the order and judgment of the court below must be reversed, and the cause remanded for further proceedings in accordance with this decision.

THE CITY OF ROSEBURG, APPELLANT, v. SOLOMON ABRAHAM, RESPONDENT.

PLEADING—PUBLIC NUISANCE—SPECIAL DAMAGE MUST BE ALLEGED.—The complaint in an action for damages occasioned by a public nuisance must allege facts showing that the complainant has suffered some special or extraordinary damage, beyond what has been occasioned to the public generally, or it will be held insufficient on demurrer.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman and Ball, for appellants.

Wm. R. Willis, for respondent.

By the Court, WATSON, J.:

This was an action for damages under section 330 of the Civil Code. The pleadings are commendably brief, and consist only of the complaint and a demurrer.

The complaint alleges: "That the plaintiff is a municipal corporation, duly organized under and by virtue of an act of the legislative assembly of the state of Oregon, approved October 3, 1872, and as such entitled to the public use of the public streets, lanes, and alleys included within its corporate limits. That the defendant has, since the organization of said corporation, and still does prevent the plaintiff from the use of a portion of Washington street (particularly described in the complaint), within the limits of said city, by erecting fences across the same, and inclosing it as his private property. That by reason of said obstruction and inclosure of said street, the plaintiff is entirely deprived of the use of the same, to its damage in the sum of one hundred dollars;" and concludes with a prayer for judgment for said sum, and "that a warrant may issue to the sheriff to abate said nuisance."

The defendant demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer, and gave defendant judgment for costs. And from this ruling and judgment plaintiff has brought this appeal.

Section 330 is as follows: "Any person whose property is affected by a private nuisance, or whose personal enjoyment thereof is in like manner affected thereby, may maintain an action at law for damages therefor. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate

such nuisance. Such motion must be made at the term at which the judgment is given, and shall be allowed of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may proceed in equity to have the defendant enjoined."

The point claimed on the demurrer is that the complaint does not state facts which make out a case either under this section or at common law. That the act complained of is a public nuisance, for which no action for damages lies, and no facts are stated in the complaint, taking this case out of the general rule.

It is conceded that the city of Roseburg is a person within the meaning of the said section 330. It is plain that the act complained of is a public or common nuisance. The fencing up, without authority, of a public street in an incorporated city affects a right common to every citizen thereof and works a common injury. (2 Dill. on Mun. Corp., secs. 520, 521, and note 1; 2 Bouvier's Law Dict. 245, title "Nuisance;" *State v. Woodward*, 23 Vt. 92; *Village of Mankata v. Willard*, 13 Minn. 27.)

The general rule that damage occasioned by a public nuisance will not support an action at law by the individual suffering the same, is maintained by all the authorities. The reason of this rule is thus clearly stated in *Pittsburg v. Scott*, 1 Pa. St. 319: "That the damage being common to all, no one can assign his particular portion of it, or if he could, it would be extremely hard if every one was allowed to harass the offender with separate actions. For this reason no person, natural or corporate, can have an action for a public nuisance, or punish it, but only the commonwealth."

This same authority, however, holds that the rule has its exceptions. After stating the rule as above, it continues: "Yet the rule admits of exceptions. When a private person suffers some extraordinary damage, beyond other citizens, by a public nuisance, in that case he shall have a private satisfaction by action. As if by means of a ditch dug across a public way, which is a common nuisance, a man

suffer any injury by falling therein, then for his particular damage, which is not common to others, the party shall have his action." (Cites 3 Bl. Com. 219.)

It is argued as a general principle that for an obstruction to a highway, which is a common nuisance, an action can not be supported by a person who has suffered some special damage. To the same effect, both as to the rule and exception, are *Garrish v. Brown*, 51 Me. 256; *Gordon v. Baxter*, 74 N. C. 470; *Schuth v. N. P. T. Co.*, 50 Cal. 592, and numerous other authorities cited by counsel for respondent.

While it is conceded that the appellant in this case, the city of Roseburg, has every right and remedy in the premises that any private person could have, it is denied, and we conceive justly, that she has any more. She can maintain an action for damages to her corporate rights, or property, only in cases where an individual could for like injuries to his individual rights, or property. As a corporation she had the same right to use this street for any practical purpose within the scope of the powers conferred upon her by her charter, as any of her citizens had. Any permanent, unauthorized obstruction of the street would be a public nuisance, affecting her rights equally with the rights of all her citizens. It does not appear that either she or they had any title to the land, or anything more than a public and common right to use the street for ordinary and common purposes. The complaint merely alleges that she has been wholly deprived of the public use of this street. So had every citizen of Roseburg. If she can maintain this action, so can each of her citizens maintain a similar one, without alleging special damage.

No special damage, nor any fact from which such damage might be deduced, is averred, and this, we hold, was necessary.

There was no error in the ruling of the court below sustaining the demurrer, and the judgment must be affirmed.

H. O. TENNY AND NEIL McKENZIE, PARTNERS UNDER THE FIRM NAME OF TENNY & McKENZIE, RESPONDENTS, *v.* N. E. MULVANEY AND E. C. BEMIS, APPELLANTS.

EVIDENCE—INADMISSIBLE QUESTION.—Where the contract provided for the delivery of good, sound, merchantable logs, to be cut from standing timber within a mile from a certain creek, and there was evidence showing that the logs were cut within a fourth of a mile from said creek, and that where the logs were cut the timber was inferior, and a great many trees were rotten; *Held*, that the question, "Are these average logs on the ground where they were cut?" was inadmissible.

IDEM.—Where a witness was asked the question, "Are these as good logs as other logs on the creek?" and there was no evidence showing the kind or quality of the other logs on the creek, or what particular other logs on the creek were referred to; *Held*, that the question assumed a fact which it was the object of the question to prove, and was incompetent.

ERROR—ASSUMING FACTS NOT IN EVIDENCE.—It is error sufficient to reverse a judgment to permit counsel to state, against objection, facts not in evidence and pertinent to the issue, or to assume, *arguendo*, such facts to be in the case when they are not.

APPEAL from Douglas County. The facts are stated in the opinion.

Wm. R. Willis, for appellants.

L. F. Lane, Hermann & Ball, and Kelsay & Burnett, for respondents.

By the Court, LORD, C. J.:

The plaintiffs allege, substantially, that on the twenty-ninth of May, 1878, plaintiffs made an agreement with defendants by which plaintiffs agreed to furnish defendants at their boom in Pass creek, in Douglas county, good, sound, merchantable logs for the agreed price of four dollars and twenty-five cents per one thousand feet; and defendants agreed to scale and pay for each one hundred thousand feet when placed in floating water above the boom.

That plaintiffs delivered in said boom one hundred and sixty-five thousand one hundred and sixty-nine feet of

good, sound, merchantable logs, and also delivered in floating water above the boom one hundred and thirty-nine thousand six hundred and fifty-four feet under said agreement. The defendants thereby became liable to pay plaintiffs therefor one thousand two hundred and eighty-five dollars and forty-nine cents;

That one hundred and thirty-five dollars has been paid, and there is now due one thousand one hundred and fifty dollars. Plaintiffs demanded payment, but defendants refused to pay any part thereof. And for other and separate cause of action alleges substantially:

That by the terms of said agreement defendants agreed to furnish the standing timber within one mile of the creek, and to scale and pay plaintiffs for each one hundred thousand feet when placed in floating water; and plaintiffs were to deliver to defendants, at their boom in Pass creek, one million feet of good, sound, merchantable logs, with privilege of furnishing as much more as they could put in the creek within one year; that after making said agreement plaintiffs had partially completed it, and had cut a large amount of logs, and were proceeding to completion, etc.;

That on the fourteenth of August, 1878, without fault or consent of plaintiffs, the defendants rescinded and breached said contract, and refused to receive the logs so cut and ready to be delivered, and prohibited plaintiffs delivering the same, and refused to scale or pay for the logs in floating water, and still refuse to pay for said logs, etc.;

That plaintiffs have been ready and willing to deliver, and would have delivered before the expiration of the year, one million five hundred thousand feet, if they had not been prevented by defendants;

That plaintiffs have been damaged, by defendants breaching said contract, in the sum of three thousand dollars, in addition to amount claimed in foregoing cause of action, and the same has not been paid; and set up another cause of action not material to this appeal, and demand judgment for four thousand and ninety dollars and fifty cents.

Defendants for answer deny that the agreement was to furnish logs at four dollars and twenty-five cents per thou-

sand, etc., but allege that plaintiffs were to furnish one million feet within one year, and to keep logs on hand so that the mill should not be shut down during the year for want of logs, at the rate of four dollars and twenty-five cents per thousand, with the privilege of putting in more if it could be done within the year, at the same price. Deny that the defendants agreed to pay for each one hundred thousand feet, or any part thereof, until the contract was completed at the end of the year. Deny the amount of logs delivered in the boom and in floating water. Deny the indebtedness of one thousand one hundred and fifty dollars, or any part thereof. And allege that no part of the money claimed was due at the commencement of this action, or before the completion of the contract at the end of the year; and for answer to plaintiff's other and separate cause of action. Deny that by the terms of said agreement defendants were to pay for each one hundred thousand feet of logs when placed in floating water in said creek, or any part thereof, until said contract was completed at the end of the year.

Deny that defendants breached the contract in any manner, or that plaintiffs were able, or willing, or would have furnished one million five hundred thousand feet of logs within the year, or any part thereof, if they had not been prevented by defendants. Deny that plaintiffs have been damaged by defendants in any sum.

Defendants further answering, and for counter-claim, allege: That defendants have at all times been ready and willing to perform the conditions of the agreement made the twenty-ninth day of May, 1878, a copy of which is hereto annexed, marked exhibit "A," and made a part of this answer as follows:

"EXHIBIT 'A.'—This article of agreement, made and entered into this twenty-ninth day of May, 1878, between N. E. Mulvaney and E. C. Bemis, of firm name of Mulvaney & Bemis, parties of the first part, and H. O. Tenny and Neil McKenzie, of the firm name of Tenny & McKenzie, parties of the second part. Parties of the first part agree to pay parties of the second part four dollars and twenty-five cents per thousand feet for good, sound, merchantable

logs, delivered at the boom in Pass creek; also agree to furnish timber for logs not to exceed a mile from the bank of the creek; to scale each one hundred thousand feet that is in floating water.

"The parties of the second part agree to furnish logs to the parties of the first part, one million feet with privilege of furnishing as much more as can be put in the creek in the year, from this date, in the boom in Pass creek; the parties of the second part shall keep logs on hand for the parties of the first part, so that the mill shall not be shut down during the year, and are to cut four hundred thousand feet, more or less, from Richey canyon.

(Signed) "MULVANEY & BEMIS,
"TENNY & MCKENZIE.

"Witness: J. W. KREWSON,
"A. SHERRELL."

And allege: That plaintiffs failed and refused to comply with said agreement; that they put into the boom and floating water a large amount of unsound and unmerchantable logs, and prevented defendants from getting in logs to keep their mill running; that their mill was for a long time shut down by reason of plaintiffs' failure to perform the conditions of said agreement, on their part, to defendants' damage four thousand dollars, and demand judgment for four thousand dollars.

The replication denies the allegations in the counterclaim. It appears by the bill of exceptions that plaintiffs, to maintain the issues on their part, proved by McKenzie that the timber in the vicinity of defendants' mill, where the logs were cut, was inferior timber, and that a great many trees were rotten. William Rosee was called by the plaintiffs, and asked: "Are these average logs on the ground where they were cut?" Defendants objected. The court overruled the objection, and the witness testified: "They were average logs on the ground where they were cut." The contract provides that the logs were to be good, sound, merchantable logs, and to be cut within a space "not to exceed a mile from the bank of the creek." It is claimed that logs

based on an average of the timber in the locality from where they were to be cut, in which there were "inferior timber, and a great many rotten trees," would not be the "good, sound, merchantable logs" for which the contract expressly provided.

It is to be presumed that the parties to the contract used the descriptive words, "good, sound, and merchantable," in the sense in which such words are generally used and applied at the place where the contract was to be executed, and in that sense understood that the particular locality within which the logs were to be cut contained that kind of standing timber which would furnish the "good, sound, merchantable logs" for which the contract called. The bill of exceptions does not disclose any testimony from which any definite opinion can be formed, as to what kind of logs would be commonly considered in the locality in which the contract was to be performed, as "good, sound, and merchantable."

That there were such logs within the area from which they were to be cut by the contract, is a fact directly testified to by the witness, Mattoon. He testifies that "there were a plenty of good, sound, merchantable logs within a mile of the creek," and also that plaintiffs "did not cut any logs that were more than a quarter of a mile from the creek."

Taking the testimony of this witness in connection with the testimony of McKenzie, that the timber in the vicinity of the mill, and where the logs were cut from, was inferior timber, and that a great many of the trees were rotten, and some idea may be formed as to what would be "average logs" on the ground where they were cut.

It should be observed, too, that the testimony of McKenzie does not exclude the idea that there was not sufficient standing timber not inferior, and trees not rotten, from which good, sound, and merchantable logs could be cut within a mile of the creek, as specified in the contract. At a former term, when this same case was before the court, a similar question was asked this same witness. The question then was, "Are these an average of the logs on Pass creek?" which is not exactly identical with the question

asked here: "Are these average logs on the ground where they were cut?"

In passing on the former question, the court said: "As the logs were to be taken from the standing timber in a particular locality, we are of the opinion that the question was properly admitted." The "average logs on Pass creek," which the court admitted to prove the kind of logs for which the contract expressly provided, was based on the general character of the standing timber from the whole area from which the logs were to be cut, and not on any limited space or ground on this area where the logs were cut. We admit the force of the argument that a decision once made in a case must continue to govern it, except when the record on the second hearing contains evidence of different or additional facts. (25 Mich. 463.)

It is our opinion that the question, "Are these average logs on the ground where they were cut?" was not admissible for the purpose for which it was offered. The contract was a written one, and the kind of logs to be furnished specified, and it was the agreement of plaintiffs to cut from the standing timber, within a mile from the bank of the creek, such logs only, without regard to the rotten trees and inferior timber, as would fairly comply with the terms of the contract, in the sense in which the terms used are commonly employed in contracts for logs in this locality, as before indicated.

The next objection is to the testimony of H. O. Tenny, one of the plaintiffs. Plaintiffs' counsel asked said witness: "Were these as good as other logs on the creek?" Defendants objected, and the objection was overruled, and the witness answered: "I hauled logs for Comstock, and these logs were as good logs as I hauled for Comstock." The objection was not to the question as leading, but as irrelevant and incompetent. There is no doubt but the question plainly suggests the answer desired. It seems to us to assume, too, that there were other logs on the creek which had been shown to be, or were the kind of logs for which the contract provided, and that these logs in dispute were as good as such other logs on the creek.

We do not think that a question which assumes as a fact that which is the object of the question to prove, is competent. To elicit competent evidence it must be by an appropriate question directed to the fact in controversy.

Another objection disclosed by the bill of exceptions is that in the closing argument to the jury the counsel for the plaintiff stated that McKenzie testified that Mulvaney, one of the defendants, had agreed to remove the obstructions out of the creek. This was objected to, on the ground that there was no issue in the pleadings on that question. The court overruled the objection, and the counsel for the plaintiffs stated that the defendants had agreed to clear the creek of obstructions, and had failed to do so. It appears, by the bill of exceptions, that this evidence of McKenzie had been admitted during the trial without objection, and that some evidence had been given tending to show that a portion of the logs which were in the water, and which were mixed with the logs in dispute, and claimed by the defendants to be rotten and unmerchantable, were drift logs from old drifts in the creek, and not put in by the plaintiffs, and that they floated down the creek and became mixed with the logs of plaintiffs, without their fault. It was in respect to this evidence to which counsel for plaintiffs alluded when he referred to the evidence of McKenzie, and counsel for defendants objected. The court declined to stop him, but said to counsel that it would in its charge instruct the jury not to consider this evidence of McKenzie, and no further allusion was made to it by Mr. Hermann, of counsel for plaintiffs.

In his charge, the court said: "There being no issue in the pleadings herein, nor in this contract, in regard to defendants cleaning out the creek, you can not consider that question, nor any testimony given on that question." We do not think that the rights of defendants were prejudiced in this matter, when it appears that the court, at the time the objection was made, stated to counsel that he would instruct the jury not to consider the evidence of McKenzie, and in his instructions specifically charged the jury they

could not consider that question, nor any testimony given on that question.

The next objection is that counsel for the plaintiffs, in his argument, stated that the creek was a public highway, and that defendants had obstructed it by placing a boom across it at their mill. Defendants objected to arguing this matter on the ground that there was no issue in the pleadings as to the creek or boom, and the objection was overruled, and the counsel stated to the jury that the defendants had obstructed the creek, a public highway, by placing a boom across it without authority of law; that it was this obstruction that prevented plaintiffs from separating the rotten and bad logs from the good logs.

It appears that defendants had offered some evidence tending to show that a portion of the logs put in the creek by plaintiffs were rotten and unmerchantable, and that to draw them out of the creek, in order to separate them from the good logs and get them out of the way at the boom, would cause them great expense. To obviate the effect of this evidence, plaintiffs offered some evidence tending to show that to put them through the boom and let them float down the creek would cost but little. Defendants then offered evidence tending to show that certain other persons were proprietors of a dam and mill below the boom, on the creek, and would not allow them to open the boom and let the logs pass down.

In his argument to the jury the counsel for the defendants claimed that the defendants could not be required to open their boom and let the logs float down the creek, rather than to draw them out of the creek with oxen, and it was in reply to this argument that counsel for the plaintiffs stated that defendants had obstructed the creek, a public highway, by placing a boom across it without authority of law, and that it was this obstruction that prevented the plaintiffs from separating the rotten logs from the good logs.

There is nothing in the contract, nor in the issue made by the pleadings, in respect to these matters. The only mention of the boom in the contract is the agreement of plaintiffs to deliver the logs at the boom in Pass creek.

There is a question raised by the evidence above stated about the expense it would require to separate the rotten logs from the good logs, by opening the boom and letting them float down the creek, or by hauling them out with oxen. If Pass creek is a public highway, it will be admitted that no one has a right to obstruct it, and if the defendants opened their boom and let rotten logs float down it, they would do so at their peril, and would be bound to see that they did not thereby obstruct its navigation, nor infringe upon the rights of private individuals. So, too, the defendants have a right to use a boom for the purpose of catching their logs, provided it does not obstruct the navigation of the creek; but we do not see the relevancy of these matters to the issue joined in this action. If the boom creates an obstruction to the navigation of the logs down the creek, it is a nuisance and can be abated; but that question is hardly involved in this case. There is not only no allegation in the pleadings, but there is no evidence disclosed by the record that authorized the counsel to make such statement to the jury. We think the effect was to mislead and confuse the mind of the jury to the prejudice of defendants.

It was also objected that the counsel for the plaintiffs stated to the jury that Mr. Bemis, one of the defendants, was absent, and had not been called as a witness. The objection was that there was nothing to show why Mr. Bemis was not present, or what his testimony would have been if present. The court overruled the objection, and counsel for the plaintiffs stated that "Mr. Bemis' testimony was willfully suppressed, and the jury had a right to presume that if he had been present and sworn, his evidence would have been adverse to the defendants." To this the defendants excepted.

The only charge made by the court in respect to this matter was that some evidence had been admitted, without objection, tending to show admissions of Mr. Bemis, one of the defendants, as to the quality of the logs furnished plaintiffs. Bemis was not sworn as a witness at the trial, nor was his evidence offered. The rule is, although fre-

quently violated, that counsel must confine themselves to facts in evidence. It is held to be the strict duty of the court to arrest an argument not based on evidence. (Weeks on Attorneys at Law, sec. 112; Proffatt on Jury Trials, sec. 250; Hilliard on New Trials, sec. 40, p. 224.) And if objection be made to this course of argument, it is error for the court to permit it, and a new trial will be granted. (Same authorities.)

Counsel stated to the jury that Mr. Bemis was absent, and had not been called as a witness; and, against the objection of counsel for the defendants, argued that his evidence was willfully suppressed; and that the jury had a right to presume, if he had been present and sworn, that his evidence would have been adverse to the defendants. If the fact was in evidence that Bemis' evidence had been willfully suppressed, there would be no doubt of the presumption, as claimed by the counsel, but the record does not disclose any such fact. It is wholly gratuitous, and assumes, *arguendo*, a fact to be in the case when it is not. This is held to be error sufficient to reverse a judgment when allowed against the objection of counsel. (22 Wis. 292; 41 N. H. 317; 75 N. C. 306; 49 Ind. 33; 25 Ga. 225.)

The judgment is reversed, and the case is remanded to the court below for a new trial.

SARAH C. WEISS, APPELLANT, v. ALBERT BETHEL, WILLIAM GIRD ET AL., RESPONDENTS.

WHERE A DECREE OF DIVORCE IS SILENT AS TO THE DISPOSITION OF PROPERTY, the right thereto, given by section 495 of the Civil Code, may, in any case requiring the interposition of a court of equity, be enforced in an original suit in the circuit court for the county where the real estate is situated, without disturbing the original decree of divorce.

PLEADING—COMPLAINT DOES NOT STATE FACTS CONSTITUTING CAUSE OF SUIT, WHEN.—A complaint in a suit brought to establish plaintiff's right to an undivided one-third part of certain real property, does not state facts sufficient to constitute a cause of suit against a defendant which merely alleges complainant's right to such undivided one-third, and "that defendant is in possession of the whole of said property, and claims some interest in the same as owner thereof."

SUIT BROUGHT IN WRONG COUNTY—OBJECTION, HOW AVOIDED.—Where suit is brought to determine an adverse claim to real property, in the wrong county, a subsequent change, by order of the court, before answer, to the proper county, cures the defect and avoids the objection.

THE PLAINTIFF MAY JOIN IN HER SUIT, to enforce her right to land, and obtain the legal title from one party, any other parties who may be in possession claiming adversely to her right.

COMPLAINT—FRAUDULENT CONDUCT NOT AFFECTING RIGHTS.—The complaint is insufficient as to a defendant who is merely charged with fraudulent conduct which does not affect the right of complainant in controversy.

LACHES, WHAT DELAY AMOUNTS TO.—A delay of over thirteen years, with sufficient knowledge to put one on inquiry in prosecuting a right where due diligence is required, is unreasonable, and amounts to laches.

APPEAL from Benton County. The facts are stated in the opinion.

Chenoweth and Johnson, for appellant.

Burnett & Kelsay, and Thayer & Williams, for respondents.

By the court, WATSON, J.:

This suit was originally commenced in the circuit court for Jackson county, but afterwards transferred to that of Benton county, by an order of the court first named, upon written stipulation of parties. After the transfer, plaintiff filed an amended complaint, by leave of the court, and made several other parties defendants.

Her amended complaint states, in substance, that she was married to defendant, Albert Bethel, in 1857, and lawfully obtained a divorce from him, on the ground of desertion, at the June term, 1866, of the circuit court for Jackson county. That, at the time of the divorce, the defendant, Albert Bethel, was the owner of the Adam Holder donation land claim in Benton county, Oregon, in T. 13 S., R. 5 W., containing three hundred and one and sixty-two one hundredth acres; also, of lots 1, 2, 3, and 4, in block 3, of the city of Corvallis in said county. That at the time she filed her complaint for divorce she was ignorant of the condition of said real estate.

That said Bethel kept his business secret from her, and led her to believe that he had sold or effectually incumbered

it, so that at the time she did not know what disposition he had made of said real estate.

She knew at that time that he had by some contrivance covered up and secreted said land, but did not know what the nature of the contrivance was, and was entirely ignorant of any and all testimony to establish the same, and was ignorant for a long time after said decree was rendered of either the act of said Bethel in secreting said property, or the parties who acted with him in said contrivance. For the above-named reasons no mention was made in her application for said divorce. That plaintiff has since learned that said real estate was secreted and covered up by the following contrivance:

That on or about the year 1860 the said Albert Bethel purchased of one William Hunter the said Holder donation land claim, and plaintiff and Bethel took possession of it on the fourteenth day of January, 1861. That the defendant William Gird, by a contrivance with said Albert Bethel, procured a deed to said land direct from said Holder to Gird, which was kept secret from plaintiff. That said Bethel induced plaintiff to give up possession of said land to Gird, alleging he had leased it to him, which was false and fraudulent, and done to deceive plaintiff, and did deceive her. That said defendant Gird knew that said land had been deeded by said Hunter to Bethel, and that it belonged to him. That prior to the time said Hunter sold said land to Bethel, he had purchased it of Holder, and paid full value for it; and that at the time Holder sold said land to Gird he was not in possession thereof, and had no interest therein. That said deed was fraudulent and of no effect, and done to defraud plaintiff. That said Gird and Holder knew it was done to defraud plaintiff. That said Bethel did not record the said deed from Hunter to him, and that the suppression of said deed was a part of said contrivance to deceive and cheat her. That plaintiff does not know where said deed now is, nor its precise date, but it was about a year prior to said deed of Holder to Gird, of January 14, 1861. That plaintiff never sold or assigned her right to said land, and that said Bethel was

the owner thereof at the date of said decree in 1866. That but for said fraudulent contrivances she would have had said court set off to her one-third of said land in fee simple.

Plaintiff alleges that the other defendants claim some interest in said land, the nature of which plaintiff does not know. That defendants John Osborn and William Fliedner are in possession of and claim to have some interest in said lots as owners thereof. That defendants Henry Kampps, Laura Irwin, Julia Holder, Margarett Kampp, Mary McBee, and William H. McBee have or claim some right, title, or interest in said land; the precise right or interest, or by what right they claim such interest, is unknown to plaintiff.

Plaintiff further alleges that the defendants Mary McBee, Henry C. McBee, and Rosa McBee are minor heirs of Geo. McBee, deceased, and all under the age of fourteen years, and concludes with prayer for a decree opening and modifying the decree of divorce of June 13, 1866, so as to give her one undivided one-third of said real property for general relief and costs.

The defendant William Fliedner demurred on the ground that said amended complaint did not state facts sufficient to constitute a cause of suit.

Defendants Gird, Osborn, and Holder also filed a demurrer jointly, setting forth the following grounds:

1. The court has no jurisdiction of the subject matter of the suit.

2. The suit has not been commenced within the time limited by the code.

3. Several causes of suit have been improperly united.

4. The complaint does not state facts sufficient to constitute a cause of action.

5. There is no equity in the bill.

Both demurrers were argued together, before the circuit court for Benton county, April term, 1880, and sustained by the court.

From this ruling and judgment of the court below, the plaintiff brings this appeal. The questions to be decided

upon the appeal are such as arise upon the demurrers to the amended complaint.

The demurrer of defendant, William Fliedner, is general, and raises the question whether the facts stated in the complaint constitute any cause of suit against him. The only allegation in the complaint in regard to Fliedner is that he is "in possession of, and claims to have some interest in said lots, as owner thereof."

In any view of the case, this allegation as to Fliedner is wholly insufficient. The plaintiff claims a right to only one-third of the real estate alleged to be in Fliedner's possession, and his being in possession, and claiming an interest as owner thereof, does not necessarily make his possession and claim adverse to the plaintiff's claim. For aught that appears in the complaint, his possession and claim are entirely consistent with a full recognition on his part of all the rights claimed by plaintiff in the premises. There was no error in the ruling of the court below in sustaining this demurrer.

The first issue made by the joint demurrer of Gird, Osborn, and Holder is upon the jurisdiction of the court over the subject-matter of the suit.

Conceding, for the sake of argument, that plaintiff had a right to an undivided one-third of the real estate described in her complaint, upon obtaining her decree of divorce, June 13, 1866, which did not vest in her at that time by reason of an omission in that decree, it does not follow that she must get that decree opened and modified or extended, in order to obtain the title in fee to such part. On the contrary, she could bring an original and independent suit in the circuit court for the county where the land is situated, to enforce her right to the same, and she could not properly commence it anywhere else. (*Godey v. Godey*, 39 Cal., 161; *Whetstone v. Coffee*, 48 Tex. 269; Civil Code, secs. 376. 383, sub. 3.)

The suit, having been commenced in the circuit court for Jackson county, was commenced in the wrong county, but its change to Benton county, before answer, we think ob-

viated the objection. (Civil Code, sec. 384.) We think this section was intended to cover just such cases as this.

The second ground of demurrer, that the suit was not commenced within the time limited by the code, is not tenable. The complaint was filed October 14, 1879; and it does not appear on its face that it was not commenced within the time limited by the code. (Civil Code, sec. 66, sub. 7; Session Laws, 1878, p. 21.)

The third ground of error is that several causes of suit have been improperly united. The plaintiff seeks by this suit to obtain a title in fee to one-third part of the lands described in the complaint, from the defendant, Albert Bethel, and at the same time to have the adverse claims of the other defendants to the same annulled and declared void as against her. This is the evident purpose of the suit, whether the complaint is sufficient or otherwise. Her cause of suit against Bethel is her right to this one-third which the statute gave her when she obtained her divorce from him, and her cause of suit against the other defendants, their adverse claims or interests in derogation of that right. Whether there is sufficient stated in the complaint to show these causes valid, is not a question here, but supposing there is, are they improperly united? We think not, and that the objection can not be maintained. (Civil Code, sec. 380.)

The fourth and fifth grounds assigned by the demurrer, that "the complaint does not state facts sufficient to constitute a cause of suit," and that there is "no equity in the bill," we deem well taken.

The complaint itself shows that the deed of Holder to Gird of January 14, 1861, was made after Holder had ceased to have any interest in the land, and that Gird well knew it, and that at the time the decree of divorce was granted on June 13, 1866, the defendant, Alfred Bethel, himself was the owner of this same land as he was at the date of the deed from Holder to Gird. It does not appear from the complaint that either Holder or Gird, at the time of that decree, or at any time since, has held, or claims to hold, any interest in said land adverse to plaintiffs' alleged

right, or that they interfered with the property in any manner whatever.

If Bethel was the owner of this property on June 13, 1866, as alleged, we can not perceive how the previous transactions between Holder, Gird, and Bethel, disconnected from everything subsequent to the decree, can possibly, in any view of the case, affect the alleged rights of plaintiff in this suit.

The alleged fraudulent transactions between these parties took place over four years previous to the decree of divorce, and over four years before the right sued for was given by the legislature, and at a time, so far as the complaint shows, when no divorce was contemplated. As to Osborn, he is merely charged in the same allegation with Fliedner with being in possession of the city lots, claiming some interest therein as owner thereof, which we have already held to be insufficient.

Again, if the peculiar circumstances of this case made it necessary for plaintiff to get the decree of divorce opened up, in order to reach the right she claims in this suit, which we hold was not the case, her complaint shows on its face such laches as would bar her suit.

She states in her complaint sufficient knowledge on her part, at the time she obtained her divorce, of the condition of this property, to have put her on inquiry at once, and yet the complaint does not show that she made any effort at all at that time or since, until the commencement of this suit, over thirteen years afterwards, to discover the actual condition of said property, nor does the complaint show when she did obtain this information. The inquiry was not apparently of so difficult a character as to justify such unreasonable delay in one who had some knowledge of the matter from the first. The case in 4 Or. 30, is in point on this question of laches.

Upon the whole we are satisfied there was no error in the court below in sustaining the demurrers, and that the judgment should be affirmed.

Judgment is affirmed.

JOHN WEISS, APPELLANT, v. THE BOARD OF COUNTY COMMISSIONERS OF JACKSON COUNTY, AND HENRY G. YOUNG, RESPONDENTS.

THE SERVICE OF NOTICE OF APPEAL must precede the filing of the undertaking therefor, and simply refiling the undertaking, after the notice of appeal has been served, will not answer.

APPEAL from Douglas County. The facts are stated in the opinion.

B. F. Dowell, for appellant.

A. C. Jones, for respondent.

By the Court, WATSON, J.:

A motion has been made in this case to dismiss the appeal upon the grounds: 1. That the notice of appeal does not sufficiently describe the decree appealed from; 2. That the undertaking for appeal, as shown by the transcript, was not filed within ten days after service of the notice of appeal, but previous to such service, and consequently there is no undertaking for this appeal. In opposition to this motion, appellant has filed his cross-motion, asking leave to file said undertaking, or file a new one.

In our opinion the notice of appeal is sufficient in the particular objected to by the respondents. The date and character of the decree, and the parties in whose favor rendered, are all set forth in the notice, and fully identify it. (*Lewis v. Lewis*, 4 Or. 210.)

The objections to the undertaking are, however, well taken. The service of the notice must precede the filing of the undertaking for an appeal. (*Dooling v. Moore*, 19 Cal. 81; *Buckholder v. Byers*, 10 Id. 481.) Nor will refiling of the undertaking now, if that were possible, aid this appeal. But as it satisfactorily appears that appellant has given his notice of appeal in good faith, and that he has failed, through mistake, to file an undertaking within the time allowed by law, the motion to dismiss will be denied, and the appellant has leave to file a sufficient undertaking for appeal.

EXTRA ANNOTATION

TO

PRECEDING VOLUME

NOTES

ON THE

OREGON REPORTS.

CASES IN 8 OREGON.

8 Or. 17-22, 34 Am. Rep. 572, SINGER MFG. CO. v. GRAHAM.

Appeal and Error.—Statement of Facts not Signed by the trial judge is no part of the record, p. 18.

Cited in Kimery v. Taylor, 29 Or. 234, 45 Pac. 771, holding certificate of trial judge necessary to review stenographic report of evidence.

Statutes.—Act Relating to Foreign Corporations Applies only to corporations mentioned in its title, p. 21.

Cited in New England Mtg. Security Co. v. Vader, 28 Fed. 268, reaffirming the rule; State v. Moore, 37 Or. 539, 62 Pac. 27, applying the rule to a fee bill not mentioning the district attorney; Pacific Bldg. Co. v. Hill, 40 Or. 290, 91 Am. St. Rep. 477, 67 Pac. 105, 56 L. R. A. 163, holding building and loan association not within purview of act relating to banking institutions.

Sales.—Lease Reserving Title Until Stipulated Rent is paid is a conditional sale and title remains in seller until full payment, p. 22.

Cited in Schneider v. Lee, 33 Or. 581, 17 Pac. 271, and Singer Mfg. Co. v. Bullard, 62 N. H. 129, reaffirming and applying the rule; Herring-Hall-Marvin Co. v. Smith, 43 Or. 320, 72 Pac. 706, holding similar contract to be a conditional sale, though it used the words rent and lease; Hays v. Jordan, 85 Ga. 749, 11 S. E. 835, 9 L. R. A. 373, holding piano sale reserving title until rent notes were paid a conditional sale and not a lease; Russell v. Harkness, 4 Utah, 206, 7 Pac. 869, applying the rule to the sale of a steam-engine, reserving title until payment of price.

Distinguished in Christenson v. Nelson, 38 Or. 477, 63 Pac. 650, where property was transferred with the consent of the vendor. Cited in notes in 40 Am. Rep. 22; 37 Am. Rep. 668, on conditional sale of chattels; 3 Am. St. Rep. 198, on devesting owner of title to chattels without his consent; 25 L. R. A., N. S., 785, on right of one leaving chattels in another's possession as against latter's vendees or creditors.

8 Or. 23–28, LOVE v. LOVE.

Public Lands.—One Holding Under the Donation Law became, from the time of filing his notification in the land office, seised in fee of an estate of inheritance to which dower would attach, p. 28.

Criticised in Hershberger v. Blewett, 55 Fed. 177, referring to the decision as irreconcilably inconsistent with itself and with the law, holding that settler dying before issue of patent acquired no title subject to administration.

Distinguished in Farris v. Hayes, 9 Or. 83, where the settler died before the completion of the four years' residence.

Overruled in Quinn v. Ladd, 37 Or. 268, 59 Pac. 459, following the decision of the federal supreme court holding that donation grant passed only possessory right; denying right to curtesy in wife's half when she died before the four years' residence.

8 Or. 29–30, HALLOCK v. PORTLAND.

Trial.—Findings of Court are Conclusive upon the appellate court, p. 30.

Cited in Kyle v. Rippy, 19 Or. 186, 25 Pac. 142, holding that the duty of the appellate court is to ascertain whether the legal conclusions drawn therefrom are warranted by law; Watson v. Buckler, 29 Or. 238, 45 Pac. 766, stating rule for construction of findings; McClung v. McPherson, 47 Or. 80, 81 Pac. 570, holding findings not reviewable is supported by any competent evidence.

Appeal.—The Granting of a New Trial is Discretionary and not reviewable, p. 30.

Cited in State v. Mackey, 12 Or. 156, 6 Pac. 648, Kearney v. Snodgrass, 12 Or. 315, 7 Pac. 312, McBride v. Northern Pac. etc. Co., 19 Or. 71, 23 Pac. 816, and State v. Foot You, 24 Or. 70, 32 Pac. 1034, all approving the rule.

8 Or. 30–35, STATE v. ODELL.

Criminal Law.—Testimony of Accomplice must be Corroborated, p. 33.

Cited in State v. Jarvis, 18 Or. 365, 23 Pac. 252, reaffirming the rule. Cited in note to 98 Am. St. Rep. 168, on convicting on testimony of accomplice.

Criminal Law.—Proof That Defendant was in the Vicinity at the time of the commission of the crime is insufficient corroboration, p. 34.

Cited in State v. Scott, 28 Or. 336, 42 Pac. 2, holding evidence of opportunity to commit adultery insufficient.

Distinguished in State v. Townsend, 19 Or. 215, 23 Pac. 969, on the facts. Cited in note in 34 Am. Rep. 410, on corroboration of accomplice's testimony.

8 Or. 35–36, JOHNSON v. OREGON STEAM NAV. CO.

This case has not been cited.

8 Or. 37–44, **REMILLARD v. PRESCOTT.**

Reformation.—Mistake must be Established by Clear and convincing proof, p. 43.

Cited in McCoy v. Bayley, 8 Or. 198, Epstein v. State Ins. Co., 21 Or. 181, 27 Pac. 1045, and Thornton v. Krimbel, 28 Or. 274, 42 Pac. 996, applying the rule. Cited in note to 65 Am. St. Rep. 494, on reformation of contracts.

Estoppel in Pais must be Specially Pleaded by party having an opportunity to do so, p. 44.

Cited in Bruce v. German Sav. & Loan Soc., 24 Or. 490, 34 Pac. 17, Bays v. Trulson, 25 Or. 113, 35 Pac. 27, First Nat. Bank v. McDonald, 42 Or. 260, 70 Pac. 902, and Union St. Ry. Co. v. First Nat. Bank, 42 Or. 611, 72 Pac. 588, all approving the rule; Duff v. Willamette Iron etc. Works, 45 Or. 482, 78 Pac. 365, enumerating defenses which must be specially pleaded. Cited in note to 27 Am. St. Rep. 346, on necessity of pleading estoppel.

8 Or. 45–47, **PAGE v. FINLEY.**

Witnesses.—Character Witness must be Asked for "general" reputation, not for "reputation," pp. 46, 47.

Cited in Kelley v. Highfield, 15 Or. 283, 14 Pac. 747, reaffirming the rule; State v. Clark, 9 Or. 469, 470, following the rule on the ground of stare decisis; State v. Marks, 16 Utah, 208, 51 Pac. 1090, stating questions which may be put to witness impeaching veracity.

Trial.—Party Desiring Further or More Specific Charge must request it, p. 47.

Cited in State v. Savage, 36 Or. 207, 60 Pac. 615, approving the rule; State v. Smith, 47 Or. 490, 83 Pac. 867, stating time when requests for instructions must be made.

8 Or. 47–49, **BENTLEY v. JONES.**

This case has not been cited.

8 Or. 49–51, **NINE v. STARR.**

Bastards.—Putative Father's Agreement to Support is not founded on valid consideration, p. 50.

Cited in Belknap v. Whitmire, 43 Or. 78, 72 Pac. 590, holding child liable for necessaries furnished indigent parent at his request; Brisbin v. Huntington, 128 Iowa, 176, 103 N. W. 148, stating effect of recognition of bastard under Iowa statute; Todd v. Weber, 95 N. Y. 190, 47 Am. Rep. 20, holding putative father liable for support of child furnished at his request. Cited in notes to 56 Am. Dec. 259, 260, on maintenance of bastards; 34 Am. Rep. 543, on agreement to support illegitimate child as a consideration; 65 L. R. A. 695, on right of mother or reputed father of illegitimate to its custody or control.

Contracts.—Moral Obligation is Valid Consideration only when there is a pre-existing legal obligation, pp. 50, 51.

Cited in Easley v. Gordon, 51 Mo. App. 641, reaffirming the rule. Cited in notes to 39 Am. St. Rep. 736, and 53 L. R. A. 362, both on moral obligation as consideration for promise.

8 Or. 51–53, GRANGE UNION v. BURKHART.

This case has not been cited.

8 Or. 53–55, ABRAHAM v. ABBOTT.

Deeds.—Reservation of a Strip Bordering Land Granted, for a Road, reserves the strip for a road only, and carries the fee to the grantee, p. 55.

Cited in Pitcairn v. Harkness, 10 Cal. App. 298, 101 Pac. 810, applying the rule in a similar case.

8 Or. 56–59, NICOLAI v. LYON.

Composition.—Fraud Which will Avoid Composition Agreement must be active, pp. 58, 59.

Cited in Corbett v. Joannes, 125 Wis. 384, 104 N. W. 74, approving the rule.

8 Or. 60–63, 34 Am. Rep. 571, DICE v. WILLAMETTE TRANSP. & L. CO.

Carriers.—Passenger has the Right to Go Ashore at intermediate stop and carrier must provide safe means of egress from the boat, p. 63.

Cited in Abbott v. Oregon R. Co., 46 Or. 565, 114 Am. St. Rep. 885, 80 Pac. 1016, 1 L. R. A., N. S., 851, stating duty of railroad carrier to keep lights on depot at platform; Dodge v. Boston & B. S. C. Co., 148 Mass. 216, 12 Am. St. Rep. 541, 19 N. E. 376, 2 L. R. A. 83, applying the rule to steamboat passenger going ashore for breakfast at intermediate stop; Alabama G. S. Ry. Co. v. Coggins, 88 Fed. 459, 32 C. C. A. 1, holding that person alighting at intermediate station for refreshments, to send telegrams or take exercise, is still a passenger subject to protection. Cited in notes to 64 Am. Dec. 524, on liability of passenger carrier for injuries due to defects in vehicles and other appliances; 15 L. R. A. 399, on duty of carrier to passenger temporarily leaving vehicle before completion of journey.

8 Or. 63–65, McRAE v. DAVINER.

Execution.—All Bona Fide Purchaser is Required to look to is a valid judgment, levy and deed, p. 65.

Cited in Faull v. Cooke, 19 Or. 465, 20 Am. St. Rep. 832, 26 Pac. 664, holding that purchaser claiming under an execution sale must prove the judgment; Willamette Real Estate Co. v. Hendrix, 28 Or. 491, 52 Am. St. Rep. 800, 42 Pac. 516, holding that the judgment, execution, sale and deed are the foundation of purchaser's title; Noland v. Coon, 1 Alaska, 41, holding deed from marshal essential to prove title.

Execution.—Irregularities Which Do not Avoid the Sale are cured by order of confirmation, p. 65.

Cited in Leinenweber v. Brown, 24 Or. 553, 34 Pac. 477, Dakota Inv. Co. v. Sullivan, 9 N. D. 306, 81 Am. St. Rep. 584, 83 N. W. 235, and Ebner v. Heid, 2 Alaska, 605, all approving the rule. Cited in note to 29 Am. St. Rep. 495, 496, on order confirming judicial sale.

8 Or. 66–67, SHERMAN v. OSBORN.

Statute of Limitations.—Denial of Plaintiff's Residence on information and belief is sufficient, p. 67.

Cited in Wilson v. Allen, 11 Or. 156, 2 Pac. 92, upholding denial on information and belief; Law Guarantee etc. Soc. of London v. Hogue, 37 Or. 560, 63 Pac. 690, holding denial on information and belief good under the code; Lake v. Steinbach, 5 Wash. 664, 32 Pac. 769, holding that defendant must specially plead his nonresidence when not set up in the complaint.

8 Or. 67–84, STROWBRIDGE v. PORTLAND.

Municipal Improvement.—Method of Acquiring Authority to Make Street Improvements does not apply to the construction of sewers, p. 83.

Cited in Paulson v. City of Portland, 16 Or. 455, 456, 457, 19 Pac. 454, 455, 1 L. R. A. 673, adhering to the rule on the ground of stare decisis only; City of Little Rock v. Katzenstein, 52 Ark. 112, 12 S. W. 200, stating what property adjoins, and is benefited by, a local improvement; In re Bonds of Madera Irr. Dist., 92 Cal. 326, 27 Am. St. Rep. 106, 28 Pac. 279, 14 L. R. A. 755, to point that property may be assessed for local improvements according to its value; Rolph v. City of Fargo, 7 N. D. 664, 76 N. W. 249, 42 L. R. A. 646, referring to the case among others basing assessment on value or area; Paulsen v. City of Portland, 149 U. S. 37, 13 Sup. Ct. Rep. 750, 37 L. ed. 640, following Oregon decisions in determining that the sewer law did not violate the due process clause. Cited in note in 60 L. R. A. 210, on procedure for establishment of drains and sewers.

8 Or. 84–100, HOLLADAY v. ELLIOTT.

Corporations.—Statute Prescribing Manner of Organizing must be substantially complied with, p. 91.

Cited in Goodale Lumber Co. v. Shaw, 41 Or. 549, 69 Pac. 548, quoting the rule and holding substantial compliance with statute necessary.

Partnership will be Dissolved in Equity at suit of anyone interested when the object for which it was formed becomes impracticable, p. 94.

Cited in Waite v. Aborn, 60 App. Div. 523, 69 N. Y. Supp. 968, reaffirming the rule; Williamson v. Monroe, 101 Fed. 331, defining a partnership at will. Cited in notes to 98 Am. Dec. 262, on dissolution of partnership; 69 Am. St. Rep. 425, on grounds for dissolution of partnership.

8 Or. 100-102, SMITH v. SMITH.

Divorce.—Falsely Charging One With Having Committed Adultery is ground for divorce, though made when parties are living apart, p. 101.

Cited in McMahan v. McMahan, 9 Or. 525, Cline v. Cline, 10 Or. 478, 479, Harberger v. Harberger, 16 Or. 329, 14 Pac. 70, Crow v. Crow, 29 Or. 393, 45 Pac. 762, McDonald v. McDonald, 155 Cal. 673, 102 Pac. 931, 25 L. R. A., N. S., 45, and Williams v. Williams, 101 Minn. 407, 112 N. W. 528, all reaffirming the rule; Lyon v. Lyon, 230 Ill. 371, 82 N. E. 852, 13 L. R. A., N. S., 996, holding that false representation that defendant had not had fits for eight years no ground for annulment, stating false representations which are grounds; Carpenter v. Carpenter, 30 Kan. 744, 46 Am. Rep. 108, 2 Pac. 144, to point that there may be extreme cruelty without personal violence. Cited in notes to 65 Am. St. Rep. 82, on cruelty as grounds for divorce; 73 Am. Dec. 629, on cruelty as ground for divorce; 18 L. R. A., N. S., 312, on making charges of adultery as ground for divorce.

8 Or. 102-113, DOUGLAS COUNTY RD. CO. v. CANYONVILLE & G. RD. CO.

Toll-roads.—Right of Private Road Companies to use public roads, pp. 106-109.

Cited in Canyonville etc. Road Co. v. Stephenson, 8 Or. 265, 270, holding that plank road company may use part of public road, but cannot exclude another road company from doing likewise; Oregon Ry. Co. v. City of Portland, 9 Or. 237, holding that corporation cannot use any part of public highway without agreement with public authorities.

8 Or. 113-118, STATE v. McDONALD.

Witnesses.—Question Laying Foundation for Impeachment by prior inconsistent statements must be definite as to time and place and persons, p. 117.

Distinguished in Sheppard v. Yocum, 10 Or. 409, where the foundation for impeachment was properly laid; State v. Welch, 33 Or. 40, 54 Pac. 215, holding that while reference to a large city would be definite as to place, a small town would sufficiently designate it. Cited in note to 73 Am. Dec. 764, on practice upon impeaching witnesses.

Appeal.—Motion for New Trial is Addressed to Discretion of trial court and not reviewable, p. 118.

Cited in State v. Foot You, 24 Or. 70, 32 Pac. 1034, and State v. Gardner, 33 Or. 152, 54 Pac. 810, both reaffirming the rule.

Modified in State v. Hill, 39 Or. 96, 65 Pac. 520, holding that anything occurring after cause has been submitted tending to subvert justice may be assigned as error.

Jury.—Incompetency of Juror is Waived by failure to challenge in time, p. 118.

Cited in State v. Powers, 10 Or. 152, 45 Am. Rep. 138, approving the rule.

8 Or. 118-124, WARREN v. HEMBREE.

Wills.—Right of Personal Representatives of Legatee to take upon his death before age at which he was to take it, p. 123.

Cited in Gerrish v. Hinman, 8 Or. 350, construing like provisions in a will.

8 Or. 124-127, JACOBS v. McCULLEY.

Chattel Mortgagor cannot Insist on Foreclosure according to method stipulated in the mortgage so long as he refuses to deliver the goods for the purpose of such foreclosure, p. 126.

Cited in Jacobs Bros. & Co. v. Ervin, 9 Or. 56, leaving the question as it stands; Sears v. Abrams, 10 Or. 503, following the rule.

Distinguished in Thayer v. Nehalem Mill Co., 31 Or. 445, 51 Pac. 204, the mortgage not providing the manner of foreclosure; Irving Park Assn. v. Watson, 41 Or. 95, 67 Pac. 946, holding the rule inapplicable to pledges. Cited in note in 18 L. R. A. 623, on effect upon validity of mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale.

Chattel Mortgage Law Construed and Harmonized with general lien law, p. 126.

Cited in Commercial Nat. Bank v. Davidson, 18 Or. 65, 22 Pac. 520, quoting the decision approvingly.

Chattel Mortgagor may Sell or Encumber the property, p. 127.

Cited in Backhaus v. Buells, 43 Or. 575, 73 Pac. 346, reaffirming the rule; Mayes v. Stephens, 38 Or. 518, 63 Pac. 762, discussing interest transferred by chattel mortgage.

8 Or. 127-129, JONES v. SNIDER.

Replevin.—Verdict must Find on All Issues, damages, ownership and value of property; a general verdict is insufficient, p. 128.

Cited in Smith v. Smith, 17 Or. 445, 21 Pac. 439, Nunn v. Bird, 36 Or. 522, 59 Pac. 811, and Feller v. Feller, 40 Or. 80, 66 Pac. 471, all approving the rule. But consult Bennett v. Harkrader, 158 U. S. 447, 15 Sup. Ct. Rep. 863, 39 L. ed. 1048, 18 Morr. Min. Rep. 224, holding general verdict sufficient.

8 Or. 129-137, TENNY v. MULVANEY.

Contracts.—Where Part to be Performed Consists of several distinct items to be paid for as each is complete, the contract is severable, p. 137.

Cited in Oliver v. Oregon Sugar Co., 42 Or. 281, 70 Pac. 904, Potter v. Potter, 43 Or. 154, 72 Pac. 704, and Barnes v. Leidigh, 46 Or. 45, 79 Pac. 52, all applying the rule. Cited in notes to 31 Am. Dec. 521, on apportionment of contracts; 59 Am. St. Rep. 280, on complete performance as essential to cause of action on entire contract.

8 Or. 138–141, CAUTHORN v. KING.

This case has not been cited.

8 Or. 141–146, KENDALL v. POST.

Highways.—Remedy of Land Owner Where Road Crew Goes on his land for rock or other road material is confined to application to county court to assess his damages, pp. 145, 146.

Cited in Branson v. Gee, 25 Or. 468, 36 Pac. 529, 24 L. R. A. 355, Cherry v. Matthews, 25 Or. 486, 36 Pac. 530, and Cherry v. Lane County, 25 Or. 489, 36 Pac. 532, all applying the rule in similar cases.

Jury.—Law Providing for Assessment of Damages, for taking road material from land, without a jury is constitutional, p. 146.

Cited in Salamon v. Cress, 22 Or. 169, 29 Pac. 441, 15 L. R. A. 614, upholding law authorizing court to assess damages for tort; Anderson v. Caldwell, 91 Ind. 456, upholding law authorizing drainage proceedings to be tried without a jury. Cited in notes to 48 Am. Dec. 190, on right to trial by jury; 25 L. R. A. 69, on compulsory reference as denial of right to jury trial; 43 L. R. A. 40, on number and agreement of jurors necessary to valid verdict; 7 L. R. A., N. S., 54, on injunctive relief as to fences or gates; 3 L. R. A., N. S., 483, on injunctive relief as to cemetery property, burials, or removal of remains.

8 Or. 147–151, BIGLOW v. LEABO.

This case has not been cited.

8 Or. 152–157, BARRETT v. FAILING.

Judgment Concludes All Questions Within the Issue whether formally litigated or not, p. 156.

Cited in Neil v. Tolman, 12 Or. 295, 7 Pac. 107, White v. Ladd, 41 Or. 332, 93 Am. St. Rep. 732, 68 Pac. 741, Ruckman v. Union Ry., 45 Or. 581, 78 Pac. 750, 69 L. R. A. 480, Harmon v. Auditor of Public Accounts, 123 Ill. 133, 5 Am. St. Rep. 502, 13 N. E. 164, and Kromer v. Friday, 10 Wash. 640, 39 Pac. 234, 32 L. R. A. 671, all approving the rule; Caseday v. Lindstrom, 44 Or. 314, 75 Pac. 224, applying rule to divorce decree.

Judgment.—Evidence Outside the Record is Inadmissible to show that question in issue in former suit was withdrawn, p. 157.

Cited in Benjamin Schwartz & Sons v. Kennedy, 142 Fed. 1030, reaffirming the rule; Glenn v. Savage, 14 Or. 574, 13 Pac. 446, defining issues and stating effect of withdrawal of question from jury; Oster v. Broe, 161 Ind. 123, 64 N. E. 921, refusing to admit evidence tending to contradict the record; Braun v. Wisconsin Rendering Co., 92 Wis. 251, 66 N. W. 198, holding that evidence of reasons forming basis of judgment cannot be shown to alter its effect. Cited in note to 44 Am. St. Rep. 569, on proof of res judicata.

8 Or. 158–163, KRUSE v. PRINDLE.

Fraudulent Conveyances.—Attacking Creditor has the Burden of proving fraudulent purpose by legal and competent evidence, p. 162.

Cited in Rochester v. Sullivan, 2 Ariz. 79, 11 Pac. 59, to the same effect.

Modified in Crawford v. Neal, 144 U. S. 596, 12 Sup. Ct. Rep. 759, 36 L. ed. 557, holding that where fraudulent intent on part of grantor is made out, the purchaser must prove good faith. Cited in note to 58 Am. St. Rep. 99, on fraudulent assignments for creditors.

Contracts.—Several Instruments Made at the Same Time between the same parties and relating to the same subject matter should be taken together as one instrument, p. 162.

Cited in Bradtfeldt v. Cooke, 27 Or. 203, 50 Am. St. Rep. 701, 40 Pac. 4, construing deed and mortgage together; Keating v. Vaughn, 61 Tex. 522, construing deed of assignment and inventory of debtor's property as one instrument; Riley v. Carter, 76 Md. 599, 35 Am. St. Rep. 443, 25 Atl. 670, 19 L. R. A. 489, to point that assignment for creditors may consist of several instruments.

Distinguished in Blagen v. Thompson, 23 Or. 246, 31 Pac. 650, 18 L. R. A. 315, the contracts in issue not being between the same parties nor concerning the same subject matter.

Assignment for Creditors.—Debtor may Prefer one creditor to another, p. 162.

Cited in Marquam v. Sengfelder, 24 Or. 14, 32 Pac. 679, approving and applying the rule.

8 Or. 163-170, **HOLSTINE v. OREGON & C. R. CO.**

Cited in note to 55 Am. Dec. 671, on contributory negligence.

8 Or. 170-172, **COOK v. MULTNOMAH COUNTY.**

Counties.—Finding of County Court Fixing Compensation of coroner for summoning a jury is conclusive, p. 171.

Cited in Pruden v. Grant Co., 12 Or. 309, 7 Pac. 308, applying the rule to fees of physician subpoenaed to attend an inquest and give opinion as to cause of death; Flagg v. Columbia County, 51 Or. 176, 94 Pac. 186, where county court fixed the compensation of a newspaper for publishing its proceedings.

8 Or. 172-176, **DAVIS v. OREGON & C. R. CO.**

Cited in notes to 25 Am. St. Rep. 40, on intoxication as contributory negligence; 40 L. R. A. 132, on intoxication as affecting negligence.

8 Or. 177-181, **STATE v. TOM.**

Jury.—Disqualifying Bias is Such as Satisfies the Judge, in the exercise of sound discretion, that he cannot try the issue impartially, p. 178.

Cited in Southern Pac. Co. v. Rauh, 49 Fed. 701, 1 C. C. A. 416, conceding trial court's discretion; Kumli v. Southern Pac. Co., 21 Or. 511, 28 Pac. 639, refusing to review court's determination of competency of juror in absence of showing of abuse of discretion.

Jury.—Opinions not so Fixed That They Could not be Removed by evidence showing the facts to be different than those forming their basis do not disqualify, p. 179.

Cited in State v. Kelly, 28 Or. 226, 52 Am. St. Rep. 777, 42 Pac. 217, holding that opinions which would not influence verdict do not disqualify; State v. Ingram, 23 Or. 435, 31 Pac. 1050, holding juror who has formed fixed opinion qualified if he state that he can try case fairly.

Criminal Law.—Before Appellate Court can Review Discretionary Order it must have before it all the evidence that was adduced on the trial, p. 179.

Cited in Hayden v. Long, 8 Or. 246, State v. Jackson, 9 Or. 461, Breon v. Hinkle, 14 Or. 513, 13 Pac. 299, State v. Moran, 15 Or. 266, 14 Pac. 422, Thomas v. Bowen, 29 Or. 262, 45 Pac. 769, and Southern Pac. Co. v. Raub, 49 Fed. 700, 1 C. C. A. 416, all approving and applying the rule.

Distinguished in State v. Miller, 46 Or. 486, 81 Pac. 363, where the bill contained sufficient evidence to show that the juror was disqualified.

Rape.—Particulars of Complaint Made by Prosecutrix after the assault cannot be proved to corroborate her, p. 180.

Cited in State v. Sargent, 32 Or. 113, 49 Pac. 890, reversing conviction because mother repeated child's narrative of the circumstances of the assault.

Witnesses.—No Witness, Though of Tender Years, can testify without being sworn, unless parties consent, p. 181.

Cited in State v. Lugar, 115 Iowa, 270, 88 N. W. 334, granting new trial where one of the state's witnesses giving damaging testimony was not sworn; State v. Wilson, 109 La. 76, 33 South. 88, holding that child of tender years should not be sworn unless it be evident that he has due sense of the obligation of an oath; State v. Taylor, 57 W. Va. 237, 50 S. E. 250, granting new trial because witness was not sworn though the omission was inadvertent. Cited in notes in 19 L. R. A. 606, on competency of children as witnesses; 65 L. R. A. 317, on admissibility of declarations of infant too young to be sworn as witness.

8 Or. 181–183, HAMBURGER v. GRANT.

This case has not been cited.

8 Or. 183–191, PARKER v. ROGERS.

Navigable Waters.—Rights of Riparian Owners and Purchasers of tide lands from them, pp. 188–190.

Cited in Wilson v. Welch, 12 Or. 359, 7 Pac. 344, and De Force v. Welch, 10 Or. 508, 509, construing act authorizing purchasers of tide lands from riparian owners to obtain title from the state; Shively v. Parker, 9 Or. 505, distinguishing the facts; State v. Shively, 10 Or. 269, not in point; Astoria Exchange Co. v. Shively, 27 Or. 109, 40 Pac. 93, Lewis v. City of Portland, 25 Or. 162, 42 Am. St. Rep. 772, 35 Pac. 261, 22 L. R. A. 736, and Bowlby v. Shively, 22 Or. 419, 421, 30 Pac. 157, 158, recognizing state's title to tide land; Shively v. Bowlby, 152 U. S. 52, 14 Sup. Ct. Rep. 548, 38 L. ed. 350, and

Hume v. Rogue River Packing Co., 51 Or. 246, 161 Am. St. Rep. 732, 92 Pac. 1068, to point that riparian owner has no rights below high-water mark; State v. Black River Phosphate Co., 32 Fla. 90, 13 South. 643, 21 L. R. A. 189, holding that the "riparian act" of 1856 does not give the owner the right to mine phosphates from the bed of the stream. Cited in note in 40 L. R. A. 602, on right of owner of upland to access to navigable water; 40 L. R. A. 647, on right to erect wharves.

8 Or. 191-193, McCULLOUGH v. HELLMAN.

Principal and Surety.—Recovery of Judgment on a Note Does not Bar Suit on another note given as security for the first one, when the judgment remains unsatisfied, p. 193.

Cited in Bateman v. Grand Rapids etc. R. Co., 96 Mich. 443, 56 N. W. 29, reaffirming the rule. Cited in note in 43 L. R. A. 178, on effect of judgment in action against part of obligors on joint or joint and several contract upon liability of others.

8 Or. 193-196, WINKLE v. WINKLE.

Executors and Administrators.—Title to Personalty must be Derived from the administrator through the orders of the court, which are binding on all persons interested, p. 196.

Cited in State v. O'Day, 41 Or. 500, 69 Pac. 544, Casto v. Murray, 47 Or. 64, 81 Pac. 885, In re Morrison's Estate, 48 Or. 616, 87 Pac. 1044, and De Bow v. Wollenberg, 52 Or. 432, 97 Pac. 718, all reaffirming the rule; In re John's Will, 30 Or. 501, 47 Pac. 343, 36 L. R. A. 242, to point that title to personalty passes solely through the instrumentality of the court.

Reconciled in Weider v. Osborn, 20 Or. 314, 25 Pac. 717, holding that title to choses in action vests in legal representative with power to collect and dispose of them; Dunham v. Siglin, 39 Or. 291, 64 Pac. 662, holding the rule inapplicable to intangible property such as a judgment.

Executors and Administrators.—County Court has Exclusive Jurisdiction in matters pertaining to transfer of personalty of decedents, p. 196.

Cited in Esterly v. Rue, 122 Fed. 612, 58 C. C. A. 548, discussing exclusive jurisdiction of probate court over claims against decedents.

8 Or. 196-198, McCOY v. BAYLEY.

Reformation of Instruments.—Mistake must be Mutual and plainly and clearly proved, p. 198.

Cited in Sellwood v. Henneman, 36 Or. 577, 60 Pac. 13, applying the rule. Cited in note to 65 Am. St. Rep. 494, on reformation of contracts.

8 Or. 198-203, LAHEY v. KNOTT.

Cited in notes to 63 Am. Dec. 541, on action for breach of promise; 66 L. R. A. 799, on refusal or failure to keep agreement for marriage at specified time or place as breach of marriage contract.

8 Or. 207-208, STATE EX REL. MAHONEY v. McKINMORE.

Appeal.—Motion to File New Undertaking must be made before motion to dismiss is brought on for hearing, pp. 207, 208.

Cited in De Lashmutt v. Sellwood, 10 Or. 52, denying motion for leave to file new undertaking; Northern Counties Inv. Trust v. Hender, 12 Wash. 564, 41 Pac. 915, refusing leave to file new bond on the ground that the original bond being totally defective the court was without jurisdiction except to dismiss.

Overruled in Elwert v. Norton, 34 Or. 571, 51 Pac. 1098, granting leave to file new undertaking without motion therefor and after objection to undertaking was sustained; Fleischner v. Bank of McMinnville, 36 Or. 556, 61 Pac. 884, granting leave to amend assignments of error.

Appeal.—Undertaking must not Limit Liability of sureties, p. 208.

Cited in Goldsmith v. Gilliland, 23 Fed. 646, 10 Saw. 606, discussing distinction between a bond and an undertaking.

Distinguished in Sanborn v. Fitzpatrick, 51 Or. 459, 91 Pac. 541, approving the rule, but construing undertaking in question not to limit the amount though the sureties qualify for a stated sum.

8 Or. 209-213, DRAKE v. SEARS.

Sales.—Damages for Breach of Warranty are such as naturally result according to the usual course of things and necessary expenses incurred, p. 213.

Cited in Lenz v. Blake-McFall Co., 44 Or. 574, 76 Pac. 357, and Hoskins v. Scott, 52 Or. 277, 96 Pac. 1114, both approving and applying the rule; Mine Supply Co. v. Columbia Min. Co., 48 Or. 395, 86 Pac. 790, applying the rule to the sale of a mill for reducing ore. Cited in note in 52 L. R. A. 233, 237, on loss of profits of sale or purchase as damages.

8 Or. 214-222, STATE v. AH LEE.

Criminal Law.—The Failure of the Accused to be Present when jury are viewing location of crime is no ground for error, p. 217.

Cited in State v. Moran, 15 Or. 277, 14 Pac. 427, Elias v. Territory, 9 Ariz. 16, 76 Pac. 611, State v. Hartley, 22 Nev. 359, 40 Pac. 375, 28 L. R. A. 33, and State v. Mortensen, 26 Utah, 346, 73 Pac. 573, Neal v. State, 32 Neb. 131, 49 N. W. 177, all approving and applying the rule; People v. Fitzgerald, 137 Cal. 551, 70 Pac. 556, holding that irregularities at view, not objected to, are waived; People v. Thorn, 156 N. Y. 293, 50 N. E. 950, 42 L. R. A. 368, holding that view is no part of the trial and presence of accused at it may be waived. Cited in notes in 42 L. R. A. 378, on view by jury; 92 Am. Dec. 344, on view by court or jury.

Homicide.—Deliberation and Premeditation Defined, p. 220.

Cited in State v. Carver, 22 Or. 605, 30 Pac. 317, and State v. Megorden, 49 Or. 273, 88 Pac. 311, both approving the definition; Cook v. State, 46 Fla. 69, 35 South. 682, defining "premeditated de-

sign." Cited in notes to 86 Am. St. Rep. 641, and 56 L. R. A. 420, both on dying declarations as evidence.

8 Or. 222-224, CORPE v. BROOKS.

Appeal.—Decisions of Commissioners for sale of school lands are not reviewable, p. 224.

Cited in De Laittre v. Board of Commrs., 149 Fed. 803, Miller v. Wattier, 44 Or. 351, 75 Pac. 210, Robertson v. Geer, 42 Or. 187, 189, 70 Pac. 616, 617, and Shively v. Pennoyer, 27 Or. 38, 39 Pac. 396, all applying the rule to discretionary acts of board of land commissioners; Warner Valley Stock Co. v. Morrow, 48 Or. 262, 86 Pac. 370, holding deed of state land board conclusive on right to convey; Pierson v. State Board of Land Commrs., 14 Idaho, 163, 93 Pac. 776, holding that no appeal lies from decisions of state land board; Pennoyer v. McConnaughy, 140 U. S. 22, 11 Sup. Ct. Rep. 699, 35 L. ed. 370, quoting the decision approvingly.

Explained in Wardwell v. Paige, 9 Or. 524, holding that equitable relief may be had against a party wrongfully obtaining a state deed.

8 Or. 224-228, ATTEBERRY v. ATTEBERRY.

This case has not been cited.

8 Or. 229-236, STATE v. DALE.

Indictment.—When Statute Describes Offense Disjunctively, charge in conjunctive form is good, p. 231.

Cited in State v. Lonna, 15 N. D. 278, 107 N. W. 525, State v. White, 48 Or. 421, 87 Pac. 139, and Cranor v. City of Albany, 43 Or. 147, 71 Pac. 1043, all approving the rule; State v. Humphreys, 43 Or. 47, 70 Pac. 825, stating when "or" may be used in indictment following the language of the statute.

Juror.—Objections must be Made to Individual Juror, not to the panel, pp. 232, 233.

Explained in State v. Ju Nun, 53 Or. 4, 5, 97 Pac. 97, 98, holding objections to panel abolished.

Embezzlement may Consist of Several Acts, the appropriation of several sums collected from different persons, p. 234.

Cited in State v. Reinhart, 26 Or. 481, 38 Pac. 827, and Chamberlain v. State, 80 Neb. 819, 115 N. W. 557, both applying the rule. Cited in note to 57 Am. Dec. 286, on what constitutes larceny.

Taxation.—Statutes Defining and Punishing Embezzlement by sheriffs and collectors construed, pp. 235, 236.

Cited in State v. Neilon, 43 Or. 178, 73 Pac. 325, construing embezzlement statutes.

8 Or. 236-240, STATE v. McCORMACK.

Criminal Law.—Larceny of Several Articles is One Offense and acquittal on trial for stealing part of them bars prosecution for stealing the others, p. 239.

Cited in State v. Ward, 19 Nev. 300, 10 Pac. 134, and People v. Sullivan, 9 Utah, 203, 33 Pac. 704, approving and applying the rule. Cited in note to 92 Am. St. Rep. 117, 119, on identity of offenses on plea of former jeopardy.

8 Or. 240–244, ROSENDORF v. BAKER.

Sale Reserving Title Until Payment of Purchase Price gives buyer only the right to possession until he has performed the condition, p. 243.

Cited in Schneider v. Lee, 33 Or. 581, 17 Pac. 271, and Herring-Hall-Marvin Co. v. Smith, 43 Or. 321, 72 Pac. 706, approving and applying the rule. Cited in note in 25 L. R. A., N. S., 784, on right of one leaving chattels in another's possession as against latter's vendees or creditors.

8 Or. 244–247, HAYDEN v. LONG.

Appeal.—To Review Ruling on Challenge to Juror, all the evidence must be brought up, p. 246.

Cited in Southern Pac. Co. v. Rauh, 49 Fed. 700, 1 C. C. A. 416, reaffirming the rule; Thomas v. Bowen, 29 Or. 262, 45 Pac. 769, extending the rule to all discretionary orders.

Trial.—Instructions Abstractly Correct are Erroneous if inapplicable to the issues, p. 247.

Cited in Buchtel v. Evans, 21 Or. 316, 28 Pac. 69, Bowen v. Clarke, 22 Or. 568, 29 Am. St. Rep. 625, 30 Pac. 431, Coos Bay etc. Co. v. Siglin, 26 Or. 393, 38 Pac. 194, and Carson v. Lauer, 40 Or. 273, 65 Pac. 1061, all reaffirming the rule.

8 Or. 247–250, 34 Am. Rep. 578, note, FINDLEY v. HILL.

Suretyship.—Extension of Time to Pay Debt, given without consent of surety, discharges him, p. 249.

Cited in Hoffman v. Habighorst, 49 Or. 393, 89 Pac. 957, approving the rule; Cellers v. Meachem, 49 Or. 189, 89 Pac. 427, 10 L. R. A., N. S., 133, and Hoffman v. Habighorst, 38 Or. 262, 63 Pac. 611, 53 L. R. A. 908, both to point that suretyship may be shown by parol.

Suretyship.—Extension of Time for Indefinite Period does not discharge surety, p. 249.

Cited in Bunn v. Commercial Bank, 98 Ga. 650, 26 S. E. 64, applying the rule.

Suretyship.—Failure to Proceed Against Principal does not discharge surety, p. 250.

Cited in Rockwell v. Portland Sav. Bank, 39 Or. 241, 64 Pac. 389, and White v. Savage, 48 Or. 608, 87 Pac. 1042, both reaffirming the rule.

8 Or. 251–254, PULSE v. HAMER.

Statute of Frauds.—A Parol Lease for One Year to begin at a future time is void, p. 254.

Cited in White v. Holland, 17 Or. 4, 3 Pac. 573, Wickson v. Monarch Cycle etc. Co., 128 Cal. 160, 79 Am. St. Rep. 36, 60 Pac. 765, and Page v. Carnine, 29 Wash. 388, 69 Pac. 1094, all approving and applying the rule; Dechenbach v. Rima, 45 Or. 504, 78 Pac. 667, where the lease covered a period of two years; Jenning & Sons v. Miller, 48 Or. 203, 85 Pac. 518, discussing part performance which will take case out of operation of statute; Taylor v. Terry, 71 Cal. 47, 11 Pac. 814, not deciding the question; Alabama Mineral Land Co. v. Jackson, 121 Ala. 177, 77 Am. St. Rep. 46, 25 South. 711, holding void a contract to purchase land to be selected thereafter, as not describing the land. Cited in note in 3 L. R. A., N. S., 816, on taking possession of realty as part performance to satisfy statute of frauds.

8 Or. 254-259, **HILL v. COOPER.**

Ejectment.—Right to Rents and Profits on Recovery in ejectment, p. 258.

Cited in Hill v. Cooper, 10 Or. 153, upholding the rule.

Ejectment.—Judgment for the Defendant Conclusively Establishes his title and right to possession, p. 259.

Cited in Morrill v. Morrill, 20 Or. 102, 23 Am. St. Rep. 95, 25 Pac. 364, 11 L. R. A. 155, and Moores v. Moores, 36 Or. 262, 59 Pac. 328, both approving the rule; Burns v. Kennedy, 49 Or. 590, 90 Pac. 1103, holding that judgment in forcible entry and detainer is no bar to suit to cancel deed or quiet title.

8 Or. 259-263, **BAYLEY v. McCOY.**

Estoppel.—Parties to a Deed are Estopped to deny its operation according to their intent, p. 261.

Cited in Salem Imp. Co. v. McCourt, 26 Or. 104, 41 Pac. 1107, approving the rule; West Coast Mfg. etc. Co. v. West Coast Imp. Co., 25 Wash. 637, 66 Pac. 101, 62 L. R. A. 763, defining the word premises. Cited in note to 105 Am. St. Rep. 858, on quitclaim deeds.

8 Or. 263-270, **CANYONVILLE & G. RD. CO. v. STEPHENSON.**

Toll Roads.—Grant of Franchise to Road Company construed, pp. 265-269.

Distinguished in State v. Douglas County Road Co., 10 Or. 192, involving a different phase of the same question.

8 Or. 270-273, **TICHENOR v. COGGINS.**

Attachment.—Assignment for Creditors discharges the attachment, p. 273.

Cited in Josephi v. Furnish, 27 Or. 263, 41 Pac. 425, holding that a general assignment does not dissolve attachment for the benefit of a third person.

8 Or. 273-275, **LEWIS v. McCLURE.**

Waters.—Custom Under Which Water Right is appropriated must be proved by party alleging it, p. 275.

Overruled in Parkersville Drainage Dist. v. Wattier, 48 Or. 336, 337, 86 Pac. 776, 777, holding the custom so universal that courts take judicial notice of it. Cited in note to 89 Am. Dec. 665, on judicial notice; 30 L. R. A. 675, on right of prior appropriation of water.

8 Or. 276-278, LEONARD v. GRANT.

Dower.—Before the Assignment of Dower the Widow has no estate in the lands of her deceased husband, p. 278.

Cited in Baer v. Baltingall, 37 Or. 421, 61 Pac. 853, holding that dower cannot be sold under execution before it is assigned; Neal v. Davis, 53 Or. 433, 99 Pac. 72, to point that unassigned dower is a mere right of action.

8 Or. 278-284, COFFMAN v. ROBBINS.

Water.—Oral Contract to Divide Water Acted upon by erecting ditches and expending money will be enforced in equity, p. 283.

Cited in Combs v. Slayton, 19 Or. 104, 26 Pac. 662, applying the rule; McBroom v. Thompson, 25 Or. 566, 37 Pac. 58, holding parol license to use water irrevocable after licensee has spent money toward its use; Bowman v. Bowman, 35 Or. 281, 57 Pac. 547, holding parol license to use land irrevocable after licensee has erected valuable improvements on the faith of it; Ewing v. Rhea, 37 Or. 586, 82 Am. St. Rep. 783, 62 Pac. 791, 52 L. R. A. 140, approving the rule but distinguishing the facts.

Distinguished in Lavery v. Arnold, 36 Or. 86, 57 Pac. 907, holding owner of water right not estopped by acquiescence in diversion. Cited in note in 49 L. R. A. 514, on revocability of license to maintain a burden on land after licensee has incurred expense.

Vendor and Purchaser.—Purchaser is Presumed to Buy with notice of water rights in use on the premises, p. 284.

Cited in Low v. Schaffer, 24 Or. 245, 33 Pac. 680, approving the rule.

Waters.—Lower Owner has the Right to Have the Waters of a stream flow through his land undiminished save as the upper owner may use it for domestic purposes and irrigation, p. 279.

Cited in Jones v. Conn, 39 Or. 36, 87 Am. St. Rep. 634, 64 Pac. 857, 54 L. R. A. 630, to point that, after the natural wants of all riparian owners have been supplied, each is entitled to a reasonable use of the water for irrigation; Meng v. Coffey, 67 Neb. 516, 108 Am. St. Rep. 697, 93 N. W. 718, 60 L. R. A. 910, holding that the upper owner must not waste, needlessly diminish or wholly use the water for irrigation to the injury of other owners.

Questioned in Hough v. Porter, 51 Or. 410, 98 Pac. 1099, citing numerous cases and concluding that there is no prior riparian ownership so far as distribution of water for irrigation is concerned. Cited in note in 41 L. R. A. 743, on correlative rights of upper and lower proprietors as to use and flow of stream.

8 Or. 284-303, COYOTE GOLD & S. M. CO. v. RUBLE.

Corporation Exists as a Legal Entity from the Time of the filing of its articles, p. 293.

Cited in Goodale Lumber Co. v. Shaw, 41 Or. 548, 69 Pac. 547, holding the filing of articles a prerequisite to corporate existence.

Corporations.—One Signing an Agreement Agreeing to Take a certain number of shares of stock does not become a stock subscriber, p. 293.

Cited in Kelly v. Ruble, 11 Or. 104, 105, 4 Pac. 609, involving the same facts.

Explained in Nickum v. Burckhardt, 30 Or. 469, 60 Am. St. Rep. 822, 47 Pac. 789, holding that subscription need not be made on stockbook.

Questioned in Nebraska Chicory Co. v. Lednicky, 79 Neb. 590, 113 N. W. 246, holding any agreement showing an intention to become a stockholder, a sufficient contract of subscription. Cited in note to 81 Am. Dec. 397, on subscriptions to corporate stock.

Corporations.—Records of Corporation must Show that one-half of the capital stock has been subscribed, p. 294.

Cited in Astoria etc. Co. v. Hill, 20 Or. 180, 25 Pac. 380, holding that assessments may be made after one-half of the capital has been subscribed; McVicker v. Cone, 21 Or. 357, to point that statutory amount must be subscribed. Cited in note to 99 Am. Dec. 762, rights and remedies as to corporate dividends.

8 Or. 303-316, 34 Am. Rep. 581, MORELAND v. BRADY.

Wills.—Extrinsic Oral Evidence is Admissible to aid construction, p. 313.

Cited in Whitcomb v. Rodman, 156 Ill. 123, 47 Am. St. Rep. 181, 40 N. E. 555, 28 L. R. A. 149, Pate v. Bushong, 161 Ind. 547, 551, 100 Am. St. Rep. 287, 69 N. E. 297, 298, 63 L. R. A. 593, and Black v. Richards, 95 Ind. 190, all approving and applying the rule.

Wills.—Erroneous Part of Description may be Rejected when remainder is sufficient to identify the property, p. 313.

Cited in Collins v. Capps, 235 Ill. 564, 126 Am. St. Rep. 232, 85 N. E. 935, and Portland Trust Co. v. Beatie, 32 Or. 312, 72 Am. St. Rep. 713, 52 Pac. 91, 44 L. R. A. 527, approving and applying the rule; Portland Trust Co. v. Beatie, 32 Or. 309, 52 Pac. 91, to point that misdescription cannot defeat obvious intent of testator; Seebrock v. Fedawa, 33 Neb. 417, 29 Am. St. Rep. 488, 50 N. W. 271, holding that error in description will not avoid devise if enough remain to show with reasonable certainty what was intended; Huberman v. Evans, 46 Neb. 803, 65 N. W. 1052, applying the rule to a description in a guardian's petition to sell land. Cited in notes to 29 Am. St. Rep. 492; 6 L. R. A., N. S., 954, 955, 975, on correction of misdescription of land in will.

8 Or. 316–323, NORTHCUT v. LEMERY.

Courts.—When Court of General Jurisdiction exercise special jurisdiction, it must strictly follow the statute and show by its record that it has done so, p. 322.

Cited in Odell v. Campbell, 9 Or. 309, Furgeson v. Jones, 17 Or. 212, 11 Am. St. Rep. 808, 20 Pac. 846, 3 L. R. A. 620, Willamette Real Estate Co. v. Hendrix, 28 Or. 495, 52 Am. St. Rep. 800, 42 Pac. 517, Knapp v. Wallace, 50 Or. 354, 126 Am. St. Rep. 742, 92 Pac. 1057, Fishburn v. Londershausen, 50 Or. 373, 92 Pac. 1064, 14 L. R. A., N. S., 1234, Kelley v. Kelley, 161 Mass. 118, 42 Am. St. Rep. 389, 36 N. E. 840, 25 L. R. A. 806, and Cohen v. Portland Lodge No. 142, B. P. O. E., 144 Fed. 269, all following and illustrating the application of the rule. Cited in note in 19 L. R. A. 819, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear.

8 Or. 324–327, CRAWFORD v. ROBERTS.

Appeal.—In This Case Appeal from Order sustaining a motion to discharge an attachment was entertained, p. 325.

Cited in Sheppard v. Yocum, 11 Or. 236, 3 Pac. 825, holding order refusing to dissolve an attachment appealable.

Explained in Farmers' Bank of Weston v. Key, 33 Or. 446, 54 Pac. 207, and Van Voorheis v. Taylor, 24 Or. 248, 33 Pac. 380, holding that order dissolving attachment is not appealable. Cited in note to 123 Am. St. Rep. 1064, on proceedings to dissolve attachments.

Statutes Adopted from Another State bring with them the judicial construction given them there, p. 326.

Cited in Everding v. McGinn, 23 Or. 17, 35 Pac. 178, Barmore v. Dickson, 21 Or. 306, 28 Pac. 9, and Trabant v. Rummell, 14 Or. 19, 12 Pac. 57, approving and applying the rule.

Limitation Laws.—Defendant Pleading Statute of Another State must show that the cause of action arose in that state, p. 325.

Cited in Re Smith's Will, 43 Or. 603, 75 Pac. 135, and Lake v. Steinbach, 5 Wash. 664, 32 Pac. 769, both following the rule.

Attachment.—Clerk has No Discretion, but must Issue the writ when the affidavit is filed, p. 326.

Cited in Newell v. Whitwell, 16 Mont. 259, 40 Pac. 871, to point that the clerk exercises only ministerial duty in issuing writ of attachment.

8 Or. 327–330, COOPER v. McGREW.

Crops.—Farm Lease on Shares Makes the Parties tenants in common of the crops, p. 330.

Cited in Messinger v. Union Warehouse Co., 39 Or. 550, 65 Pac. 810, and Abernethy v. Uhlman, 52 Or. 364, 93 Pac. 938, both supporting the rule. Cited in notes to 37 Am. Dec. 318, on agreements for cultivation of land on shares; 23 L. R. A. 468, on sale or mortgage of future crops.

Contracts.—Policy of Law is to Give Effect to intention of parties, p. 330.

Cited in Fox etc. Co. v. McKinney, 9 Or. 499, applying the rule in construing a lease.

8 Or. 330-333, **ELKINS v. PARRISH.**

This case has not been cited.

8 Or. 333-337, **MILLER v. VAUGHN.**

This case has not been cited.

8 Or. 337-342, **POPPLETON v. YAMHILL COUNTY.**

Property.—Words "Personal Property" Defined, p. 341.

Cited in Fishburn v. Londershausen, 50 Or. 370, 92 Pac. 1063, 14 L. R. A., N. S., 1234, approvingly; Dundee Mtg. etc. Co. v. School Dist. No. 1, 19 Fed. 367, to point that notes and mortgages are personalty.

Explained in Dundee Mtg. etc. Co. v. School Dist. No. 1, 21 Fed. 154, holding that mortgages are taxable as "property" only by virtue of statute.

Review.—Writ Lies to Review Orders of board of equalization, p. 338.

Cited in Paulson v. City of Portland, 16 Or. 464, 19 Pac. 458, 1 L. R. A. 673, and Southern Oregon Co. v. Coos County, 39 Or. 192, 64 Pac. 648, approvingly; Oregon etc. Bank v. Jordan, 16 Or. 117, 17 Pac. 624, to point that remedy of tax-payer is to go before board of equalization, thence to prosecute a writ of review.

Taxation.—Equalization may Increase Assessment by including property not found by the assessor, p. 339.

Cited in Horton v. Driskell, 13 Wyo. 78, 77 Pac. 357, holding that county may add omitted property though the owner's name does not appear on the assessment-roll.

Taxation.—Notes Transferred to Evade Taxation may be taxed where owner resides, p. 340.

Cited in Shotwell v. Moore, 129 U. S. 596, 9 Sup. Ct. Rep. 362, 32 L. ed. 829, approvingly; Sisler v. Foster, 72 Ohio St. 447, 74 N. E. 642, where property was placed in trust to avoid taxation. Cited in note to 56 Am. Dec. 530, on place for taxation of property.

Review is Properly a Proceeding to Try Errors of law appearing on the record, not facts, p. 341.

Cited in Oregon Coal etc. Co. v. Coos County, 30 Or. 309, 47 Pac. 852, Meinert v. Harder, 39 Or. 619, 65 Pac. 1058, McAnish v. Grant, 44 Or. 62, 74 Pac. 398, and California & O. Land Co. v. Gowen, 48 Fed. 775, all to the same effect.

8 Or. 342-344, **GRIFFIN v. PITMAN.**

Justice of the Peace has No Power to set aside judgment and grant a new trial, p. 343.

Cited in American Bldg. & Loan Assn. v. Fulton, 21 Or. 493, 494, 28 Pac. 636, and Meinert v. Harder, 39 Or. 619, 65 Pac. 1058, approving the rule; McCoy v. Bell, 1 Wash. 511, 20 Pac. 598, holding that jurisdiction of justice is exhausted when he enters judgment.

8 Or. 344-348, SCHMIDT v. VOGT.

This case has not been cited.

8 Or. 348-350, GERRISH v. HINMAN.

Wills Take Effect at the Date of testator's death, p. 349.

Cited in Scott v. Ford, 52 Or. 294, 97 Pac. 101, reaffirming the rule.

Wills.—Devise to "My Children and the Children of My Daughters" goes per stirpes, not per capita, p. 350.

Distinguished in Ramsey v. Stephenson, 34 Or. 412, 57 Pac. 195, construing a provision directing estate to go equally among the heirs.

8 Or. 351-354, 34 Am. Rep. 585, GERRISH v. GERRISH.

Wills.—Another Instrument Properly Identified may be referred to and made part of the will, p. 353.

Cited in Nightingale v. Phillips, 29 R. I. 189, 72 Atl. 226, approving and applying the rule; In re Soher's Estate, 78 Cal. 480, 21 Pac. 9, holding that holographic will may revoke an attested will not written by testator and refer to it for complete provisions. Cited in notes in 49 Am. Rep. 454; 68 L. R. A. 374, on incorporation of extrinsic document into will.

Statutes Adopted from Another State are construed in the light of decisions of that state, p. 353.

Cited in Barmore v. Dickson, 21 Or. 306, 28 Pac. 9, and Hardenbergh v. Ray, 151 U. S. 124, 14 Sup. Ct. Rep. 305, 38 L. ed. 96, both reaffirming the rule.

Wills.—Statute Avoiding Will as to Pretermitted Children does not require that actual provision be made for the children nor that they be designated by name, p. 353.

Cited in Neal v. Davis, 53 Or. 428, 99 Pac. 71, holding that the word "heirs" is not equivalent to the word "children"; Brown v. Nelms, 86 Ark. 388, 112 S. W. 379, upholding will devising one-half to wife and the other half to the "children"; Bower v. Bower, 5 Wash. 229, 31 Pac. 599, denying right to admit extrinsic evidence to show that provision for "heirs" was intended to provide for "children." Cited in notes to 17 Am. St. Rep. 260; 39 Am. Dec. 740, 743, on rights of child or issue unintentionally omitted from will.

8 Or. 354-355, GAUNT v. PERKINS.

Justice of the Peace cannot Enter Default before one hour after summons is returnable, p. 355.

Cited in State v. Laurandeau, 21 Mont. 220, 53 Pac. 537, holding that record must show that plaintiff appeared within an hour after the summons is returnable.

8 Or. 356–367, PORTLAND v. BAKER.

Injunction Should be Granted Only in Cases where plaintiff is in danger of suffering irreparable injury, p. 365.

Cited in Ladd v. Ramsby, 10 Or. 211, approving the rule; Coffeyville Min. & Gas Co. v. Citizens' Nat. Gas etc. Co., 55 Kan. 180, 40 Pac. 328, holding that injunction cannot be obtained on the visionary basis of fears and beliefs.

8 Or. 367–370, 34 Am. Rep. 587, SPRAGUE v. FLETCHER.

Bills and Notes.—Waiver of Protest and Notice does not waive demand, p. 369.

Cited in Blatchford v. Harris, 115 Ill. App. 164, reaffirming the rules.

Denied in Bank of Montpelier v. Montpelier Lumber Co., 16 Idaho, 735, 102 Pac. 686, holding demand waived by waiver of protest. Cited in note in 51 Am. Rep. 536.

8 Or. 370–379, CROSSEN v. EARHART.

Sheriffs are not Entitled to Mileage for transporting convicts to penitentiary, p. 379.

Cited in State v. Chadwick, 10 Or. 547, appendix, opinion of referee who did not have access to the citing case.

8 Or. 380–393, SPEAR v. COOK.

This case has not been cited.

8 Or. 394–396, 34 Am. Rep. 590, note, STATE v. DUCKER.

Larceny.—Intent to Steal may be Formed after acquisition of property by mistake, pp. 394, 395.

Denied in People v. Miller, 4 Utah, 411, 11 Pac. 514, holding that intent must exist at the time of taking. Cited in notes in 39 Am. Rep. 194, 80 Am. St. Rep. 38, 88 Am. St. Rep. 579, 599, 600, and 57 Am. Dec. 280, on what constitutes larceny; 52 L. R. A. 138, 139, on larceny of money or property delivered by mistake.

8 Or. 396–402, STATE EX REL. CUPLES v. HIBERNIAN SAV. & L. ASSN.

Banks.—Constitution of Oregon Construed not to Prohibit incorporation of banks, p. 401.

Cited in State v. Lord, 28 Or. 529, 43 Pac. 480, 31 L. R. A. 473, discussing the propriety of bringing suit in name of state on relation of private individual when matter of public concern is not involved.

8 Or. 402–404, JACKSON v. JACKSON.

This case has not been cited.

8 Or. 405–406, WILLIAMS v. ACKERMAN.

Statute of Frauds.—Parol Lease for Three Years, when executed and recognized by both parties becomes a tenancy from year to year, p. 406.

Cited in Rosenblat v. Perkins, 18 Or. 160, 22 Pac. 600, 6 L. R. A. 257, approving and applying the rule; Brown v. Kayser, 60 Wis. 6, 18 N. W. 525, implying tenancy from year to year where tenant holds over; Parker v. Taswell, Martin v. Smith, 8 Eng. Rul. Cas. 652, Doe d. Rigge v. Bell, 15 Eng. Rul. Cas. 599, and Allen v. Hill, Richardson v. Langridge, 25 Eng. Rul. Cas. 8, not accessible. Cited in notes to 42 Am. Dec. 133, on notice to quit; 120 Am. St. Rep. 45, on unlawful detainer.

8 Or. 406–411, HENDRIX v. GORE.

Mortgage Given to Secure Future Advances is valid, p. 409.

Cited in Nicklin v. Nelson, 11 Or. 411, 50 Am. Rep. 477, 5 Pac. 54, Sabin v. Columbia River Lumber etc. Co., 25 Or. 24, 42 Am. St. Rep. 756, 34 Pac. 695, Backhaus v. Buells, 43 Or. 571, 73 Pac. 345, Doyly v. Capp, 99 Cal. 156, 33 Pac. 736, and Hester v. Gairdner, 128 Ga. 536, 58 S. E. 168, all approving and applying the rule. Cited in note in 21 L. R. A. 327, on setoff on mortgage foreclosure.

8 Or. 412–428, ALLEN v. HIRSCH.

Statutes—General or Public Act, and Special or Private Act defined and distinguished, p. 422.

Cited in Crawford v. Linn Co., 11 Or. 498, 5 Pac. 746, involving definition of special law; Crawford v. Linn Co., 11 Or. 499, 5 Pac. 746, distinguishing special and local law; Maxwell v. Tillamook County, 20 Or. 501, 26 Pac. 805, giving illustrations of special laws; Maxwell v. Tillamook County, 20 Or. 506, 26 Pac. 806, stating intent of constitutional provision against special acts; Farrell v. Port of Columbia, 50 Or. 173, 174, 91 Pac. 547, defining general and special law; Eckerson v. City of Des Moines, 137 Iowa, 471, 115 N. W. 185, defining the words "local" and "special" as used in the constitution.

Denied in Dundee Mtg. etc. Co. v. School Dist. No. 1, 21 Fed. 158, holding that public statute may be special or local.

8 Or. 428–436, PHILLIPPI v. THOMPSON.

Ejectment.—Plaintiff must Show Legal Title and present right to possession, p. 433.

Cited in Altschul v. Casey, 45 Or. 190, 76 Pac. 1085, approving and applying the rule.

8 Or. 436–438, TRULLINGER v. KOFOED.

Execution.—When Resale is Ordered, proceeds must be first applied to repaying former purchaser the amount of his bid, p. 436.

Cited in Crane v. Runey, 26 Fed. 17, on obligation to restore, on reversal, money received on erroneous judgment.

8 Or. 438–444, PRICE v. KNOTT.

Ferry Franchise is Limited to Line of Boats run from points included in grant, p. 443.

Cited in Knott Bros. v. Jefferson Street Ferry Co., 9 Or. 535, applying the rule and holding that owner of franchise has no interest en-

titling him to question or oppose establishment of another ferry. Cited in note in 59 L. R. A. 532, on establishment, regulation and protection of ferries.

8 Or. 444-450, BENNETT v. STEPHENS.

Trial.—The Admission of Irrelevant Evidence upon the Promise to make it relevant by subsequent proof rests in discretion of court, pp. 446, 447.

Cited in Crosby v. Portland Ry. Co., 53 Or. 514, 101 Pac. 205, holding order of proof discretionary.

Assumpsit.—The Law will not Imply a Promise to pay for services of a relative or one admitted into the family because in need of support, p. 447.

Cited in Wilkes v. Cornelius, 21 Or. 349, 28 Pac. 135, holding that relative must prove contract to pay for services by direct and positive evidence; Fitzpatrick v. Dooley, 112 Mo. App. 172, 175, 86 S. W. 721, 722, holding that where a family or parental relationship is shown to exist agreement must be proved by claimant. Cited in note in 11 L. R. A., N. S., 878, on implication of agreement to pay for services of relative or member of household.

8 Or. 451-454, ROHR v. ISAACS.

This case has not been cited.

8 Or. 454-464, THOMPSON v. WOOLF.

Quieting Title.—Constructive Possession is Sufficient to enable one to bring suit to quiet title, p. 455.

Cited in Hyde v. Holland, 18 Or. 333, 22 Pac. 1105, approving the rule.

Criticised and distinguished in O'Hara v. Parker, 27 Or. 167, 39 Pac. 1006, holding that one having such legal title as affords adequate remedy at law cannot maintain bill to quiet title. Cited in note to 45 Am. St. Rep. 377, on who may maintain action to remove cloud on title.

Evidence.—Before Declarations can be Admitted to Prove Pedigree, the relationship of the declarant must be proved by evidence other than his declarations, p. 463.

Distinguished in Young v. State, 36 Or. 421, 423, 59 Pac. 813, 47 L. R. A. 432, holding that declarations of decedent as to his family history are admissible to identify him and show family connection with those claiming to be his relatives; Woolsey v. Williams, 128 Cal. 554, 79 Am. St. Rep. 67, 61 Pac. 671, where the preliminary proof sufficiently established the relationship of declarant.

8 Or. 464-465, 34 Am. Rep. 592, note, LICHTENSTEIN v. MELLIS.

Trademark Using Some of the Words Contained in Another is not necessarily an infringement, p. 465.

Cited in Miskell v. Prokop, 58 Neb. 631, 79 N. W. 553, holding that there is no infringement if ordinary attention would disclose a dif-

ference. Cited in notes to 85 Am. St. Rep. 95, 115, 118, on what words or phrases may constitute a valid trademark; 47 Am. Dec. 295, on what constitutes an infringement of trademark; 15 L. R. A., N. S., 630, on relief against infringement of trade name not used in connection with manufactured article.

8 Or. 466–470, BOIRE v. McGINN.

Partnership.—Where One Partner has Full Charge of the Business, he is liable to the other for the profits proved to have been made generally, p. 468.

Cited in Bloomfield v. Buchanan, 14 Or. 183, 12 Pac. 239, where one partner was excluded from participation and the others were held severally liable to him for the profits. Cited in note in 52 L. R. A. 842, on partnership books of account as evidence.

8 Or. 470–474, MOUNTAIN v. MULTNOMAH COUNTY.

Counties.—Review of Errors of County Court and duty of such court to provide militia quarters, pp. 473, 474.

Cited in Flagg v. Columbia County, 51 Or. 177, 94 Pac. 186, to point that refusal of county court to pay a claim is a decision which can be reviewed only by writ of review.

Distinguished in Crossen v. Wasco County, 10 Or. 116, holding that where the county court acts as the fiscal agent of the county it does not exercise the functions of a court; Vincent v. Umatilla, 14 Or. 380, 382, 12 Pac. 735, 736, holding that before county can be made liable for an armory all the requirements of the statute must be complied with.

8 Or. 474–479, 2 Dan. Ch. Pr. 1563, FAHIE v. LINDSAY.

Interpleader may be Filed by Maker of Note sued by payee and by attaching creditors, pp. 477, 478.

Cited in Curtis v. Williams, 35 Ill. App. 523, holding that owner of mortgaged land made defendant in suit to foreclose and in another suit to establish title may interplead; Hoyt v. Gouge, 125 Iowa, 604, 101 N. W. 464, stating object and grounds for interpleader in Iowa. Cited in notes to 91 Am. St. Rep. 613, on right of interpleader; 35 Am. Dec. 706, 708, on interpleader in equity.

Appeal.—Findings of Referee will not be Disturbed unless they are clearly against the weight of evidence, p. 479.

Cited in Besser v. Joyce, 9 Or. 316, approving but not applying the rule.

Criticised in Nessley v. Ladd, 29 Or. 360, 45 Pac. 905, holding findings of court or referee merely advisory on appeal in equity.

Overruled in O'Leary v. Fargher, 11 Or. 225, 4 Pac. 330, holding that on appeal in equity the case is tried anew without regard to findings of court or referee.

8 Or. 485–486, STATE EX REL. MAHONEY v. McKINNON (No. 1).

Appeal is not Perfected Until Undertaking is Filed, and an order dismissing for failure to file it is not an affirmance, p. 486.

Cited in Whipple v. Southern Pacific Co., 34 Or. 375, 55 Pac. 976, reaffirming the rule.

8 Or. 487-493, STATE EX REL. MAHONEY v. McKINNON (No. 2).

Appeal.—Assignment of Errors must Specify particular ground of error, p. 490.

Cited in Northern Pac. Terminal Co. v. Lowenberg, 11 Or. 287, 3 Pac. 683, Herbert v. Dufur, 23 Or. 463, 32 Pac. 302, and Roman Catholic Archbishop v. Hack, 23 Or. 587, 32 Pac. 402, all reaffirming the rule.

Contempt.—Charges in Contempt Proceedings are not regarded as pleadings, p. 490.

Distinguished and explained in State v. Sieber, 49 Or. 4, 88 Pac. 314, holding that charges of contempt must now be made on the positive statement of the affiant.

Appeal.—Court is Bound to Take Notice of Error going to the jurisdiction though not assigned, p. 492.

Cited in Weissman v. Russell, 10 Or. 74, stating errors which need not be assigned; Carver v. Jackson County, 22 Or. 63, 29 Pac. 78, to point that jurisdictional defects will be considered on appeal though not assigned; Huffman v. Huffman, 47 Or. 619, 114 Am. St. Rep. 943, 86 Pac. 595, holding that superior courts have jurisdiction at all times regardless of terms to vacate void judgments; Woodruff v. Douglas County, 17 Or. 317, 21 Pac. 50, holding that court is bound to notice jurisdictional defect; Maxwell v. Frazier, 52 Or. 188, 96 Pac. 550, 18 L. R. A., N. S., 102, court should refuse to proceed if it discover a want of jurisdiction at any stage of the proceedings.

Contempt.—One Court cannot Punish Contempt committed against another, p. 492.

Cited in Kissel v. Lewis, 27 Ind. App. 306, 61 N. E. 210, holding that special judge whose jurisdiction terminated on rendition of decree had no jurisdiction to punish a contempt of it; Johnson v. Bouton, 35 Neb. 902, 53 N. W. 996, to point that contempt must be punished by court against which it was committed. Cited in note to 22 Am. St. Rep. 419, on relief of party convicted of contempt.

Courts have No Power, in Vacation, to punish contempts, p. 493.

Cited in State v. Stevens, 40 Kan. 117, 19 Pac. 367, holding that judge at chambers has no authority to punish a person for a contempt not committed in his presence; Mau v. Stoner, 12 Wyo. 489, 76 Pac. 587, holding that a judge at chambers cannot render a judgment unless specially authorized by law; Ex parte Ellis, 37 Tex. Cr. 542, 66 Am. St. Rep. 831, 40 S. W. 276, to point that judgments rendered in vacation are void unless authorized by some express law.

8 Or. 493-502, STATE EX REL. MAHONEY v. McKINNON (No. 3).

Election.—Provision Authorizing Special Tribunal to decide election contest does not oust quo warranto, p. 499.

Cited in Pratt v. Breckinridge, 112 Ky. 43, 65 S. W. 148, State v. Kempf, 69 Wis. 474, 2 Am. St. Rep. 753, 34 N. W. 227, and State v.

Elliott, 117 Ala. 154, 23 South. 125, holding that statutory contest and quo warranto are cumulative unless the statute makes one exclusive.

Denied in Parks v. State, 100 Ala. 648, 13 South. 757, holding decision of special tribunal exclusive and a bar to quo warranto.

Explained in Simon v. Portland Common Council, 9 Or. 443, holding decision of city council in election contest not reviewable. Cited in notes to 16 Am. St. Rep. 222, on review by law courts of decisions of bodies affecting power to determine election and qualifications of their members; 26 L. R. A., N. S., 209, on provision for testing election of officer before municipal body as exclusive remedy.

Elections.—Ballots Written on Printed or Colored Paper are void, p. 501.

Cited in State v. Wolf, 17 Or. 125, 20 Pac. 319, holding this phase of the question changed by the law requiring the state to furnish the ballots; In re M'Dade, 29 Misc. Rep. 221, 60 N. Y. Supp. 109, holding ballots containing distinguishing feature void; Boyd v. Mills, 53 Kan. 606, 42 Am. St. Rep. 306, 37 Pac. 19, 25 L. R. A. 486, discussing distinguishing marks and features on ballots; Cook v. Fisher, 100 Iowa, 34, 69 N. W. 266, construing law against distinguishing marks on ballots; People v. Board of County Canvassers, 129 N. Y. 413, 29 N. E. 334, 14 L. R. A. 624, barring ballots inadvertently sent to wrong booth as containing distinguishing mark; Horning v. Burgess, 119 Mich. 53, 77 N. W. 446, holding law requiring inspector's initials on the back of the ballot directory; State v. Saxon, 30 Fla. 690, 32 Am. St. Rep. 46, 12 South. 224, 18 L. R. A. 721, construing law against ornaments, designations or marks on ballots.

Elections.—Tie Vote Elects Neither Candidate until decided by lot, p. 501.

Cited in Johnston v. State, 128 Ind. 19, 25 Am. St. Rep. 412, 27 N. E. 423, 12 L. R. A. 235, holding that tie vote may be determined by lot; State v. Kramer, 150 Mo. 94, 51 S. W. 717, 47 L. R. A. 551, construing law regulating decision of tie vote for justices of the peace. Cited in note in 47 L. R. A. 558, on decision of tie vote at election.

8 Or. 502–509, REMDALL v. SWACKHAMER.

Execution.—Decision of Sheriff's Jury in Trial of right to property levied upon is conclusive, p. 508.

Cited in Capital Lumbering Co. v. Hall, 9 Or. 95, 100, 108, Vulcan Iron Works v. Edwards, 27 Or. 565, 36 Pac. 22, and on rehearing, Vulcan Iron Works v. Edwards, 27 Or. 571, 39 Pac. 403, all reaffirming the rule.

8 Or. 509–512, ROSEBURG v. ABRAHAM.

Nuisance.—Obstruction of Highway is a Public or common nuisance, p. 511.

Cited in Van Buskirk v. Bond, 52 Or. 236, 96 Pac. 1104, reaffirming the rule.

8 Or. 513–522, TENNY v. MULVANEY.

Contracts.—Words are Presumed to be Used in the Sense in which they are generally taken where the contract is made, p. 517.

Cited in Tenny v. Mulvaney, 9 Or. 411, applying the rule.

Appeal—Trial.—Argument of Counsel Assuming Facts not in issue nor warranted by the evidence is ground for reversal, p. 521.

Cited in State v. Hatcher, 29 Or. 316, 44 Pac. 586, and State v. Moore, 32 Or. 67, 48 Pac. 469, both reaffirming the rule; State v. Drake, 11 Or. 399, 4 Pac. 1206, holding that irrelevant language of counsel in argument must be incorporated in the record; Huber v. Miller, 41 Or. 116, 68 Pac. 404, holding that arguments are usually within the discretion of the trial court and reviewed only when clearly prejudicial.

8 Or. 522–528, WEISS v. BETHEL.

Divorce.—One Obtaining Decree not Mentioning Property may bring an original suit for its division in the county where it is situated, p. 526.

Distinguished in Bedal v. Sake, 10 Idaho, 282, 77 Pac. 642, 66 L. R. A. 60, holding that one who voluntarily leaves Idaho to obtain a divorce cannot thereafter maintain an action there for a division of the property; Barrett v. Failing, 111 U. S. 528, 4 Sup. Ct. Rep. 598, 28 L. ed. 507, holding that a wife obtaining a divorce in another state acquires no title to husband's land in Oregon.

Overruled in Ross v. Ross, 21 Or. 12, 14, 26 Pac. 1007, 1008, holding that court cannot adjudge title to property not in issue in the divorce suit.

Equity.—Thirteen Years' Delay in Prosecuting Suit for division of property, after obtaining divorce, bars relief, p. 530.

Cited in Wilson v. Wilson, 41 Or. 464, 69 Pac. 925, applying the rule; Mathews v. Culbertson, 83 Iowa, 441, 50 N. W. 203, stating when equity will hold claim barred for laches.

8 Or. 529, WEISS v. JACKSON COUNTY COMMRS.

Appeal.—Notice of Appeal Giving Date and Character of the decree and the parties in whose favor it is rendered sufficiently describes the decree, p. 529.

Cited in Mendenhall v. Elwert, 36 Or. 379, 52 Pac. 23, stating requisites of description of decree in notice of appeal.

9 ORE.

EXTRA ANNOTATED EDITION.

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

AT THE

JULY TERM, 1880, AND THE JANUARY, MARCH AND OCTOBER TERMS, 1881.

T. B. ODENEAL,
REPORTER.

VOLUME 9.

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1911.

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CIRCUIT COURTS OF OREGON.

JUDGES.

HIERO K. HANNA, ... *First District,*

COMPOSED OF

Jackson, Josephine and Lake counties.

JAMES F. WATSON, ... *Second District,*

COMPOSED OF

Benton, Coos, Curry, Lane and Douglas counties.

REUBEN P. BOISE, ... *Third District,*

COMPOSED OF

Linn, Marion, Polk, Tillamook and Yamhill counties.

RALEIGH STOTT, ... *Fourth District,*

COMPOSED OF

Clackamas, Clatsop, Columbia, Multnomah and Washington counties.

L. L. MCARTHUR, ... *Fifth District,*

COMPOSED OF

Baker, Grant, Umatilla, Union and Wasco counties.

THE SUPREME COURT

OF

OREGON.

WILLIAM P. LORD,
CHIEF JUSTICE.

EDWARD B. WATSON, JOHN B. WALDO,
ASSOCIATE JUSTICES.

T. B. ODENEAL,
CLERK.

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CASES REPORTED.

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CASES CITED.

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RULES

OF THE

SUPREME COURT.

RULE 1.

That the second day of the October term be set apart as the time when persons desiring admission to practice as attorneys in the courts of this state, may appear and present their applications; and, having been examined in open court, touching their qualifications for admission, and found duly qualified, may be admitted to practice as attorneys and counselors in the several courts of this state. Application for such admission can only be made in this court.

RULE 2.

The examination of applicants for admission as attorneys, shall be conducted by the justices of the supreme court, and the examination shall be divided into the following branches, viz.: Pleading, evidence, contracts, real property and equity. Each applicant must be prepared for examination in the following books, to wit: *Chitty on Pleadings, Wharton's Criminal Law, Greenleaf on Evidence, Blackstone's Commentaries, Kent's Commentaries, and Story's Equity Jurisprudence, or Willard's Equity Jurisprudence.*

RULE 3.

Each applicant for admission to practice must produce the affidavit of some attorney of good standing in this court that such applicant, if a graduate of some literary institution, has read law at least two years; if not such graduate, at least

three years, and has been critically examined in the books prescribed in Rule 2. There shall also be presented the affidavit of two attorneys as to the applicant's moral character.

RULE 4.

Attorneys and counselors at law, and solicitors in chancery may be admitted to practice as attorneys in the courts of this state upon proper certificates of admission in the highest court of any other state.

RULE 5.

Every transcript on appeal to this court shall be plainly written on one side only of the legal cap paper; be chronologically arranged and prefaced with an alphabetical index, specifying the page of each separate paper, order or proceeding. All transcripts and testimony filed in this court must be paged by numbering the leaves from one consecutively to the end, on the bottom of the leaf near the left hand corner. The transcript must have the name of each paper written on the margin of each page. Each leaf of the testimony must have written on the left hand margin, near the bottom, the name of the witness. The testimony must be preceded by an index, in which shall be noted the first page of the testimony of each witness.

RULE 6.

The transcript shall be filed with the clerk of this court on or before the second day of the term next after the perfecting of the appeal.

RULE 7.

When the appeal is perfected and the transcript is not filed as required by Rule 6, the same shall be deemed abandoned, and the respondent may have the judgment or decree of the court below affirmed by filing copies of the following papers, viz.: The notice of appeal, and service thereof, the undertaking and the judgment entry.

RULE 8.

The causes from each judicial district shall be docketed together, and the districts shall be placed upon the docket in numerical order.

RULE 9.

All business, except motions to dismiss appeals, motions to perfect transcripts, and motions to affirm judgments in cases where appeals have been abandoned, shall be taken up when the district is reached.

RULE 10.

The argument upon a motion for any other purpose than the perfection of the transcript, or dismissal of the appeal, will not be heard until the case is called in which the motion is filed.

RULE 11.

All applications for re-hearing shall be by petition in writing, presented and filed within ten days after the judgment, order or decision is announced, and within the term. No argument will be heard thereon.

RULE 12.

The counsel of the respective parties shall cause to be printed in their briefs such portions of the testimony of witnesses in suits in equity, as they may deem material and pertinent to substantiate the issues in their behalf; giving the names of the witnesses, and the number of the question and answer.

RULE 13.

The page of the printed brief must be eight and one-half inches in length, and five and one-half inches in width, and the outer blank margin of each page must be one and one-fourth inches in width.

RULE 14.

No records or papers on file in the office of the clerk, shall be taken therefrom, except by order of the court or one of the justices.

Ordered that all former rules of the court be rescinded upon the publication of the foregoing, in the 9th volume of Oregon Reports.

JULY TERM, 1880.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JULY TERM, 1880.

GEORGE H. DURHAM, Respondent, v. THE MONUMENTAL SILVER MINING COMPANY, Appellant.

MANDAMUS—NOT ALLOWED WHERE REMEDY AT LAW IS ADEQUATE.

Mandamus is not the proper remedy where the plaintiff has a plain, speedy and adequate remedy in the ordinary course of the law.

PRIVATE CORPORATIONS—RIGHTS OF CLAIMANTS MUST BE DETERMINED BY COURTS OF LAW.

Where the plaintiff claimed to be the owner of certain shares in a mining corporation by purchase at a sheriff's sale, which the secretary refused to transfer on the stock book: *Held*, that mandamus is not the proper remedy, as the plaintiff has an adequate remedy at law by an action against the corporation for the value of the stock claimed.

Where it appears that the same stock is claimed by other persons, not parties to the proceedings before the court: *Held*, that mandamus would not lie to compel the transfer of the stock to the plaintiff.

APPEAL from Multnomah County. The facts are stated in the opinion.

Mitchell & Dement and J. H. Reed, for appellant.

Contend, first, that respondent is not entitled to the extraordinary remedy by writ of mandamus, for the reason that he has a plain, speedy and adequate remedy at law. (Civil Code, section 583; High on Extraordinary Legal Remedies, section 313; Angell and Ames on Corporations, section 710; *Kimball* v. *Union Water Co.*, 44 Cal., 173.)

Second, that, originally, the writ of mandamus was a pre-

rogative writ, in contradistinction to a writ of right, and only issued against officers of the crown, and now it only issues in matters of public concern. (Angell and Ames on Corporations, section 717; *King* v. *London Assurance*, 5 Barn. & Ald., 7 Eng. C. L. R., 295.)

Mandamus will not lie to decide the right and title to property between the plaintiff and third persons who are not made parties to the record. (High on Extraordinary Legal Remedies, section 314; 12 Nevada, 105; 110 Mass., 95; 46 Mo., 155; 8 Pick., 90; 3 Vroom, 439.)

Durham & Thompson, for respondent.

We admit that the weight of authority is in favor of the proposition that mandamus will not lie to compel the transfer of stock upon the books of a private corporation in cases where the stock in question has been sold at private or voluntary sale and the parties have a plain, speedy and adequate remedy at law.

But we maintain that the rule is different in cases where the stock in question has been the subject of a sale upon execution. We think that such distinction exists independent of any statutory provisions upon the subject, but perhaps it is not necessary to consider that question, as we believe our statute has regulated the proceedings in cases of this kind.

Section 13, page 527 of the general laws of this state, provides, "that stock in all private corporations organized under this chapter, are to be deemed personal property, and subject to attachment, execution and sale," and when sold by the sheriff, it provides that the corporation "is required to make the necessary transfer upon the stock book."

Every step in a sale upon execution is to be performed by a public officer, and the corporation, in delivering property so sold, is simply performing one of the duties of the sheriff. This is the principle announced in *Bailey* v. *Strohecker*, 1 Am. Cor. Cases, 347. Respondent also cites 46 N. Y., 11;

24 N. Y., 114; 3 Or., 55, and 565; 32 N. J., 439; 20 Pick., 495, and 23 Wend., 461.

By the Court, LORD, C. J.:

This is an application for a writ of mandamus to compel the transfer of certain shares of stock upon defendant's books. The plaintiff purchased shares of stock at an execution sale against H. C. Paige, received a certificate to that effect and presented it to the defendant and demanded a transfer to the plaintiff of the said stock on the books of the company, which demand was refused.

At the time of the commencement of the action, which resulted in the judgment, execution and sale, the stock was attached, and then was, and ever since has been, on the books of the company, in the name of the judgment debtor.

The defendant answered that long prior to the month of August, 1879, and prior to any action having been brought against H. C. Paige, or any attachment issued, the said H. C. Paige, in good faith, and for a valuable consideration, had bargained, sold and transferred all his right and title to said shares, and that the certificates of said stock had, prior to the commencement of said action, been transferred to certain persons, in certain proportions, all fully set forth in said answer, and that the owners of said stock lived at a distance from the office of said company, and were prevented by that fact, and by the writ of mandamus having been issued, from having the said stock transferred to them on the books of the company, etc.

To which answer plaintiffs interpose a general demurrer, which the court sustained *pro forma*, and a judgment was entered for plaintiff, from which this appeal was taken.

The first objection made by appellant is, that the writ of mandamus will not lie, for the reason that respondent has a plain, speedy and adequate remedy at law.

Under the provisions of our code, the office of this writ is

precisely the same as it was under the common law. (*Warner* v. *Myers*, 4 Or., 75.)

It may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. (Civil Code, section 583.)

But the same section further provides that the writ shall not be issued in any case where there is a plain, speedy and adequate remedy at law. The existence or non-existence, of an adequate and specific remedy at law under the ordinary forms of legal procedure, is, therefore, one of the first questions to be determined in all applications for the writ of mandamus; and whenever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refuse to interfere by the exercise of their extraordinary jurisdiction. (High's Extraordinary Legal Remedies, section 117, and authorities cited.)

The principle is said to be tersely stated by Mr. Justice Yeates in *Commonwealth* v. *Rosseter*, 2 Bur., 360, in these words: "To found an application for a mandamus, the established rule of law is, that there ought, in all cases, to be a specific legal right, as well as the want of a specific legal remedy, unless, as it is said in some cases, the remedy be extremely tedious. It is evident that it would be highly inconvenient to try civil rights in this mode of procedure, where the party may institute a suit in the ordinary legal course, and if injured, obtain a complete satisfaction, measured out to him by a jury, equivalent to a specific remedy."

Applying the same rule of construction to section 583 of our code, as it was applied to a similar statute by the supreme court of California, and the last part of that section should be construed as a limitation of the powers of the court conferred by the first part of the same section, and not as an enlargement of those powers. (*Kimball* v. *Union Water Co.*, 44 Cal., 175.)

As was said by Judge Prim in *Warner* v. *Myers*, 4 Ore-

gon Reports, 75, the question is, whether respondent had a plain, speedy and adequate remedy in the ordinary course of law. If he had, the latter part of section 583, just referred to, provides that the writ of mandamus shall not issue.

From this construction of the statute of the limits and conditions of the writ, it would seem plain that the writ will be granted only when it is evident that the law has provided no other sufficient remedy.

In the proceeding for the writ in the case before us, it appears that after the sale of the shares under execution, and respondent had become the purchaser, he presented his certificate of such purchase to the secretary of the corporation and requested that the shares be transferred on the stock book, etc., and that the secretary refused to make such transfer on the ground, as alleged in the answer, that said shares had been sold before the commencement of the action at law under which respondent had purchased the same, etc., and that said owners of said stock lived at a distance from the office of the company, and were prevented by that fact, and by the writ of mandamus having been issued, from having the stock transferred to them, etc. The question to be decided is, has the respondent any sufficient remedy in the ordinary course of the law, if the appellant has improperly refused to make the transfer on the stock book?

In *Kimball* v. *Union Water Co.*, 44 Cal., 175, before cited, Niles, J., said: "Conceding that upon the presentation of the certificate of stock, endorsed as stated in the petition, with the proffer of a sufficient bond of indemnity, *it was the absolute duty* of the respondents to transfer fourteen shares of the stock upon the books of the company to the relators, the question is presented whether the law affords any adequate remedy, other than mandamus, to the parties aggrieved."

It has been so frequently decided that a party entitled to stock in a private corporation has an action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company books, that it must

be considered as a settled principle of law. (*King* v. *Bank of England*, 2 Doug., 526; *Shipley* v. *Mechanics' Bank*, 10 John., 484; *Wilkinson* v. *Providence Bank*, 3 R. I., 22; *Ex parte Fire Insurance Company*, 6 Hill, 243; *American Asylum, etc.*, v. *Phœnix Bank*, 4 Conn., 172; *Sargeant* v. *Franklin Insurance Company*, 8 Pick., 90.)

In *Shipley* v. *Mechanics' Bank*, the court said: "The applicants have an adequate remedy by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus in so ordinary a case. It might as well be required in every case where trover would lie."

In the *City of St. Louis* v. *Bessel*, 46 Mo., 157, the court said: "It is very clear that the relator misconceives his remedy, and that he may obtain adequate and ample redress without resorting to a proceeding by mandamus. If he has a good title to the stock, he can recover the market value in an ordinary action. It is the uniform and current ruling of the courts that when a corporation *improperly* refuses to transfer stock on its books, the party injured has an ample remedy by action, and therefore a mandamus to compel such transfer will not lie."

Mr. Angell, in speaking on this subject, says: "Upon this ground a mandamus has been refused to compel a bank to permit a transfer of stock on the books of the company, since a complete satisfaction, equivalent to specific relief, may be obtained in an action on the case." (Angell and Ames on Corporations, section 710.)

In conformity with the general principle that mandamus will not lie where other adequate and specific remedy may be had at law, the courts refuse to lend their interference by this extraordinary writ for the purpose of compelling the transfer to a purchaser of shares of capital stock upon the books of an incorporated company, or to compel a company to issue certificates of stock. In all such cases full and complete satisfaction, equivalent to specific relief, may be obtained in an

ordinary action at law to recover the value of the stock; and the existence of such other remedy is a complete bar to the exercise of the jurisdiction by mandamus, where it does not appear that the particular stock in question possesses any special value over other stock of the corporation. (High's Ex. Legal Remedies, section 313; *Murray* v. *Stevens*, 110 Mass., 96; *State of Nevada* v. *Guerrero*, 12 Nevada, 107; *Birmingham Fire Insurance Company* v. *The Commonwealth*, Supreme Court of Penn., reported Feb. 11, 1880; *Baker* v. *Marshall*, 15 Minn., 180; *People ex rel. Jenkins* v. *Parker Vein Coal Co.*, 10 Howard Prac. R., 546.)

The only cases which we have been able to find in the American courts in which it has been held that mandamus would lie to compel a private corporation to transfer shares, are *Townshend* v. *McIver*, 2 Rich. N. S., 25; *Green Mount. State Turnpike Co.* v. *Buller*, 45 Ind., 1, and *Bailey* v. *Strohecker*, 38 Geo., 260.

In the case of the *State* v. *McIver*, the court holds that a railroad company, chartered by the state, is so far a public corporation that its officers owe duties to the public which they may be compelled to perform by writ of mandamus—among which are the duties relative to the capital stock of the company, and the control of the transfer thereof. The court said: "A distinction has always been observed between companies chartered as trading associations or scientific societies, or others of that character, aiming only at objects of their own, and not contemplating any benefit to the public, or taking upon themselves any public government duty or responsibility, which are exclusively private, and those where, although the inducement to their creation is individual gain, yet the interests of the community are so inseparably connected with them that what affects the one will be sensibly felt by the other."

The case of *Bailey* v. *Strohecker* is more in point to the matter before us, and is the one on which respondent chiefly relies to sustain the issuance of the writ. Under the attach-

ment law of the State of Georgia, section 3,224, it is provided that certificates of purchase shall be granted by the officer selling, as prescribed in case of executions, and on presentation of such certificates to the proper officer of the corporation it shall be his duty to make such transfer on the books, if necessary, and afford the purchaser such evidence of title to the stock purchased as is usual and necessary with other stockholders.

The facts in the case of *Bailey* v. *Strohecker* were that Bailey sued out a writ of attachment against Cowles, and fifty shares of the stock of the company, of which Strohecker was president, were levied on, etc.; the shares were sold at public sale by the sheriff, and Bailey became the purchaser, and the sheriff so certified. Strohecker refused to transfer the shares, and a writ of mandamus was issued. The court held, on appeal, "that the legislature has substituted the proper officer of the corporation for the sheriff, and has made him *pro hac vice* a public officer, charged with the performance of this very duty, which he is required to perform on the presentation of the certificate given by the sheriff to the purchaser at the sale. If he refuses to do this duty, he may be compelled by mandamus." Under the corporation laws of this state (section 13, page 527, General Laws) the stock in all private corporations is to be deemed personal property, and subject to attachment, execution, levy and sale, and the corporation, in case of such sale, is required to make the necessary transfer thereof to the purchaser, on the stock book. Under this section, and the authority of the case of *Bailey* v. *Strohecker*, respondent claims he is entitled to the writ to compel the transfer of the shares he purchased.

But it is to be observed in the case of *Bailey* v. *Strohecker* that there were no adverse rights of other parties to the shares in dispute. Strohecker claimed that there was no authority to enforce a private right against him, or as a private officer of a private corporation, and that therefore the court had no jurisdiction.

A different state of facts is presented by the record before us. Here the right to the shares is disputed. Others, it is alleged, were the owners of these shares prior to the commencement of the action under which respondent purchased at sheriff's sale. The refusal to make the transfer to respondent is based on this ground, which did not arise in the case of *Bailey* v. *Strohecker*, and no case has been cited, nor have we been able to find one, in which a disputed claim of ownership was alleged, that the courts have held that mandamus was an appropriate or proper proceeding to pass on questions of this character. On the contrary, many decisions may be found in which the courts have directly said that they would not venture on determining such matters on mandamus. In the case of the *State of Nevada* v. *Guerrero*, the court said: "The stock demanded by relator is claimed by other parties as their property, and those persons are not before us. The present proceeding is a very imperfect mode of trying questions touching their rights. If the stock belongs to those persons, certainly respondent ought not to be required to cause it to be issued to the relator, and if this court should cause it to be so issued, it would be an indirect recognition of relator's superior rights thereto, without the presence of such persons, and without all the facts affecting their rights before us."

In the case of *Murray* v. *Stevens*, before cited, on an agreed state of facts, in which it appeared that the president of the company declined to issue the new shares, or to make a transfer, on the ground that the certificates had been fraudulently obtained from Robbins, and the assignment thereof fraudulently filled up, the court said: "Without undertaking to lay down any invariable rule on the subject, we think it must be said that this process was not intended, and is not well adapted for the trial of mere questions of property."

In the case of *Birmingham Fire Insurance Co.* v. *The Commonwealth*, Reporter, Feb. 11, 1880, page 187, in which the right to the ownership of the shares was disputed, as

appeared by the petition and answer, the court said: "If the courts here were inclined to enlarge the remedy (mandamus) it could not be done in a case where the right was disputed."

In the case of *Baker* v. *Marshall,* 15 Minn., 180, the court said: "The bridge company could not be compelled to issue certificates of stock to both of these claimants, and having issued the certificate to Clayton in good faith, under color of title in him, we cannot, in this proceeding, try the question of ownership, or the validity of his title."

In the case of the *State* v. *Rumbauer,* 46 Mo. 156, the court said: "A controversy might spring up in regard to the ownership, and that would require an adjudication at law. Courts will not venture on determining such matters by proceedings on mandamus."

From these authorities it seems clear that where disputed questions of ownership are likely to arise, or the rights of third parties to intervene, who are not parties to the record, the proceedings by mandamus will not be granted. For this reason we do not think the case of *Bailey* v. *Strohecker* can be invoked as applicable to the state of facts presented by this record.

In many of the states the general law under which corporations are organized, or their charters, provide for the keeping of a stock book, in which shall appear the names of the stockholders, the amount paid, the transfer of stock, etc., and some others provide, further, that a transfer shall not be valid, except between the parties, until the same is entered on the books of the corporation. It is true that those statutes or charters do not provide, in direct terms, that the corporation shall make such transfer to the purchaser, but such duty is, nevertheless, imposed by fair and reasonable construction and implication, to make the transfer, whether the purchaser produces a certificate of private sale or sheriff's sale. The gist of the complaint in either case would be the refusal of the proper officer of the corporation to perform a duty which the

law enjoins, and whether expressly or by implication, can make no difference.

There is no doubt that mandamus is the appropriate remedy in many instances to compel private corporations to perform numerous acts within the scope of its duties; such as producing and allowing an inspection of their books when material in a controversy at the suit of a corporator; of restoring persons to corporate offices of which they have been unjustly deprived, when the title to the same has been determined by a proper adjudication; but in such instances it is not because such officers of a corporation sustain any public relation, but because the law affords no other adequate remedy.

The principle is that where a general law or charter imposes a duty either in express terms or by fair and reasonable implication, and there is no other specific and adequate remedy, the writ of mandamus will be awarded. But if the general law of the land, or the charter, affords any other specific and adequate remedy, it must be pursued.

Nor does it appear in the case under consideration that the particular stock in question possesses especial value over other stock in the corporation, and, as was said by the court in *Shipley* v. *Mechanics' Bank*, supra, "there cannot be any necessity, or even desire, of possessing the identical shares in question. By recovering the market value of them at the time of the demand, they can be replaced." (*State* v. *Guerrero*, 12 Nevada R., 107; *Wilkinson* v. *Providence Bank*, 3 R. I. R., 22; High's Extraordinary Legal Remedies, section 313.)

Nor does the reason for the deviation from the general rule applicable to proceedings in mandamus, which influenced the court in the case of *Townshend* v. *McIver*, supra, apply to corporations of this character.

We should certainly feel great hesitation in extending the writ to corporations "established to secure great purposes of state," and of a quasi public nature, in the presence of such

decided weight of authority holding that mandamus is not the proper remedy, where, in the ordinary course of the law, a speedy and adequate remedy is furnished by an action against the corporation for the value of the stock claimed. We should certainly feel less inclined to do it in a case of this character, where no public interest is involved; where the rights of property in the shares is disputed; where it does not appear that the stock claimed possesses any special value over other stock in the corporation, and where the remedy by an action at law is fully adequate.

The judgment of the court below is reversed, and the petition is dismissed.

JACOBS BROTHERS & CO., Appellants, v. ABRAM ERVIN, Assignee, and McCALLEY & ANDREWS, Respondents.

INSOLVENCY—ASSIGNMENT—ENFORCEMENT OF CREDITOR'S RIGHTS.

An assignee for the benefit of creditors, under the act of October 18, 1878, does not occupy the position of a purchaser in good faith, but he is, under said act, the trustee of the creditors, as to the property conveyed to him by the assignment, and so far represents them that it is his duty to oppose any attempt by a creditor who claims a lien on any of such property, which is void as to other creditors, to enforce the same. Such power is essential to the effectual performance of his trust.

CHATTEL MORTGAGE—NO LIEN WHEN FRAUDULENT.

Where, upon the execution of a chattel mortgage on a portion of a stock of goods in a store of a retail merchant, there is a verbal agreement between the parties that the mortgaged goods shall remain in the mortgagor's possession, and form part of his stock in trade, and that he shall have full power to sell and dispose of the same in the usual course of his business, and the mortgagor did retain possession and hold the goods for sale in accordance with such agreement: *Held*, that the chattel mortgage was fraudulent and void as to the other creditors of the mortgagor, and created no lien on the goods. Following the case of *Orton* v. *Orton*, 7 Oregon, 478.

APPEAL from Linn County. The facts are stated in the opinion.

R. S. Strahan and L. Flinn, for appellants.

Contend that a mortgagor's possession of the mortgaged goods, with the power of selling them in the usual course of business, does not make the transaction fraudulent *per se;* that fraud in such cases is a question of fact which must be proven. If fraud is alleged to exist in a sale or mortgage, it must be proved as a fact. (Leonard A. Jones on Fraudulent Mortgages, page 30, and references given.)

Statutes providing for the recording of chattel mortgages are a substitute for and equivalent to the possession of the mortgagee. (*Forbes* v. *Parker,* 16 Pick., 464; *Bullock* v. *Williams,* 16 Pick., 33; *Hughes* v. *Covey,* 20 Iowa, 399.)

Our code, section 54, page 523, declares that the question of fraudulent intent shall be deemed, in all cases, a question of fact and not of law.

Powell & Bilyeu, and Humphrey & Wolverton, for the respondents.

The authorities are numerous in support of the doctrine that a chattel mortgage is void as to creditors and purchasers for value, if the instrument or the evidence shows that the mortgagor was to retain possession of the mortgaged goods, and dispose of them as his own. This doctrine has been settled by this court in the case of *Orton* v. *Orton,* 7 Or., 478.

The assignee may attack the validity of a judgment confessed by the assignor, and contest, for the benefit of creditors, the claim of a mortgagee, under a defective mortgage. (Burrell on Assignments, section 393; *Nichols* v. *Kribs,* 10 Wis., 76.)

In support of the doctrine that a chattel mortgage is void, when the right is given the mortgagor to retain possession of the goods mortgaged, and sell them as his own, we cite 17 Wend., 492; 18 Ill., 403; 58 N. H., 155; 1 Sawyer, 7; 11 Wall., 392; 5 Ohio, 1.

By the Court, WATSON, J.:

This suit was brought in the circuit court for Linn county, to foreclose a chattel mortgage executed by McCalley & Andrews, in favor of the appellants, on March 7, 1879.

The mortgage was duly filed and registered in the office of the county clerk of Linn county, in which county the mortgaged goods were situated, on March 10, 1879.

On March 13, 1879, McCalley & Andrews, being insolvent, made an assignment of all their property, including that covered by said mortgage, for the benefit of all their creditors, to Abram Ervin, and delivered said property into his possession, under said assignment, and in accordance with the provisions of the general assignment law of the state, approved Oct. 18, 1878.

The deed of the assignment was duly recorded the same day, in the office of the county clerk of Linn county, and thereafter the assignee took every step necessary to carry the assignment into effect.

McCalley & Andrews, at this time, were residing and doing business as retail merchants in Linn county, Oregon. This suit was commenced March 28, 1879, against all of the defendants.

The complaint alleges, in addition to the due execution and registration of the chattel mortgage to secure the payment of a *bona fide* debt, the subsequent assignment and delivery of the property to Ervin, as assignee, by McCalley & Andrews, and that Ervin, as such assignee, holds possession of such mortgaged property, and refuses to give up or surrender the same to plaintiffs.

Defendants demurred to the complaint. The demurrer was sustained, but, on appeal, this court reversed the decision of the court below, and remanded the case for further proceedings.

McCalley & Andrews made no further defense, but Ervin filed his separate answer to the complaint, denying that he

ever refused, prior to the commencement of this suit, to give up or surrender the mortgaged goods to the plaintiffs, and as a separate defense, alleged that said chattel mortgage was fraudulent and void as to the creditors of McCalley & Andrews, and created no lien as to them on said mortgaged goods, for the reason that it was given to hinder, delay and defraud such creditors, of whom there was a great number, both at the time said chattel mortgage was executed, and at the date of said assignment, and that it was understood and agreed between plaintiffs and McCalley & Andrews, before and at the time said chattel mortgage was executed, that the mortgaged goods should continue to remain in the possession of McCalley & Andrews, and be sold and disposed of by them in the ordinary course of their business, in connection with their other goods, and should form part of their stock in trade, and that under this agreement McCalley & Andrews did remain in possession of said mortgaged goods, and did continue to sell and dispose of the same in connection with their other goods, in the ordinary course of their business, from the execution of said chattel mortgage up to the date of said assignment to them, on March 13, 1879.

Upon these facts Ervin claimed a right, as such assignee, to sell and dispose of such mortgaged goods, as well as all other goods contained in said assignment, for the benefit of all the creditors of McCalley & Andrews.

Plaintiffs filed a general demurrer to this separate defense in Ervin's answer, which was overruled, and they then replied, denying all the new matter set up in such defense.

The evidence was taken and a trial had, when the court below, on March 13, 1880, rendered a decision declaring said chattel mortgage fraudulent and void as to the creditors of McCalley & Andrews, and dismissing the complaint at the cost of plaintiffs. From this decree plaintiffs have brought this appeal.

Upon the previous appeal of the case, it was held by this court that "where in a mortgage there is a manner provided

for foreclosing the same, either party may insist on having the mortgage foreclosed in the manner so provided, but the party so insisting must fulfill each provision or stipulation on his part, and if the mortgagor insists on the mortgagee foreclosing the mortgage in the manner provided, such mortgagor must deliver the mortgaged goods to the mortgagee to enable him to sell the same." (8 Oregon, 124.)

It is contended by respondent's counsel that this decision was incorrect, and a different ruling on the point is claimed. But even if the court could consider the question still open, as to whether appellants became entitled to foreclose their mortgage in any other manner than that stipulated in the mortgage itself, by the refusal of the mortgagors to deliver the possession of the mortgaged goods, it may be passed without expressing any opinion; for if the mortgage is void as to creditors, and can be assailed by the assignee in this suit, the result must be fatal to the appellants, though that question be decided in their favor.

This brings us to the consideration of plaintiffs' demurrer to Ervin's separate defense, which was overruled by the court below, but which appellants insist on here as they have the right to do.

It is claimed by appellants on this demurrer, that Ervin, as assignee, is not a purchaser in good faith. This position we consider to be correct, whether he represents the assignor or the creditors of the assignor, existing at the date of the mortgage, or both together; he must take the property subject to any equity that could be sustained against both, or either of them, if no assignment had been made. The authorities supporting this proposition are numerous. We shall cite only a few. (*Clark* v. *Flint*, 22 Pick., 243; *Griffin* v. *Marquardt*, 17 N. Y., 29; *Vanheusen and Charles* v. *Radcliff*, Id., 584; *Yeatman* v. *Savings Institution*, 95 U. S., 766; Story's Eq. Jur., 1,288, 1,229.)

The principle maintained by these authorities is, that neither the assignee nor his beneficiaries part with any right,

and are, in no manner, prejudiced by taking the assignment subject to such equities as exist against the property in the hands of the assignor.

Another question arises on the demurrer which is more difficult to solve. It is in regard to the powers of the assignee under our statute, in cases where his assignor, previous to the assignment, had made transfers of, or created incumbrances upon his property, which the law holds valid as to him, but fraudulent and void as to creditors. The decisions upon this point, which are accessible to us, are not numerous, but we think they establish the doctrine that at common law a voluntary assignment confers upon the assignee no power to impeach or set aside previous transfers or conveyances of property by his assignor which had been completely executed, and had vested the title in the property in the fraudulent vendee, and were valid as to the assignor, but fraudulent and void as to his creditors.

In such cases the assignor being completely cut off from the title to the property, and having no further interest in it, or power over it, his voluntary assignment could not affect it in any manner whatever. It could not be deemed any part of his estate upon which a voluntary assignment could operate, but the right of the general creditor, in equity, attached to the property, and followed it into the hands of the fraudulent vendee, and gave him, and him alone, the power to impeach and set aside the fraudulent transfer or conveyance. This right of the creditor could not pass by the assignment. (Burrell on Assignments, 358; *Browning* v. *Curtis*, 10 Paige, 210; *Browning* v. *White*, 6 Barbour S. C. R., 91; *Leach* v. *Kelsey*, 7 Id., 466.)

But where a mere lien or incumbrance, fraudulent and void as to creditors, but valid as between the parties, has been created by the assignor, upon property remaining in his possession, and the title to which passes to and vests in the assignee for the benefit of creditors, under a voluntary assign-

ment, a different case is presented, and upon which it is extremely difficult to reach a perfectly satisfactory conclusion.

We have not been cited to, nor have we been able to find, a single decision denying to the assignee, under a voluntary assignment, even at common law, the right to resist the enforcement of a mortgage or other lien, valid as to assignor but void as to creditors, against the trust property in his hands for the benefit of creditors under such assignment. On the other hand it has been held by the Supreme Court of Wisconsin, and also by the Court of Appeals of Maryland, without reference to any statute, and evidently upon recognized principles of the common law, that an assignee for the benefit of creditors, under a voluntary conveyance, does possess this right. (*Nichols* v. *Kribs*, 10 Wis., 76; *Building Association* v. *Wilson, et al.*, 41 Md., 506.)

And in Indiana, under a statute which, so far as the question under consideration is concerned, may justly be deemed as identical with our own, the same doctrine has been held by the supreme court. (*Lord, et al.*, v. *Fisher*, 19 Ind., 7; *Lockwood* v. *Slevin, et al.*, 26 Ind., 124.)

Our statute making provisions on this subject, passed in October, 1878, does not expressly confer this power on the assignee. (Session Laws of 1878, page 36.)

Its object, so aptly expressed in its title, was: "To secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors." To this end it declares that no such assignment shall be valid unless made for the benefit of all the creditors, in proportion to the amount of their respective claims; that attachments levied on the assignee's property, but not ripened into judgment, at the date of the assignment, shall be discharged, and the attachment creditors be compelled to accept a *pro rata* distribution of the proceeds of the debtor's estate, from his assignee, and that the creditors shall be conclusively presumed to consent to the assignment. Security is required of the assignee, and

a complete mode of proceeding marked out. Its whole design clearly shows that it was the intention of its framers to provide a simple and effectual mode of making an equitable distribution of the insolvent debtor's estate among all his creditors, and such a construction should be given it, if consistent with established legal principles, as will make it effectual for that purpose.

The right of the general creditors to impeach or resist a fraudulent transfer or incumbrance attaches to the property, and we can conceive no inconsistency in holding that that right vests in the assignee under the assignment which they have assented to. He is the trustee of the creditors, as well as of the debtor, and holds the property assigned to him in trust for the payment of their claims against the debtor. With their consent he has taken the title and possession of the property, and represents the interest which they have in it, and it would be a narrow construction, indeed, that would deny that he represents their whole interest; especially would this be the case where it so plainly appears, as it does in such cases as the present, that such power is necessary, in a vital degree, to enable him to effectually administer his trust.

Another consideration for holding in favor of the power of the assignee, in such cases, is the change which the statute has effected in the creditor's remedy. His right to proceed, by attachment, is virtually taken from him, and his means of successfully contesting fraudulent liens and incumbrances thereby greatly diminished, while the difficulties in the way are multiplied; and yet the enforcement of such incumbrances would result in preferences far more inequitable than those which it was the manifest purpose of the statute to strike down.

Upon these views of the nature of the trust created in him, not by the voluntary assignment of the debtor alone, but by the consent of the creditors also, under our statute, and upon the authorities cited, we feel justified in holding that the assignee possesses the power contended for.

The only remaining question arising on the demurrer is, whether the agreement set up in Ervin's separate defense would render the mortgage of plaintiffs fraudulent and void as to the general creditors of McCalley & Andrews.

The same question, substantially, was decided by this court in the case of *Orton* v. *Orton*, 7 Oregon, 478. We have no disposition to question the authority of this case, as we understand the doctrine it lays down. The reasons upon which it is based seem to us to be sound, and the authorities cited in its support are both able and well considered. We have no hesitancy in affirming it here as a sound and authoritative exposition of the law upon the subject in this state. The demurrer must be overruled.

It only remains to determine, as a question of fact, upon the evidence in this case, whether there was any such agreement entered into between plaintiffs and McCalley & Andrews, as is alleged in Ervin's answer.

The stipulations in the mortgage itself that the mortgagors may remain in possession of the goods, and in the free use and enjoyment of the same, subject to the mortgagees' right to take possession thereof, and sell upon default in payment, or other breach of conditions, do not establish such an agreement, in themselves, as would render the mortgage fraudulent and void as to creditors, under the rule adopted by the court. (*Cleaves* v. *Herbert*, 61 Ill. 126.)

It is the retention of possession, with power to sell generally, in the course of trade, by agreement with the mortgagee, that is objectionable, and no such power is necessarily implied from such stipulations. It must depend on the evidence outside of the mortgage itself, and in addition to anything it contains, whether such an agreement has been established. Its stipulations must, however, be considered in connection with the parol evidence on the question whether such an agreement as is alleged was made or not.

The mortgage provides that the mortgagors shall retain possession and have the full use and enjoyment of the mort-

gaged property, subject, however, to the right of plaintiffs to take possession and sell it at any time after the conditions should be broken. Robert McCalley and David Andrews both testify, positively, that the understanding and agreement between them and Henry Ach, plaintiffs' agent, when they gave the chattel mortgage, was, that they should be allowed to go on with their business the same as before, and sell the goods mortgaged just the same as before until after harvest, and they were to sell these goods just as other goods in the store, without distinction, in the usual course of their business.

Henry Ach testifies that there was no such understanding or agreement to his recollection, and that he had no authority from plaintiffs beyond collecting or securing the account for which the note secured by the chattel mortgage in controversy was given.

But the negative character of Mr. Ach's testimony must, upon well settled principles of evidence, effectually prevent it from being considered of equal weight with the positive testimony of both McCalley & Andrews, or either of them. Their testimony, taken in connection with the stipulations in the mortgage, after giving to the testimony of Mr. Ach all the weight that can be fairly claimed for it, satisfies us that there was an understanding and agreement between them at the time the mortgage was given, such as is pleaded in Ervin's answer; and this conclusion is supported by a decided preponderance of the evidence.

In consequence of this conclusion, and under the authorities above cited as having our approval, we are compelled to hold this mortgage fraudulent and void as to the creditors of McCalley & Andrews, and their assignee for the benefit of their creditors. We find no error in the decree of the court below, and it must be affirmed with costs.

Decree affirmed.

M. V. STINGLE, et al., Appellants, v. JAMES NEVEL, Respondent.

STATUTES—REPEAL BY IMPLICATION—AMENDMENT.

Subdivision 2, of section 37, chapter 4, of miscellaneous laws, was repealed, by implication, by the act of October 20, 1876, entitled, "An act to provide for the collection of school district taxes."

The act of 1878, entitled, "An act to amend sections 8, 11, 12, 25, 34, 37, 43 and 46 of chapter 4, of the miscellaneous laws of Oregon, pertaining to common schools," did not repeal the act of 1876. The only amendment made by that act to said section 37, was to add subdivision 9 of the amended section.

Where a constitutional provision requires an amendment to be made by publishing the act or section, amended at full length, those portions of the old law copied into the enactment without change, are not re-enacted.

APPEAL from Umatilla county.

Turner & Baily, and Bonham & Ramsey, for appellants.

Everts & Walker, and Rufus Mallory, for respondent.

By the Court, WALDO, J.:

This is a suit brought to enjoin the collection of a school district tax, levied at a school meeting held in district No. 35, of Umatilla county, in April, 1879. The respondent is the school clerk of said district, and has levied upon, and is about to make sale of chattels, the several property of the appellants, to satisfy that proportion of said tax assessed, severally, to the appellants, by virtue of the action of said school meeting. The appellants, among other objections, deny the authority of the directors to issue said warrant to the clerk of the district.

Prior to 1876, the authority of directors of school districts to issue warrants for the collection of school district taxes, was to be found in subdivision 2 of section 37, chapter 4, of miscellaneous laws, page 510, which makes it the duty of directors of school districts "to issue warrants to the clerks,

authorizing them to collect, in the name of the district, and in the same manner as the state and county taxes are collected, all taxes assessed to the inhabitants thereof, and upon the taxable property of all non-residents."

But in 1876, the legislature, by an act entitled "An act to provide for the collection of school district taxes," gave the power to collect such taxes by levy and sale of property to the sheriff of the county. (Session laws of 1876, page 20.) This act, it is claimed, repeals subdivision 2 of section 37, above mentioned, by implication.

That repeals by implication are not prohibited by section 22, article IV., of the constitution of Oregon, has been settled by this court in *Fleischner* v. *Chadwick,* 5 Oregon, 152, and *Grant County* v. *Sels,* Id., 243.

While it is well settled that repeals by implication are not favored, it is also true that the intention of the legislature, limited by the rule that effect can not be given to an intention not expressed, is the pole star in the construction of statutes. If it be the intention of the legislature to make a statute the sole law which shall govern, it will operate to repeal, by implication, all other acts on the same subject. "A subsequent statute reviving the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former." (Dewey, J.; *Bartlett* v. *King,* 12 Mass., 537; *Thorp* v. *Schooling,* 7 Nevada, 15; *Johnson's Estate,* 33 Pa. St., 515; *Davis* v. *Fairbanks,* 3 How., 645; authorities cited in note, 14 Am. Dec., 209, *Towle* v. *Marrett.*)

It was evidently the intention of the legislature to make the act of 1876 a substitute for all other acts providing for the collection of school district taxes, and it therefore repeals subdivision 2 of section 37, chapter 4, of miscellaneous laws.

This section prescribed the duties of directors of school districts, and, as we have seen, so far as it related to the duty

The judgment of the circuit court must, therefore, be reversed, and the cause remanded with directions to make the preliminary injunction perpetual.

Judgment reversed.

A. J. HUBLER, Respondent, v. W. H. GASTON and G. W. FURRY, partners under the firm name of GASTON & FURRY, Appellants.

CONTRACT—PRESENT RIGHT OF PROPERTY DOES NOT ATTACH UPON AGREEMENT TO DELIVER ON DEMAND.

Where H. buys of G. & F. a certain number of bushels of oats of a described quality, for which payment is then made, and they agree to deliver that quantity and quality of oats, in good sacks, on board of the cars when demanded, etc.: *Held*, that a present right of property did not attach in H.

DELIVERY OR IDENTIFICATION NECESSARY TO PASS RIGHT TO GOODS PURCHASED.

Where the defendants, after admitting the allegation of a complaint which shows a present right of property in the oats sold did not attach in the plaintiff, and then to avoid the effect of their admission, allege, as a defense, that "after the sale of the oats, plaintiff left them in the defendants' warehouse," etc., without alleging any fact to show that the oats sold had been identified, or appropriated to the contract by which the right of property passed to the plaintiff: *Held*, that such answer was not a defense.

APPEAL from Linn county.

The complaint alleges, in substance, that on the 20th day of September, 1879, defendants sold to plaintiff, two thousand bushels of bright, merchantable white oats, for the sum of seven hundred and sixty dollars, and agreed to deliver the same to plaintiff, in good sacks, on board the cars at Albany, whenever called for by plaintiff. That plaintiff then and there paid defendants the said sum of seven hundred and sixty dollars for said oats. That afterwards, on the 14th day of November, 1879, the plaintiff demanded said oats of the

defendants, and defendants refused and still refuse to deliver the same or any part thereof to the plaintiff, to the damage of the plaintiff in the sum of seven hundred and sixty dollars.

There are three other causes of action set forth in said complaint, which it is not necessary to recite.

The answer admits the facts alleged in the complaint, except damages, and sets up separate matter as a defense, which is denied in the reply, all the facts in respect to which appear in the opinion of the court.

Powell & Bilyeu, and R. S. Strahan, for appellants.

The sale of the oats, as alleged in the complaint, passed the title thereto from appellants to respondent at the time of the sale. (Benjamin on Sales, secs. 313, 315, 316, and note b., page 259; 2 Bouvier's Law Dictionary, 493; 8 Howard, U. S., 495, 545; 51 N. Y., 431.)

The destruction of the oats by fire, under the circumstances alleged in the answer, constituted a sufficient excuse for their non-delivery when demanded. (Benjamin on Sales, secs. 308, 570.)

Delivery is not necessary to pass title. (102 Mass., 444; 13 Allen, 28, and Benjamin on Sales, sec. 1.)

L. Flinn, for respondent.

The title to the oats never passed, and could not pass, under the terms of the contract, until they were selected and delivered after demand, or until they were delivered and accepted before demand. The contract was executory, and could have been filled by the delivery of any oats of the kind and quality mentioned. (Benjamin on Sales, secs. 308, 310, 312; note d.; 52 N. Y., 550; 11 Cush., 573; 1 Cal., 395; 27 Cal., 451; 51 N. Y., 288; 2 Kent's Com., 496; 111 Mass., 10; 13 Pick., 213; 47 Barb., 73; 35 Maine, 385; 19 Ohio St., 375; 20 Id., 295.)

By the Court, LORD, C. J.:

Two questions are presented by this record. First, do the

facts, as admitted by the pleadings, show an executory or an executed contract? And, second, if executory, does the answer set up a sufficient defense of new matter? A contract is said to be executory when there remains something to be done, the performance of which is a condition precedent to the transfer of the property, and executed when the thing and price have been assented to, and nothing remains to be done to prevent the transfer of the property.

In Blackburn on Sales, 151 and 152, it is said that it is for the benefit of the vendor that the property should be transferred at the time the sale is made, for the reason that it transfers the risk to the purchaser, etc.; but if by the agreement the vendor is to do something before the purchaser would be bound to accept the goods in accordance with the terms of the agreement, the intention of the parties should be taken to be that the vendor was to do this before he obtained the benefit of the property.

Where the parties have made an agreement, or agreed by their pleadings on a certain statement of facts, which leaves in doubt what was intended and meant, the courts have adopted and applied certain rules of construction for the solution of the controversy arising out of such agreement or agreed statement of facts.

It is laid down as a fundamental principle pervading everywhere the doctrine of the sale of chattels, that if goods be sold by number, weight or measure, the sale is incomplete, and the risk continues in the seller until the specified property be separated and identified. (2 Kent's Com., 496.)

It does not alter the principle that the payment for the goods has been made in whole or in part, nor that they are unfit for delivery at the time of the sale. To overcome the presumption that the sale is incomplete, and the contract executory, there must be some further act of the parties to express the intention that the title shall be complete and executed. The principle applying to such sales is, "that the contract is only executory when the goods have not been

specified, or if specified, something remains to be done to them to put them in a deliverable shape, or to ascertain the price." (Benjamin on Sales, sec. 315.)

In *Wilkinson* v. *Holiday*, 33 Mich., 686, this doctrine of the law is accurately stated by Chief Justice Cooley, who says: "Where, under a contract for the purchase of personal property, something remains to be done to identify the property, or to put it in a condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong that by the understanding of the parties the title was not to pass until such act had been fully done and accomplished."

The general principle of all the authorities is that no sale is complete so as to vest in the vendee an immediate right of property so long as anything remains to be done between the buyer and seller in relation to the thing sold. (Chitty on Contracts, 396, 397; Story on Sales, sec. 296, and authorities cited.)

Applying these principles to the facts admitted, we are to ascertain whether the oats sold were identified, or whether anything remained to be done to them by the vendor to put them in a deliverable shape. It will be admitted, if the goods sold are sufficiently designated, so that no question can arise as to the thing intended, that it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition; but, if the goods sold are not identified, the sale is incomplete, and the contract is executory.

The contract of sale cannot attach until the parties are agreed on the identical thing to be transferred. The facts admitted are that appellants sold to the respondent two thousand bushels of bright, merchantable white oats, for the sum of seven hundred and sixty dollars, for which payment was then received, and agreed to deliver the same, in good sacks, on board of the cars at Albany, when called for by the respondent. The quantity and quality of the oats are specified,

and the price fixed and paid, but the identity of the oats sold is not ascertained. Any oats of that quantity and quality, put in good sacks and put on board of the cars when demanded by the vendee, would fulfill the terms of the contract on the part of the vendor.

Such contract is for the sale of a certain quantity of goods in general, and cannot be regarded as any more than a contract to supply, on demand, any other oats of like quality and quantity. This is inconsistent with an intention to transfer some particular, identified oats, and no other, when the oats were sold and the price paid. There must be some separation or identification of the oats sold, so as to completely distinguish them from all other similar oats, or the intention to transfer the property is not manifest, and the sale is executory.

There is some conflict of authority where the sale is made of a lesser out of a greater quantity, uniform in kind and quality. The English courts adhere to the rule that as between the vendor and purchaser, *separation* of the quantity sold from a larger bulk, identical in kind and quality, is necessary before the title will pass, although it is said that very slight and unimportant circumstances will take the transaction out of the rule in those courts.

In the American courts the cases on this subject are quite conflicting. In Virginia, New York, Connecticut, Maine and New Jersey, the courts hold that where the subject matter of the sale is part of an ascertained mass of uniform quality and value, the property will pass though there be no separation of the quantity sold, if such be the intention of the parties, and that no rule of law will overrule that intention, if it be otherwise clearly expressed. (*Chapman* v. *Shephard*, 39 Conn., 420; *Kimberey* v. *Patchin*, 19 N. Y., 330; *Russell* v. *Carrington*, 42 N. Y., 118; *Waldron* v. *Chase*, 37 Maine, 414; 44 N. J., 486; 6 Randall, 473.)

In such cases the bulk, or mass, is ascertained or identified, and of uniform kind and quality, and when inspected or ap-

proved by the purchaser, and the contract price paid, there does not seem to us to be any valid reason that until the quantity purchased is separate, the title to the property will not pass. But it does not appear from the facts admitted that the oats sold were a part of an ascertained mass or bulk of uniform kind and quality, which required to be separated.

The conclusion we reach is, that upon the facts admitted in the complaint the oats sold were not ascertained or identified, and a present right of property did not attach in the buyer. Any similar oats of that quantity and quality would comply with the terms of the contract, and until the oats sold were identified, the contract of sale could not attach, nor could the respondent be the owner of "the said two thousand bushels of oats." Some act of selection or identification of the oats sold must first take place before the title to any oats would vest in the respondent.

But the appellants, after admitting facts the legal consequence of which was not to vest the title in the respondent, and make him the owner of the oats sold, and without averring any fact of identification, by which the title to the oats sold would be changed and vested in the respondent, and the legal conclusion arising from the facts admitted in the complaint, destroyed, allege, as new matter, and by way of defense. "that after the sale of said two thousand bushels of oats to the plaintiff by the defendants, the plaintiff left said oats in defendants' warehouse in Albany, Oregon," etc. It is not possible, and logically cannot be true, that respondent could leave "said two thousand bushels of oats in defendants' warehouse," when "the said two thousand bushels of oats" had not been identified, and respondent was not the owner of "said two thousand bushels of oats."

Appellants cannot admit facts which show the oats were not identified, and as a consequence, not the property of the respondent, and then aver that respondent "left said oats in defendants' warehouse." Before appellants can avoid the effect of their admission, they must allege some fact at the time

of the sale, or after the sale, by which the identity of the oats sold was ascertained, and respondent became the owner of them, and then they can allege, consistently, and notwithstanding their admission of the facts in the complaint, that the respondent left said oats in defendants' warehouse.

If, for instance, at the time of, or after the sale, any oats had been inspected by the respondent, and with his approval put in sacks and set aside, or had formed a part of an ascertained mass of uniform quality and value out of which it was agreed that the two thousand bushels of oats sold should be taken, although not separated; or, if there were any facts of identification, of whatever nature, or appropriation of the oats by respondent, and such fact or facts of like import, had been alleged in the separate answer, *then* the appellants could allege, consistently and logically, that respondent "left said oats in defendants' warehouse."

The theory of appellants' answer was based on the proposition assumed in the argument, that the facts alleged in the complaint, and admitted to be true, showed an executed contract, and the title of the oats sold in respondent, and in that view the matter set up in the answer would be consistent. It was upon this theory that counsel attached so much importance to the word "sold" in the complaint, which, from the ability of the argument, is deserving of notice.

In *Russell* v. *Nicoll*, 3 Wendell, 118, the words used in the contract were: "Sold by Daniel Rapale, for our account, to R. M. and J. Russell, five hundred bales of cotton," etc., and the court said, in commenting on the interpretation to be given to the word "sold:" "If the contract be executory, and such it evidently is, the same interpretation must be given to the word *sold* that was given to it in the case of *Boyd* v. *Griffkin*, 2 Conn., 326. It means *contracted to sell.*" In *Ormsbee* v. *Machir and Renick*, 20 Ohio State R., 295, the contract was reduced to writing, and consisted of two instruments signed and interchangeably delivered by each party to the other. One began in these words: "I have this day sold

to O. Ormsbee, eight thousand bushels of ear corn, to be delivered on board of canal boats at West Fall," etc.; and the other: "I have this day bought of Charles Machir, eight thousand bushels of ear corn, to be delivered on board of canal boats," etc., and the court held the contract to be executory. Neither the counsel nor the court gave any attention to the words "sold" or "bought," as affecting the conclusion whether the sale was executed or executory. But in that case, as in this, the question of the identity of the eight thousand bushels of ear corn sold by the contract was involved. Counsel for the plaintiff in error claimed that by the written contract there was a contract for the sale and future delivery of a *specified quantity*, but of no *particular lot*, of ear corn, and one of the counsel for the defendants in error said the important question was whether there was a sale of certain specified corn, or merely a contract for the sale of corn in general, and admitted that the contract, as written, was for the sale of no specific corn. The court said: "The contract, by its terms, is for the sale of a certain quantity of corn in general, and for aught that appeared, it would have been competent for the plaintiff to have performed it by the delivery of any corn of the quantity and quality called for."

From these views it follows that the judgment of the court below is affirmed.

Judgment affirmed.

E. E. McKINNEY, Assignee of ALBERT HALSTEAD, Appellant, v. J. A. BAKER, Respondent.

PARTNERSHIP—DISSOLUTION AND DIVISION VESTS PROPERTY IN EACH PARTNER, INDIVIDUALLY.

Where there are but two co-partners in a firm, and by agreement they dissolve the co-partnership, and divide the partnership property between them, and each assumes the payment of certain claims against the firm, in consideration thereof, and there being no imputation of fraud or bad faith in the transaction, the title to the property vests, according to the division, in each of the partners, individually, and is freed from its character as partnership property.

ASSIGNMENT—DISSOLVES ATTACHMENT—EXECUTION SALE ON SUBSEQUENT JUDGMENT INVALID.

An assignment for the benefit of creditors by either of the former partners, individually, would vest the title to such property in his assignee in the same manner and to the same extent as it would the title to any other individual property covered by the assignment.

APPEAL from Marion county. The facts are stated in the opinion.

Tilman Ford and W. M. Ramsey, for appellant.

It is competent for partners, upon a voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them; and it will transfer the whole property to such partner, and like any other sale to third persons, will wholly free it from the primary claim of the joint creditors. (*Miller* v. *Estill*, 5 Ohio St., 517.)

The dissolution and assignment entered into between Rowland and Halstead were valid, and the goods became the individual property of Halstead. (*Baker's Appeal*, 21 Penn. St., 76; 32 N. Y., 65; 9 Cush., 553; 13 Gray, 114; 35 Iowa, 323.)

This being true, Halstead had a right to make the assignment to McKinney, and the assignment having been made before the judgment of Hawley, Dodd & Co. had been obtained, the attachment was dissolved. (Session Laws 1878, page 36.)

Thayer and Williams, for respondent.

An assignment by one of two partners to the other, of all his interest in the firm property, to be applied to the payment of the firm debts, does not dissolve the firm, and the property remains partnership property till the partnership debts are paid. (*Matter of Sheppard*, 3 Benedict, 347.)

An assignment of one partner of his share in the stock, simply transfers any interest he may have in any surplus remaining after the payment of the firm debts. He simply acquires as to the interest purchased, the right to an account, and to share to that extent in the surplus of the property of the firm after the settlement of its affairs, and the property remains liable for the firm debts. (*Menagh* v. *Whitwell*, 52 N. Y., 146, 166, 167, 168.)

Halstead would have had what was left after the payment of the partnership debts. (*Claggett* v. *Kilbourne*, 2 Black., 346; *Place* v. *Sweezler*, 16 Ohio, 142; *Sutcliff* v. *Doshman*, 18 Ohio, 181; *Miller* v. *Brigham*, 50 Cal., 615.)

The property was attached before it went out of the hands of Halstead, and while the firm creditors had a right to seize it. (*Menagh* v. *Whitwell*, 52 N. Y., 171.)

By the Court, WATSON, J.

This action was begun February 12, 1880, in the circuit court for Marion county, to recover damages for the wrongful conversion of personal property. The facts necessary to be stated are as follows:

On June 30, 1879, and for some time prior thereto, Albert Halstead and W. H. Rowland were partners engaged in merchandising at Turner, Marion county, Oregon, under the firm name of Rowland & Halstead. At that date they executed a written agreement purporting to dissolve the partnership, divide the partnership goods and effects, and imposing on each obligation to pay certain specified claims against the partnership.

Hawley, Dodd & Co. were creditors of the partnership at

that date, to the extent of fifteen hundred and thirty-two dollars; G. H. Chandler in the amount of one hundred and twenty dollars and ninety-eight cents, and T. Dittenhoefer to the extent of one hundred and ninety-five dollars and ninety-seven cents, all for goods, wares and merchandise previously sold and delivered to the partnership.

On July 7, 1879, Hawley, Dodd & Co. having previously become the owners, by purchase and assignment, of the said accounts of T. Dittenhoefer and G. H. Chandler, commenced an action against the firm of Rowland & Halstead, in said circuit court, to recover said several amounts, and attached the property in controversy in this action, and on October 24, 1879, recovered judgment in said action against Rowland & Halstead for nineteen hundred and ninety-eight dollars and ninety-six cents, and costs. Afterwards, before the commencement of this action, the goods were sold under an execution upon said judgment by the respondent, as sheriff of Marion county.

Previous to the rendition of the judgment in favor of Hawley, Dodd & Co., but on the same day, Halstead, being insolvent, made an assignment of all his property, including that in controversy, for the benefit of all his creditors, and all the creditors of the partnership, under the general assignment law of 1878, to the appellant, who duly qualified and took all needful steps to render such assignment complete and effective before such judgment was rendered. Appellant demanded possession of the goods from respondent before the sale, but was refused.

The property in controversy belonged to the firm of Rowland & Halstead, and formed part of its stock in trade, up to June 30, 1879, and was, by the agreement of that date between the partners, designated as going to Halstead.

After giving some and refusing other instructions asked by counsel for the respective parties, which we deem it not necessary to consider here, the court below directed the jury to find a verdict for respondent (all of which was duly excepted

to by appellant), which was done, and judgment rendered accordingly. From this judgment this appeal has been brought.

The first question presented here is upon the effect which the contract of June 30, 1879, had on the title to the property in dispute. Up to that date it was partnership property, and unless this agreement, accompanied by delivery of goods, converted the same into the individual ownership of Halstead, it remained partnership property, liable to the attachment and execution of Hawley, Dodd & Co., and the title did not pass to appellant by the individual assignment of Halstead.

The agreement, among other things, provides "that the copartnership heretofore existing between the parties of the above named firm, is, by mutual consent, hereby dissolved. That all debts and liabilities of said firm, due or owing to Hawley, Dodd & Co. for goods sold to said Rowland & Halstead, and all debts due or owing to T. Dittenhoefer, G. H. Chandler and J. Stokley, for goods sold to said Rowland & Halstead, are assumed, and shall be paid by Albert Halstead, one of the parties of the above named firm of Rowland & Halstead. That the store-house used by said firm is to be retained and used by said Halstead. That the stock of hardware is to be taken by said Albert Halstead."

We have quoted only such portions of the agreement as seem to us material to a correct understanding of the points involved.

Respondent contends that this agreement is executory merely; but we are not able to agree with him, at least so far as the foregoing stipulations are concerned. The partnership is dissolved by force of the agreement itself, that being the plainly expressed intention of the parties, as soon as it was executed; and the assumption of the payment of the debts mentioned by Halstead, and not their actual payment, was the consideration for which he received the property in dispute. This was the manifest intention of the parties, appearing from the instrument itself.

If these views are correct, the agreement shows an executed and not an executory contract, so far as it contains any provisions affecting the title to the property in dispute. But the question still remains as to what interest in the property it conveyed to Halstead.

This will depend wholly on whether we are to regard this disposition of the property of the partnership as the act of the firm, or as the act of the individual partners. That the title to the property being in the firm could only be conveyed out of it by an act of the firm, is a proposition too plain to require any elucidation. But the firm may deal with the partners in their individual capacities, and if it, without fraud, and for an adequate consideration, sells the partnership property to one of its members, it becomes his individual property just as much as though he had been a stranger.

Upon this principle the authorities hold that where there are but two members of a co-partnership, and they agree together that the partnership shall be dissolved, and that one shall have the partnership goods, he assuming to pay the partnership debts, that this is a sale by the firm, upon a sufficient consideration, and that all the title which the firm had in the property passes to the individual partner and becomes his individual property. The same rules govern such a transaction as would govern a sale by the firm to a stranger. (*Miller* v. *Estill, et al.*, 5 Ohio Stat., 517; *Baker's Appeal*, 21 Penn., 76; *Menagh* v. *Whitwell*, 52 N. Y., 159, 160 and 171.) We think this case is clearly within this principle.

This property, then, having become the individual property of Albert Halstead before it was attached by Hawley, Dodd & Co., vested in the appellant by the assignment, and the attachment was thereby dissolved, and the respondent could not rightfully detain it from the assignee, or sell it under the execution.

We have not considered all the objections to the rulings of the court below, as the one made to the ruling directing the jury to find a verdict for the defendant, notwithstanding the

evidence (as shown by the bill of exceptions), fully established the facts stated in the first part of this opinion, seems to us to raise every question necessary to be passed upon in the case.

We think this ruling was clearly erroneous, and the judgment must be reversed with costs, and the cause remanded for further proceedings in the court below, in accordance with the conclusions herein expressed.

S. P. TURNER, Respondent, v. H. W. CORBETT, Appellant.

PLEADING—COMPLAINT—DEFECTS IN—HOW AIDED.

After verdict, an answer which discloses any facts necessary to the validity of the complaint, but not alleged, or defectively stated therein, will be held to aid the complaint to that extent.

APPEAL from Multnomah county.

H. T. Bingham, for appellant.

J. G. Chapman, for respondent.

By the Court, WATSON, J.

This action was originally commenced in justice's court for North Portland precinct, Multnomah county, and was afterwards appealed to the circuit court from whence an appeal has been taken to this court.

The complaint alleges, in substance, that the defendant, in September, 1879, made a contract with plaintiff, whereby he agreed to pay the plaintiff one hundred and five dollars for white-washing certain cellars for him, and that plaintiff has performed a large portion of said work pursuant to said contract, and was at great expense in preparing materials and

implements for carrying on said work according to contract, but was prevented by defendant, acting through his agent, from so doing, and that the defendant is indebted to him on said contract in the sum of one hundred and five dollars, for which sum he prays judgment.

The answer denies that the defendant is indebted to plaintiff in the sum of one hundred and five dollars, or any other sum, for white-washing said defendant's building upon a contract, and denies all other material allegations in the complaint, except the making of the contract as alleged; and the answer alleges affirmatively that in the month of September, 1879, plaintiff and defendant entered into a contract, wherein plaintiff promised and agreed to perform and complete certain work in and about defendant's building, in a skillful and workmanlike manner; that in consideration of said work to be performed as aforesaid, defendant promised and agreed to pay plaintiff one hundred and five dollars; that plaintiff performed his work in such an unskillful and unworkmanlike manner that defendant received no benefit therefrom, but was damaged in the sum of one hundred and twenty dollars, and prays judgment for that amount and costs.

The replication denies that the plaintiff performed his work in an unworkmanlike or unskillful manner, or in such unskillful or unworkmanlike manner that defendant received no benefit therefrom, and denies that defendant was damaged thereby in any sum whatever.

The case was tried by a jury, and a verdict found for the plaintiff for the full amount claimed. The only question before this court is whether the pleadings above set forth should be held sufficient after verdict. The complaint, it may be conceded, was defective; but, if taken in connection with the answer and reply, it ought to be held good after verdict, and the judgment should not be reversed.

The defendant, however, in his answer, sets forth the contract, and alleges, in effect, that the work was performed, and

only complains of the unworkmanlike character of the performance.

We think, in this instance, the defendant having undertaken in his answer to set out the plaintiff's case, shows that the performance, even if incomplete, was accepted by him, and considered a complete performance, and would, to that extent, if necessary, be held to aid the complaint after verdict rendered. There was no error in the judgment of the court below, and it must be affirmed with costs.

Judgment affirmed.

ROXANNA FARRIS, and her Husband, T. J. FARRIS, Appellants, v. J. W. HAYES, et al., Respondents.

PLEADING—DOWER—VOID JUDGMENT.

G and wife became settlers upon the public lands under the act of September 27, 1850. G died before the completion of the four years' residence and cultivation. The patent issued, and afterward the widow married, and while a married woman signed a promissory note as surety, on which judgment was recovered against her by default, by service of notice upon a member of her family, the sheriff's return not stating that she could not be found. An execution was issued on the judgment, and her interest in the land sold to a purchaser in good faith. On a suit brought by her for a partition of her interest in the north half of the claim, and for the assignment of dower in the remainder of the north half, and to declare said judgment and proceedings under it fraudulent and void, and for a restitution of the south half, and for an account of the rents and profits: *Held*, First—That the failure to allege herself in possession of the north half, or to allege facts from which possession might be presumed, was fatal on demurrer to a suit for partition. Second—That she was not entitled to dower. Third—That if the judgment under which the property had been sold was void, she had an adequate remedy at law for the recovery of possession, and for damages.

APPEAL from Jackson county. The facts are stated in the opinion.

B. F. Dowell, for appellants.

A. C. Jones and R. S. Strahan, for respondents.

By the Court, WALDO, J.

The complaint in this case shows that on the 3d day of September, 1861, in the county court for Jackson county, Or., Samuel Smith recovered a judgment for the sum of one hundred and sixty-six dollars and seventy-nine cents, against Roxanna Whitworth, now Roxanna Farris, the appellant in this suit; that in order to make the said sum of money, a donation claim, owned by appellant in Jackson county, Oregon, was sold at execution sale. This suit is founded on the alleged insufficiency of said proceeding to divest the appellant of her title to said lands.

The appellant prayed "that said judgment and deed be declared fraudulent and void so far as they interfere with the interest of the plaintiff in said lands, and that the one-fifth of the north half of said donation claim be set apart to her in severalty; that one-third of the balance be set apart as her dower, for her use and benefit during her natural life; that an account be taken of the rents and profits of said tract of land during the time it has been in the possession of the defendant, Hayes, and that he be compelled to pay the same to the appellant; that the judgment and deeds be declared fraudulent and void so far as they interfere with the interest of appellant in said lands, to the south half of said lands, or that the appellant, Roxanna, be authorized to bring an action of ejectment for said land, and that the defendant be prohibited from pleading the statute of limitation to such action, and for such other and further relief as the nature of the case may require."

A demurrer filed by the respondent to the effect that the amended complaint did not state a cause of suit, was sustained

in the circuit court. A second amended complaint, containing, substantially, the same cause of suit, was stricken out as frivolous, and judgment was entered against the appellant for costs.

It is shown by the complaint that Jacob Gall, and his wife, Roxanna Gall, now Roxanna Farris, the appellant, on the 1st day of April, 1852, took up a donation of three hundred and twenty acres of land in Jackson county. Jacob Gall died February 7, 1856, before the completion of the four years' residence and cultivation required by the act of congress, leaving his widow, the said Roxanna, and four children living, to whom his interest in the land was transferred under the eighth section of the donation act. The patent, which afterward issued, gave the south half of the claim to the widow, and the north half to Jacob Gall, or, in legal effect, to the widow and children, in equal parts, so that Roxanna became the owner, in fee, of the whole of the south half, and of an undivided one-fifth of the north half of the claim.

The appellant claims that she was also entitled to dower in the north half of the claim, and cites the case of *Love* v. *Love*, 8 Oregon, 23. But that case was where the four years' residence and cultivation had been completed, and was within the rule laid down in *McKay* v. *Freeman*, 6 Oregon, 449, that the settler had thereby acquired an estate of inheritance. But where the settler dies before the completion of the four years' residence and cultivation required by the act, his interest in the land terminates. His heirs and widow take the land directly as the donees of the United States. The estate of the settler is terminated by his death. (*Hall* v. *Russell*, 3 Sawyer, 509, 514; *Dolph* v. *Barney*, 5 Oregon, 202.) Under such circumstances there is no estate to which dower can attach.

The appellant claims that the proceedings purporting to divest her of her title to the land can be impeached in this suit on two grounds:

First—That the judgment was rendered against a married

woman, on a promissory note signed by her as surety, and was, therefore, void.

Second—That she had no notice of the pendency of the action in which the judgment was recovered.

It may be conceded, on the facts stated in the complaint, that the note on which the judgment was recovered, was void. But it does not follow that the judgment rendered against her, and the sale under the judgment, can be treated as a nullity, so as to disturb the title acquired by respondent, Hayes, from a *bona fide* purchaser at the sale. A rule of law more potent than that which declares the note void, prevents such a result—the conclusiveness of the record.

In *Fithian* v. *Monke*, 43 Mo. 502, the court below gave judgment against a mortgagor's vendee, ordering a sale of the mortgaged premises, with a personal judgment over against such vendee for the residue of the debt. Under such personal judgment the premises in controversy were sold and purchased, in good faith, by the defendant. *Held*, that such personal judgment was void, and that the purchaser's title could be attacked collaterally. It was held that the court could look into the action in which the judgment was recovered, and take notice that the judgment was rendered on a demand for relief—a personal judgment against the vendee—which the court had no power to give. It was not a case where a cause of action had been defectively stated, but it was one where the record itself disclosed that no statement, however complete, could constitute a cause of action on which a valid judgment could be rendered.

But it does not appear by the record in the case before the court that the note on which the judgment was recovered was the note of a married woman, or that the judgment was against a married woman. Whatever may have been the effect, had these facts appeared of record, they cannot now be brought forward by parol to assail the title of a purchaser in good faith, or of those claiming under him.

The appellant claims, secondly, that the judgment was void

because of the appellant's want of notice of the action. This point seems well made according to the rule laid down in *Settlemier* v. *Sullivan*, 7 Otto, 444. But it follows that the appellant had an adequate remedy at law by an action of ejectment, and, thence, that the case stated is not one for the cognizance of a court of equity.

In *Janney* v. *Spedden*, 38 Mo., 395, there was a petition for equitable relief, praying to have a judgment, a sale of real estate under the judgment, a sheriff's deed to the purchaser at the sale, and a deed from the purchaser to a third person declared void, and that the plaintiff have restitution of the property sold. The judgment, as insisted in the petition, was pronounced void by the court. But the court then said: "It is scarcely necessary to say that a bill in equity is not the proper remedy for the recovery of possession of lands. The party has an adequate remedy at law by the action of ejectment, or otherwise. The judgment and deeds being void in law, there was no occasion for this interference of a court of equity to set them aside and declare them void." (*Armstine* v. *Chashire*, 2 Dev. Eq., 234.)

The appellant also asks for a partition of the north half of the claim, and since her title was not divested by the judgment and sale to Pebler, she would be entitled to a decree to this extent, if in possession as a tenant in common with Hayes, and had so alleged in her complaint.

Counsel for appellant cites *Hitchcock* v. *Skinner*, Hoff. Ch., 24, *Brownell* v. *Brownell*, 19 Wend., 369, and *Green* v. *Liten*, 8 Cr., 229, to show that she has such possession. But these cases say no more than that the possession of one tenant in common, is, presumptively, the possession of all; or that constructive possession, as by delivery of the patent, is equivalent to actual possession; that possession follows the legal title, no adverse possession being shown.

"An entry by one man on the lands of another, is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made un-

der claim or color of right, it is an ouster, otherwise it is a mere trespass." (Baldwin, J. *Ewing* v. *Burnett*, 11 Pet., 52.)

The appellant seems to insist that since the judgment recovered by Smith was void, and is an essential link in the chain of respondent's title, Hayes' possession has not such color of right as will constitute an adverse possession. But a conveyance by one having no title, to a third person who enters under that conveyance, is an ouster of the true owner. (*Bradstreet* v. *Huntington*, 5 Pet., 433, 439, 441.) So a sheriff's deed of land, though void as a conveyance, is good as color of title. (*Barkhalter* v. *Edwards*, 16 Gray, 596; *Northrup* v. *Wright*, 7 Hill, 468.)

And further, in order to give the court jurisdiction of a suit for partition, the complaint should allege that the plaintiff is in possession. (*Bradley* v. *Harkness*, 26 Cal., 76; *Bunkers* v. *Bunkers*, 2 Barb. Ch., 468.)

It was laid down in *Jennings* v. *Van Schack*, 3 Paige, 245, that possession might be presumed from an allegation that the parties were tenants in common. However, there is no such allegation in the complaint, but on the contrary, it is alleged that Hayes is in possession of the whole of the land, and also that he has a claim of title to that portion owned by appellant, by virtue of mesne conveyances from Pebler, the purchaser at the execution sale. The complaint, therefore, sets up no cause of suit for partition.

Again: The appellant claims that the loss of the judgment roll, as alleged in the complaint, delayed the appellant in bringing this suit, and, particularly, delayed the appellant in bringing an action of ejectment, followed by the prayer that the appellant be authorized to bring an action of ejectment, and that respondent be enjoined from pleading the statute of limitations. But it appears from the complaint that the judgment roll was found several weeks before the statute of limitation had run against an action of ejectment, and there was nothing to prevent the bringing of an action. Had the

respondent answered, in abatement, the pendency of another suit, the appellant could have discontinued her suit in equity before replying. (1 John. Cases, 397.) Or might have pleaded that the former suit must be ineffectual; that the plaintiff could have no equitable relief in such suit. (*Ware* v. *Curtis*, 18 Conn., 294; 20 Conn., 515.)

Besides, the pendency of a suit in equity is not usually considered a sufficient ground for sustaining a plea in abatement to an action at law. (*Colt* v. *Partridge*, 9 Met., 576.)

An objection was also made to the order of the court striking out the amended complaint. Sham, frivolous and irrelevant pleadings may be stricken out. (Civil Code, sec. 80.) A pleading that is but a repetition of a former one adjudged insufficient, may be regarded as frivolous. (Bliss on Code Pleadings, sec. 421.)

In *Robinson* v. *Erickson*, 25 Iowa, 85, it was held that it was not error to strike out an amended complaint which was but a repetition of a former complaint. It follows that the judgment of the circuit court must be affirmed.

Judgment affirmed.

JANUARY TERM, 1881.

(88a)

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1881.

TEAL *v.* COLLINS.

CLOUD UPON TITLE—SUIT TO REMOVE—COMPLAINT—REQUISITES OF.

In a suit to remove a cloud upon title, the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, should be stated in the complaint.

APPEAL from Polk. The facts are stated in the opinion.

A. C. Gibbs and J. L. Collins for appellant.

All points in this case arise on the complaint; the averments which bear most strongly against the pleader will be taken as true. (*Bell* v. *Brown*, 22 Cal., 671; *Dickinson* v. *Maguire*, 9 Cal., 46; 1 Chitty Pl., 237, 241.)

The complaint avers "that plaintiff is the owner in fee simple of the premises," &c. An estate in fee simple is the entire and absolute interest and property in the land. Hence it follows that no one can have a greater estate. (Willard on Real Estate, 50.)

The complaint shows that plaintiff has a complete remedy at law; that he could maintain ejectment or trespass upon the title set up in his complaint, and therefore courts of equity will not interfere. (*Ewing* v. *City of St. Louis; Kennedy* v. *Kennedy*, 43 Penn. St., 417; *Bean* v. *Coleman*, 43 N. H., 268; *Kimberly* v. *Fox*, 27 Conn., 307.)

Durham & Thompson, for respondent.

In the court below the appellant relied upon and urged the proposition that the complaint stated too much, rather than not enough, to constitute a cause of suit, in that it showed upon its face that appellant's title, as stated, could not be a cloud upon that of the plaintiff, and that therefore a court of equity had no jurisdiction. The rule contended for by appellant has long since been abandoned. (*The Chatauqua Bank* v. *White*, 6 Barb., 605; *Hamilton* v. *Cummins*, 1 John. Ch., 517.)

Whatever may have been the doubts or difficulties formerly entertained on this subject, they seem by the modern decisions to be fairly put at rest, and the jurisdiction is now maintained in the fullest extent. (Story's Eq. Jur., Section 700; Code, Section 500.)

It is sufficient to call into exercise the jurisdiction of the court, that the deed casts a cloud over the title of the plaintiff. As in such case the court will remove the cloud by directing the cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance, creating such a cloud, must result. (*Pixley* v. *Huggins*, 15 Cal., 134.)

By the Court, LORD, C. J.:

This is a suit to quiet title. The complaint alleges that the plaintiff is the owner in fee, and in possession of certain lands therein particularly described, situated in Polk county, Oregon, and their proceeds. "That the defendant claims to be the owner of said premises by a chain of conveyances from the U. S. Government. That said claim of said defendant is wrongful and untrue, and a cloud on plaintiff's title. That plaintiff is the owner in fee of said premises by a good and sufficient chain of conveyances from the U. S. Government, which are prior in their execution and record to the pretended conveyances under which said defendant claims title thereto adverse to the plaintiff."

To this complaint the defendant demurred on the following grounds:

1. That the complaint does not state facts sufficient to constitute a cause of suit.

2. That the complaint does not show that the plaintiff is entitled to any equitable relief.

The circuit court overruled the demurrer, and the defendant appeals to this court.

This suit is brought to quiet title under section 500 of the civil code, which provides that "Any person in possession by himself, or his tenant, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest."

This section confers a jurisdiction beyond that ordinarily exercised by courts of equity, to afford relief in quieting title and possession of real property. It recognizes not only a well established principle of equity practice to remove clouds upon title—which courts of equity had exercised long prior to this section—but also provides a remedy where a party out of possession claims an estate or interest adverse to the party in possession, and injurious to his rights, for determining the same. In such case it seems it is sufficient that the party in possession is incommoded or damnified by the assertion of some claim or interest in the property adverse to him. He may not know the nature or ground upon which such adverse claim or interest is asserted—only that such claim to an estate or interest adverse to him is made, whereby the value of his property is depreciated, or its sale injured or prevented. He can then commence his suit, and require the nature and character of such adverse estate or interest to be set forth and judicially determined. But when the suit is brought to remove a cloud upon the title—which is an old and recognized head of equity jurisprudence—the cause of the suit consists in the invalidity of the defendant's claim, which is not apparent on its face.

A cloud upon title is a title, or incumbrance, apparently valid, but, in fact, invalid. (*Bissell* v. *Kellogg*, 60 Barb., 629.)

In such suits it has been held that there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. (*Hibernia S. & L.* v. *Ordway*, 38 Cal., 681.)

It is an elementary rule that "every fact essential to the plaintiff's title, to maintain the bill and obtain relief, ought to be stated in the bill, otherwise the defect will be fatal." (Story's Eq. Pl., Sec. 257.)

In declaring the requisites of a complaint to remove cloud upon title under a statute somewhat similar to our own, it is said, in *Wals* v. *Grosvenor* (31 Wis., 684), that "the complaint ought to disclose the nature of the defendant's claim which has a tendency to throw a cloud over the title, and state such facts and circumstances in respect to such claim as show its invalidity, before a court of equity will interfere and direct it to be released and canceled." (*Collart* v. *Fisk*, 38 Wis., 243.)

Before suit is brought to remove a cloud upon the title, the plaintiff ought to know there is one, and in what it consists, and state the facts.

For these reasons we think the complaint is fatally defective in not stating the nature of the defendant's claim, or chain of conveyances, showing in what their invalidity consists. The judgment of the court below is reversed.

Judgment reversed.

CAPITAL LUMBERING CO. v. HALL.

SHERIFF'S JURY—EFFECT OF VERDICT.

The verdict of a sheriff's jury, adverse to the claimant, under section 284 of the civil code, is a bar to a subsequent action by him against the sheriff for the recovery of the possession of the property claimed.

The doctrine of the decision of *Remdell* v. *Swackhammer*, 8 Or., 502, reviewed and re-affirmed.

APPEAL from Polk. The facts are stated in the opinion.

R. S. Strahan and J. W. Rayburn, for appellant.

Where the trial of the right of property before a sheriff's jury is had, and the verdict is against the claimant, he cannot afterwards maintain an action against the sheriff for the recovery of the property, or for damages for taking the same. (*Remdell* v. *Swackhammer*, 8 Oregon, 502; *Storms* v. *Eaton*, 5 Neb., 453; *Patty* v. *Mansfield*, 8 Ohio St., 369; *Ralston* v. *Oursler*, 12 Ohio St., 105; *Jones* v. *Carr*, 16 Ohio St., 420; *Fisher* v. *Gordon*, 8 Mo., 388; *Rowe* v. *Bowen*, 28 Ill., 116; *Commissioners* v. *Wheldon*, 15 Ind., 147.)

J. A. Stratton and C. B. Moores, for respondent.

It is a familiar rule that when a law of one state is adopted by another, the courts of the latter will give it that construction which it had already received in the courts of the former. (42 Wis., 454; 43 Id., 604; 60 Ill., 114.)

That part of the Oregon statutes relating to the manner of commencing actions, is taken, word for word, from the New York code, and had already been construed in the latter state, and held that, notwithstanding a verdict of a sheriff's jury, the claimant might sue the sheriff. (10 Johns., 98; 15 Johns., 147.) The same doctrine is declared in California, under a similar statute. (*Perkins* v. *Thornburg*, 10 Cal., 189; *Sheldon* v. *Sheldon*, 28 Cal., 123.) A similar rule prevails in Iowa. (3 Iowa, 104 and 586.) Also in Kentucky. (J. J. Marshall, 230.)

Our statute expressly gives the right of action to the claimant, notwithstanding a verdict, for the possession of the property. Such an action cannot be brought against any person other than the sheriff, because he is the only person who can have the possession. (*Richardson* v. *Reed*, 4 Gray, 441; *Grace* v. *Mitchell*, 31 Wis., 533; *Ramsdell* v. *Buswell*, 54 Me., 546.)

By the Court, WATSON, J.:

This action was brought in the circuit court for Polk county, to recover two millions feet of saw logs. The complaint is in the usual form, alleging ownership and the right of immediate possession in plaintiff; the wrongful taking of the property and refusal to deliver possession on demand; the value of the logs is placed at nine thousand dollars; and prayer for judgment in the alternative for the recovery of the possession of the property, or, if not to be had, then for nine thousand dollars, its value, and costs of action.

The answer denies plaintiff's ownership and right of possession; denies the wrongful taking; and denies the value to be over eight thousand dollars.

The answer sets up as a separate defense, that the defendant was, at the time of the alleged wrongful taking, sheriff of Polk county, and that he took the logs under a writ of attachment against the property of one J. L. Smith, issued in an action brought by Connor & Crosno against said Smith, in said court. That afterwards plaintiff claimed the property under section 154 of the code; a trial was had before a sheriff's jury, and a verdict was rendered against plaintiff under section 283 and 284 of the code.

All this part of the defense was stricken out of the answer by the court below, on plaintiff's motion. The answer further alleges that at the time of the attachment and taking of said logs into the custody and possession of the defendant, said logs were the property of said J. L. Smith. That on the 15th day of February, 1880—the date of the alleged wrong-

ful seizure by the defendant—the said J. L. Smith was the owner of, and in the actual possession of, the logs above mentioned. This is denied in the reply. The issue thus presented by the pleadings, was tried by a jury and a verdict given for plaintiff, in these words, after stating the title of the cause:

"We, the jury in the above-entitled action find for the plaintiff, and assess the value of the property respectively at the sum of ($8,000) eight thousand dollars.

"W. S. FRINK, Foreman."

Upon this verdict, the court below, after overruling the defendant's motion for a new trial, and for judgment notwithstanding the verdict, rendered judgment for the plaintiff for the possession of the property, and in the alternative for the value as found by the jury, if delivery could not be had, and costs.

From this judgment defendant has brought this appeal. Numerous errors are assigned in the notice of appeal.

The first is that the court below erred in striking out that portion of the answer, alleging his official character, and the proceedings before the sheriff's jury. As the answer shows a demand for the property, this ruling was not error, unless the proceedings had before the sheriff's jury, as set forth in the portion stricken out, were a bar to the action.

This identical question was decided by this court at the last term, in the case of *Remdell* v. *Swackhammer*, reported in 8th Oregon, page 502, and we there held such proceedings a bar to an action of this character. Upon the suggestion, however, of new authority, and different argument by respondent's counsel, and their frank admission that an adherence to the doctrine of that case, must prove fatal to them here, we concluded to re-examine the grounds of that decision, and with that purpose we have carefully considered the arguments made and the authorities presented by them.

The two principal questions involved are upon the constitu-

tionality and proper construction of our statute providing for trials of the right of property before sheriff's juries.

It is contended by respondent's counsel that if the proceeding before a sheriff's jury is not judicial, it cannot have the effect, in any event, of depriving a claimant of his vested rights of action against the sheriff, arising out of the wrongful taking and detention of the claimant's property; and, if judicial, it is void for repugnance to section 1, article 3, and section 1, article 7, of the state constitution, which provide, in substance, for the division of the powers of government into the legislative, executive and judicial departments; prohibits any one person from exercising any of the functions of more than one department at the same time; and vests the judicial power of the state in certain courts therein specified. They insist that the judicial character of the proceeding is established by giving to it a judicial effect, in divesting vested rights of action which are valuable and to be considered as property. But if the term "judicial effect," as used by respondent's counsel, means only an effect of the same character or kind as ordinarily results from a judgment, we do not consider the proposition a sound one, in law.

It is the exercise of judicial powers in such a proceeding, and not any particular effect which may be attached to it by special statutory provisions, which must determine whether it should be held judicial or not, and thus settle the question of its constitutionality. But judicial power does not depend for its exercise upon the consent of a party. A judicial tribunal may exercise its powers against his consent. Its proceedings are *in invitum*, and its adjudications conclusive upon the rights determined.

In the proceeding before a sheriff's jury, under our statute, the claimant is the moving party. He cannot be compelled to adopt it. His act is purely voluntary. And although his right to the property is the very question passed on by the sheriff's jury, its verdict does not finally determine that right, as it must necessarily do, without any statute

declaring its effect, if it should be considered an adjudication in a judicial proceeding.

Under a statute of Illinois, providing for a trial of the right of property by a sheriff's jury, and for an appeal from their verdict to the circuit court, and declaring that the "verdict of the jury, in all cases, under this charter, shall be a complete indemnity to the sheriff or other officer, in proceeding to sell or restore any such property according to the verdict," the supreme court of that state, at its April term, 1862, in the case of *Rowe* v. *Bowen*, 28 Ill., 116, held that the verdict against the claimant was a "complete indemnity" to the sheriff, but to no other party, and that the proceeding itself was not judicial. Caton, C. J., dissented from the view that it was not judicial, and expressed the opinion that if the finding of the jury protected the sheriff, it must the purchaser under him, and so be binding, "like all other judicial determinations, on parties and privies."

Whatever weight his dissenting opinion as to the character of this proceeding, under the statute of Illinois, may justly be deemed to possess, there can be no doubt of the correctness of its conclusion as to the effect it would have if judicial. A verdict adverse to the claimant would determine his right to the property finally and absolutely, like the judgment of a court of competent jurisdiction.

In no state from which any authority has been cited, has this proceeding ever been held judicial, or unconstitutional, or as possessing any other or different effect than that prescribed by the statute providing for it.

But the learned counsel for the respondent insist that in Ohio the proceeding is judicial, because, after the notice to the sheriff, the rest of it is had before a justice of the peace. But we conceive this circumstance does not affect the essential character of the proceeding. Under the decisions of the supreme court of that state, the effect of the proceeding is not like that of a competent court, conclusive as to the right of property, and the sheriff is indemnified no further than

the statute of that state intended he should be under the construction given it by that court.

And this principle of giving to the final determination of this proceeding to try the right of property, no effect whatever, simply as an adjudication, but all the effect which the statute providing it, declared it should have, has been adopted in every decision to which we have been cited, whether the proceeding was had before the sheriff or other ministerial officer, or before a justice of the peace or other judicial tribunal. Besides, a justice of the peace was not a judicial officer at common law, and his investment with additional powers by statutory or constitutional provision, affords no presumption of their judicial character.

We are still at a loss to perceive any material distinction in the different modes provided for this proceeding in our own statute and the statutes of other states, which have been referred to. In neither of the cases of *Rowe* v. *Bowen*, 28 Ill., 116, or *Schræder* v. *Clark*, 18 Mo., 184, was the proceeding had before a justice of the peace. In the former, the question as to its judicial character was discussed, and the opinion of the majority of the court, as we have already seen, was declared against the proposition. The mere fact that Chief Justice Caton dissented from the majority opinion, on this identical question, would indicate that it had been discussed to some extent at least. And in the latter case the proceeding was had before the constable who had seized the property, without the intervention of a justice of the peace or other judicial officer.

That the provision in the statute for holding such a proceeding before a judicial officer does not impart to it a different character than it would otherwise have when had before the sheriff or other ministerial officer, but the effect of the proceeding, in either case depends on the intention of the legislature, solely, as it can be collected from the statute itself, is apparent from an examination of the authorities cited. This proposition is fully sustained by the authorities most

relied upon by respondent's counsel themselves, as we shall see further on.

But it is claimed by respondent's counsel that the determination in this form of proceeding cannot be held to possess such an effect as to take away the claimant's right of action for the wrongful taking and detention of his property by the sheriff, even though the legislature so intended.

The supreme court of Ohio, in 1866, in *Jones* v. *Carr*, 16 Ohio St., 425, upon a general review of the decisions in that state, upon the subject, thus expresses its views on this proposition:

"In several cases which have come before this court, and its predecessor under the former constitution, and which involved a construction of the statute now under consideration, or of prior statutes containing substantially the same provisions, the objection that the immunity given to the officer, as a result of this summary proceeding (which concludes the rights of none of the parties in other respects) is inconsistent with the constitutional rights of the claimant, has been repeatedly considered, and has never received but one answer. That answer has invariably been that in such a trial of the right of property, the claimant was a voluntary actor, and that having chosen to avail himself of this summary and cumulative remedy, instead of resorting at once to his common law remedy, he has no right to complain if he is subjected to all the conditions upon which the statute affords the remedy which he has chosen."

This principle, apart from the high authority announcing it, seems to us to be intrinsically sound and just, and fully supported by the analogies of law, in other cases of election between different legal remedies. A party having a right of action as in this case, may have an election of several remedies. But he will not be allowed to pursue them all, although no single one of them will enable him to reap all the advantages from his cause of action, which a resort to all such

remedies would bring him. When he deliberately chooses one he waives the right to pursue the others.

In this case, before taking this proceeding before the sheriff's jury, the plaintiff might have maintained his action for damages against the sheriff for the original wrongful taking, which would have included the value of the property at that time, with legal interest, at least; or, waiving that tort, have brought his action for damages for the conversion of the property, and under some circumstances have recovered a greater amount; or have brought this action to recover possession of the property, with or without damages for its detention; but an election of one would have been a waiver of the others.

Now, if the legislature has provided this summary remedy by claim and trial before a sheriff's jury, as a substitute for the action to recover the possession of personal property, and declared in substance that if the plaintiff elects to litigate his right to the possession as against the sheriff, in this form of proceeding, he shall not afterwards, if the decision is adverse to him, resort to any of his original remedies against the sheriff, we can perceive no sound reason why he should not be deemed to have waived all other remedies, and be held bound by the result, and subjected to all the conditions of the statute, whether for his benefit or disadvantage. We think the only real difficulty in the case; is to reach a proper construction of our statute.

The learned counsel for respondent claim that this statute was borrowed from New York, and that it had previously received a construction in the highest courts of that state, different to that given it by this court in *Remdell* v. *Swackhammer*, 8 Oregon, 502, and cite 10 Johns., 98; 15 Id., 147, and 4 Wait's Practice, 58, as showing such previous construction. But not having been able to find any trace of the existence of such a statute as ours among the statutes of that state, at any period, or of any other statute on this subject, making any change whatever in the common law rule, in

regard to the effect of such a proceeding as we are now considering, and the authorities cited not referring to any statute, but evidently proceeding on the common-law doctrine, solely, we are compelled to conclude that the counsel have been misled in the premises, and that their deductions from them, otherwise entitled to great weight, are not applicable here.

They also cite 10 Cal., 189, and 38 Id., 123; the latter merely following the former. In the former case, the supreme court of California, upon a statute seemingly to the same effect as that construed in *Patty* v. *Mansfield*, 8 Ohio, 369, adopting a different rule of construction, reached a widely different result as to the effect of this proceeding, but it holds unequivocally that the effect the proceeding should have, depended altogether on the intention of the statute. The court says, in the course of the opinion, "it will be seen that the code itself states the effect of the verdict in favor of the claimant. It also states the effect of the verdict if against the claimant, *as to costs*. When a statute assumes to specify the effect of a certain provision, we must presume that all the effects intended by the law maker are stated." In the case of *Patty* v. *Mansfield*, 8 Ohio, 369, the supreme court of Ohio went beyond the literal words of the statute, and in order to accomplish what it held was one of its principal objects—the protection of the officer—construed certain effects to be within its intent and spirit, which were not expressed.

If the protection of the officer was one of the principal objects of the Ohio statute, the rule of construction adopted by the court in this latter case, was not untenable. But neither statute is like the one we are considering, in some important particulars, as we shall see.

The case of *Chism* v. *Russell*, 2 Blackf., 172, was evidently decided upon common law principles and authorities, without reference or regard to any statute.

In the later case of *Limpus* v. *The State*, decided by the same court, the identical statutory provisions which respond-

ent's counsel claim existed and were construed, in the former case, were considered by the court and held to have the effect which they purported. The court say:

"The statute is express that the judgment, in case of such trial of the right of property, is conclusive while unreversed, as to any party who had had personal notice of the trial, and as the statute requires in such case the execution plaintiff and the officer (the present parties) should have notice of the suit, it must be presumed that they had such notice."

In the case of *Morrill* v. *Miller*, 3 Iowa, 104, it does not appear what effect the proceeding would have had but for the proviso, which the court there construes to preserve the claimant's right to resort to his original remedies, notwithstanding an adverse determination in this proceeding. This proviso is in these words: "Provided, that nothing herein shall be construed to prevent the claimant of property taken as aforesaid from seeking his remedy in an action of replevin, detinue, trespass, or trover." The court, however, cited another section as being *in pari materia*, and aiding in the construction, which provided, "That when property attached is claimed by some person other than the defendant, the right shall be tried by a jury in the manner prescribed, where property taken on execution is claimed by some stranger to the suit, but the verdict on such trial shall not be conclusive against either of the parties, and that the same proceedings may be instituted to obtain the property, or compensation therefor, as though the trial provided had not taken place."

It also cites *Chism* v. *Russell*, 2 Blackf., 172, as putting the same construction on the Indiana statute as that claimed by respondent's counsel, in regard to which, as we have already intimated, we apprehend there is some mistake. It concludes its opinion, however, thus: "The statute affords every opportunity for a full and fair hearing of the claimant's rights to the property. Aside, then, from the manifest intention of the legislature and the authorities on the subject,

we should be at a loss for a good reason for granting a claimant a second action and a second day in court to determine the same subject matter. But legislative intention and the authorities must prevail; and hence we are of the opinion that the trial provided by statute in cases like the present, is no bar to an action of replevin for the same property." The trial in this case was had before the district court, and judgment was rendered on the verdict.

The passage quoted from the opinion of the supreme court indicates very plainly that but for this proviso, the court would have held such trial and judgment conclusive as a final adjudication upon the right to the property, binding upon all parties. The action itself does not appear from the meagre statement of facts accompanying the decision, to have been against the sheriff at all, and was most probably against purchasers at sheriff's sale. No question of indemnity to the officer was considered in the decision, and there is nothing in the case to indicate that any such question was before the court. If the statute upon which it was made, made no provision for the protection of the sheriff, if no question of this kind was considered, then we cannot see how the case can be deemed in point.

But at all events the court was governed entirely by what it conceived the intention of the legislature to be.

The last case cited by respondent's counsel, which we deem it necessary to consider, is that of *Phillips and Walker* v. *Harris*, 3 J. J. Marshall (Ky.), 127. This was a case where the proceeding to try the right of property was had before a sheriff's jury without the intervention of any judicial officer. The mode of proceeding was substantially like our own. There can be no shadow of a pretense that it was judicial. The Kentucky statute declares that "should the claimant not succeed in establishing the property to be his, the sheriff or other officer, as the case may be, shall sell the property and not be liable to any suit on account of such sale."

The supreme court of that state held that in the event of the verdict of the jury being adverse to the claimant, or of the jury failing to agree (which latter was the fact in that case), the sheriff was only indemnified as to the *act of sale*, because the legislature only intended to afford him that measure of protection. That after a sale of the property under the process, the plaintiff could not recover its value, against the sheriff, in any form of action, but he could still recover damages for the unlawful taking and detention up to the time of sale; or, at any time before sale, although, after the verdict of the sheriff's jury, he could replevin the property.

This case then fully supports the principle that the verdict of the sheriff's jury, although not of a judicial nature, should have whatever effect the legislature intended it should have; and, further, that such verdict may have the effect of divesting a vested right of action. For, previous to commencing the proceeding before a sheriff's jury, the plaintiff in that case had a vested right of action against the sheriff on account of the original wrongful taking, for damages, including the full value of the property taken. That right would have remained to him even after the sale by the sheriff, if the proceeding before, and verdict of, the sheriff's jury had not intervened. By that proceeding, and in the contingency of the sale of property, he would lose this right—his chief right—of action in the case.

If he could be divested of this principal right in this manner, why not of the much less important ones which remained if the statute should be held broad enough to cover them, also?

This decision was rendered in 1829. In 1853, the supreme court of Missouri, in the case of *Schrœder* v. *Clark* (18 Mo., 184), on substantially the same kind of a statutory provision, describing the effect of the same identical proceeding, held that after the verdict of a constable's jury, adverse to the claimant, he could not maintain any action against the sheriff. The portion of the statute, on which this decision is made, is

as follows: "If the jury find the goods and chattels to be the property of the defendant in the execution, the verdict as against the claimant shall justify the officer in selling such goods and chattels." The court, in the course of its decision, says: "By claiming a trial of the right of property, and having it found against them, they waived their action against the officer."

Now, as the manifest object of the statute in such case was the protection of the officer, against the claimant, after a determination adverse to his claim of property, it would seem that the construction should be adopted, if permissible at all, which would be best calculated to effect that object. In this view it is not difficult to determine that the rule adopted by the supreme court of Missouri, in the case cited, is the better one, and in fact the only one that can afford the officer any practical indemnity against the claimant. Under the decision of the supreme court of Kentucky, the great object of the statute is defeated. By a strict adherence to a literal construction, in the latter case, the legislature is made to appear guilty of the glaring inconsistency of requiring the sheriff to sell the property, after a verdict adverse to the claimant, and protecting him as to the act of sale, but in the meantime leaving him exposed to annoying and injurious litigation for doing the very thing he is required to do, and at all events liable to the claimant for the damage occasioned by the necessary detention of the property until a legal sale can be effected.

Secs. 283 and 284 of the civil code contain the provisions of our statute on the subject. The first section provides for the commencement of the proceeding, by the plaintiff giving the sheriff written notice of his claim. The sheriff then summons a jury, to try the right of property, of six persons qualified as jurors, between the parties, and gives five days' notice of the time and place of trial to the plaintiff in the process, or his attorney. The sheriff is empowered and directed to subpoena witnesses at the request of either party, compel them to attend and give testimony, and administer the neces-

sary oaths to jurors and witnesses. The effect of the decision is declared in these words, in section 284: "On the trial the defendant and the claimant may be examined by the plaintiff as witnesses, and the verdict of such jury being rendered in writing, and signed by the foreman, shall be a full indemnity to the sheriff proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property, or for damages for taking the same."

Here there can be no question but that the legislature intended some protection for the sheriff as against the claimant, and, as we have seen, the legislative intention must govern when it can be ascertained. All the cases we have considered go this far. The statute itself declares that he shall be *fully indemnified* while proceeding in accordance with the verdict. This just as fairly includes the necessary possession and detention of the property after the verdict, until the sale, as it does the act of sale itself. If it is good for any part of the proceeding in accordance with the verdict, it is good for the whole. They are all equally within the words of the statute, as well as within its obvious purpose.

But it is contended that the subsequent clauses preserve the plaintiff's right of action against the sheriff, notwithstanding an adverse determination of the proceeding before the sheriff's jury. It is claimed that the language of these clauses can only be referred to the claimant's original remedies against the sheriff, and that they can be so construed and yet leave the sheriff a limited indemnity against the claimant. But if the plaintiff in the process directed the levy, he was a trespasser equally with the sheriff, and an action for damages for the wrongful taking would lie against him; while an action for the recovery of the possession of the property would lie against the purchaser of claimant's property at sheriff's sale, under an execution against a third person.

The language of the statute is susceptible of such an application, and it is not altogether improbable that the legis-

lature intended it should do so, to avoid any doubt as to the claimant's right to prosecute his remedies against such parties, notwithstanding his right to the property might seem to have been finally determined by the verdict of the sheriff's jury. We do not see that a provision of this nature, added for such a purpose, would necessarily evince any unusual or needless caution on the part of the legislature. The effect of such a proceeding on the ultimate right of the claimant to the property had been mooted, and we even find Chief Justice Caton, of the supreme court of Illinois, entertaining the opinion that such a determination was a final adjudication of the right of property, binding on both parties and privies. (*Rowe* v. *Brown*, supra.)

And it ought not to be wondered at if the legislature, adopting new provisions on the subject, evidently designed to afford a greater degree of protection to the officer, should, out of greater caution, add saving clauses, which, upon strict legal principles, might not be held absolutely necessary. But if these clauses cannot be so applied, and must be held to relate to the claimant's remedies against the sheriff, it is quite certain that they will, if upheld, take away all the effect of the statute as an indemnity to the sheriff against the claimant.

It was suggested on the argument that the "action for damages for taking the same" would only entitle the claimant to recover nominal damage for the taking and actual damage for the subsequent detention after the verdict of the sheriff's jury. But damage for any detention is not mentioned, nor can damages for the original unlawful taking be set down to nominal damage.

As we understand it, the measure of damage for a wrongful taking, always includes the value of the property taken, and we can conceive of no sound reason for construing the words used in this statute to have any different signification.

Now these clauses, thus construed, and held valid, reserve to the claimant every right in action, and every remedy he ever

had against the officer, and effectually destroy the full indemnity against the claimant, which the first part of the section declares he shall have. These clauses appear in the body of the enactment, and under the construction contended for, must render that portion of the enactment which previously gives the sheriff a full indemnity against the claimant, void, or be held void themselves. Where a saving clause would take away all the effect of the previous enactment, it must be held void, in order to give the statute some effect. For it will not be admitted that the legislature intended the act should have no effect (Potters Dwarris on Statutes, 117; Sedgwick on Statutory and Constitutional Law, 61).

The same rule must apply where, in a previous part of the enactment, a distinct and particular provision is made and a subsequent clause purports to take away all its effect and render it nugatory. The subsequent clause, if susceptible of no other application, must be held void, so that the provision may have some effect.

But we have chosen to give the statute such a construction as prevented the necessity of declaring any portion of it void. We thought, and still think, the language of the act will bear it, and that such is the proper construction.

After a careful, and as we feel, a candid and impartial re-examination of our former decision, in the case of *Remdell v. Swackhammer,* above cited, in the light of the additional authorities produced, and the very able argument of respondent's counsel, we have not been able to arrive at a different conclusion as to the law governing such cases, and feel compelled to stand by the principles of that decision.

As this point is fatal to respondent on this appeal it is not necessary to consider any of the other points raised in the case.

The judgment of the court below is reversed, with costs, and the cause is remanded for further proceedings in accordance with the views above expressed.

Judgment reversed.

FRIENDLY v. McCULLOUGH.

CHATTEL MORTGAGE—SUBSEQUENT ADVANCES—COMMISSION—SERVICES.

Where a mortgagee of chattels, under an agreement subsequent to the mortgage, agreed to take possession of the property mortgaged (logs, &c.) and manufacture them into lumber, at the mill of the mortgagor, and sell the same, and out of the money realized, after deducting all costs and expenses, to apply the residue on the chattel mortgage: *Held*, that it was not error to allow for necessary repairs on the mill.

When advances have been made on the credit of the property mortgaged, and there are no intervening equities of third parties, and the court below held the property mortgaged liable for the payment of the subsequent, as well as the original debt: *Held*, there was no error.

Where a certain per cent. is agreed to be paid as a commission on all sales of lumber, for services, and the services have been performed according to the terms of the agreement, and the evidence discloses no undue advantage, imposition or fraud in the transaction: *Held*, that the party was entitled to his commission.

APPEAL from Benton. The facts are given in the opinion.

Kelsay & Burnett, for appellant.

F. A. Chenoweth and J. R. Bryson, for respondent.

By the Court, LORD, C. J.:

This is a suit in equity to foreclose a chattel mortgage. After the execution of the chattel mortgage the complaint alleges that the respondent and appellant entered into an agreement that the respondent should take possession of the saw logs mortgaged, run them down Mary's river to the saw-mill of appellant, manufacture them into lumber, and sell the lumber, and out of the proceeds to pay, first, all the costs and expenses of running and sawing the logs into lumber, and all the expenses connected therewith, and apply the remainder on the chattel mortgage.

Pursuant to this agreement the respondent took possession of the logs, and manufactured them into lumber. For managing and carrying on said business, and selling said lumber, the appellant promised to pay respondent a commission of ten per cent. on all sales of lumber.

From the exceptions made at the argument it is unnecessary to state further facts of the pleadings. The defendant Henkle is in no wise concerned in the case as it is presented on the appeal.

The evidence shows, in the account taken, that the total amount of sales of lumber to April 1, 1880, was thirteen thousand three hundred and thirty-two dollars and eighty-two cents, and that the total expenses amounted to the sum of ten thousand six hundred and seventy-three dollars and forty-five cents, leaving the sum of two thousand six hundred and fifty-nine dollars and thirty-seven cents, to be applied on the chattel mortgage, to which is also to be added the sum of three thousand two hundred and fifty-nine dollars and thirty-seven cents.

According to the evidence, the chattel mortgage was composed of one note, dated Dec. 23, 1878, for one thousand dollars, at twelve per cent. interest per annum; one note for twenty-five hundred and eighteen dollars, of same date, and drawing the same rate of interest, and advances to be made in goods to the amount of sixteen hundred and fifty-seven dollars, but the amount received was thirteen hundred and ninety-seven dollars, making a total, with interest upon the notes, of the sum of five thousand four hundred and seventy-five dollars and seventy-nine cents. Applying the sum of three thousand two hundred and fifty-nine dollars and thirty-seven cents, as a credit on the mortgage, and there remains due thereon the sum of twenty-two hundred and sixteen dollars and forty-two cents. The amount found due on the mortgage by the court below is twenty-five hundred and twenty-one dollars and sixteen cents.

To this result, and every part of it, several exceptions were made, which will be considered in the order treated in the argument.

The first exception is that the sum of one thousand two hundred and seventy-six dollars, paid out for repairs on the mill, is too much, and more than was necessary to keep the

mill in good running order. A bill of items accompanies the deposition, and no item of that expense for repairs has been designated, or shown to be unnecessary. The argument proceeded on the theory that the saw-mill was in good condition when the respondent took charge, and by comparison from evidence of those who had run saw-mills, claimed that the charge was too much, and if expended, some of it was unnecessary. It is not denied that the actual expenses paid out for necessary repairs should be allowed. The evidence shows, however, that the saw-mill, at the time the respondent took charge of it, was "in a poor condition," and very much out of repair. That the stoppages, in consequence of it, were frequent, and the repairs made absolutely necessary to run the mill and manufacture the lumber.

It will only be necessary to refer briefly to the evidence on this point to establish that condition of things beyond controversy. Mr. Smith, who was foreman, testifies that the mill was "in a very poor condition," and that they "never run more than two or three days without a break-down"; that "all the repairs put on it were absolutely necessary," and that "the mill could not be run without them." Mr. Lewis, who was book-keeper at the mill, testifies that "the mill was not in good repair, and the expense was considerable; that there were a great many repairs to be made, and that they were necessary to be made, and necessitated the shutting down of the mill." Mr. Jacobs testified that "we had a heap of break-downs, and repairing and fixing the mill to make it run."

Mr. Couchman, the engineer, and the respondent, testified to the same effect. The appellant testifies that some of the repairs were necessary, but that many of the breakages were through carelessness, and some unnecessary to repair. The appellant was about the mill during much of the time, but he fails to show in the evidence what "breakages" arose from carelessness, or designate what repairs were unnecessary.

The evidence of the other witnesses, all of whom had

worked for the appellant in the mill, before the respondent took charge under the agreement, shows that the mill was in a poor condition, and subject to frequent break-downs, and that the repairs made were absolutely necessary to run the mill. We do not think that the court below erred in allowing this expense for repairs.

The second exception is, that the sum of fifteen hundred and ten dollars, paid out on the orders of the appellant, ought not to be allowed, because the same is not included in the mortgage—are outside of the mortgage. It appears from the evidence that the different sums advanced, which make this aggregate, were paid out on the written and verbal orders of the appellant, and that at the time the respondent took possession of the mill, under the agreement, the appellant owed considerable sums to different hands employed in getting the logs on Mary's river, which he had not paid, and which it was necessary to pay to keep the hands at work, and get the mortgaged logs on Mary's river down to the mill to be manufactured. It appears, too, from the evidence, and the manner in which the business was conducted, that it was the understanding of the parties, when the advances or credits were given on the orders, that it was on the credit of the property mortgaged. It is not material whether it be included in the expense account, or tacked, the result will be the same under the circumstances of this case.

There can be no doubt, from the evidence, but what the amount charged was obtained upon the written and verbal orders of the appellant, and subsequently to the execution of the mortgage, and was, in our opinion, to be taken out of the property mortgaged, or, in other words, advanced on the credit of the mortgaged property.

There is not in this case any intervening equity of other creditors, and when the rights of third parties do not intervene, there is every reasonable intendment to be made in favor of the doctrine of tacking, as to chattel mortgages. "For without any proof of a distinct agreement, the property may

be held until the subsequent as well as the original debt is paid, upon the principle that he who seeks equity must do equity; and the party seeking relief in court ought to pay all that is due his creditor, the presumption being that the subsequent advances would not have been made but upon the credit of the property mortgaged, and will be tacked to it if no other incumbrancer resists." (Herman on Chattel Mortgages, section 56.)

The appellant asks for the accounting, and when the facts and circumstances show that the advances were made with the understanding that the property held or mortgaged should be liable, there does not seem to be any reason, in the absence of intervening equities, why the property mortgaged may not be held until the subsequent as well as the original debt is paid.

In *James* v. *Johnson*, 6 John. R., 429, the Chancellor said: "In many cases, a subject pledged for a debt may be considered as a security for further loans, and I see no possible objection to it, if no intervening rights exist to prevent the justness of the application of the rule. We are to presume that further debts were created, or advances made, on the credit of the original security. It is only where the rights of third parties are prejudiced by the want of notice, that the extension of security is provided. Under the circumstances of this case the exception is not well taken."

The third exception is, that the appellant ought to be allowed an average of fifteen dollars per thousand for all the lumber sold. All the circumstances of this case show that it was the intention of the parties to manufacture the logs into lumber as speedily as possible, and get it ready for market, so as to realize the money for it, and apply it according to the agreement, and that to induce sales, some of the lumber was sold for lower rates than the usual market prices. The respondent testifies that some of the lumber sold for less than twelve dollars per thousand; that he had an understanding with the appellant to that effect. Lewis, the book-keeper at

the mill, testifies that he sold lumber at a lower figure than the usual rates, under the instructions of the respondent, and when asked whether the appellant did not object to this, says: "Well, McCullough told me to do just as Friendly told me to do; that they had an understanding about it." This corroborates the statement of the respondent, and shows there was an understanding in respect to selling the lumber at a lower figure than the usual rates.

The price of the lumber, as is further disclosed, varied according to the grade, and the whole number of feet manufactured from the logs mortgaged, and the amount arising from the sales of the same, is reported.

Numerous exhibits are attached, giving the different items connected with the management of the business. The evidence shows that the appellant kept an account of all transactions, and stood ready with his books to furnish any explanation, or to give a bill of items, or to submit his books for examination, if desired. When asked whether it had been his practice to ascertain the sum total of the sales each week, he answered that it was, and "as far as the sales, the account had been very strict at all times." As if to test the accuracy of this statement, and the correctness of the account kept, he was asked to examine his books and tell how much lumber was sold for the two weeks following the 20th day of October, 1879. He refers immediately to his books, gives the dates, the number of feet sold, the amount sold on credit, and the amount sold for cash. Satisfied on this point, the appellant does not seem to have deemed it necessary to press the inquiry further. No error or mistake is shown in his account or books, and as far as we can see from the evidence, there is no suppression or concealment.

The argument proceeded upon the theory that the number of feet sold ought to have realized a larger sum than the amount reported, but that calculation is based on a fixed rule, arbitrarily assumed, which ignores the fact in evidence, of a

reduction in the price, by an understanding of the parties, which produced that result.

The fourth exception is, that the ten per cent. agreed to be paid to the respondent, on the sales of lumber, for managing the business, ought not to be allowed, because the services were not worth that much, and were not fully performed by the respondent. It is claimed that Lewis, the book-keeper at the mill, attended to the sales and much of the management, and that the business was principally carried on through him. Lewis was book-keeper for the appellant, before and at the time the respondent took charge and undertook the management of the business under the agreement. He was retained, as were the other employes at the mill, as seems to have been the understanding of the parties. The evidence does not afford much opportunity for controversy on this point, nor is the promise to pay this per cent. on the sales of lumber denied, only that the services were irregular and occasional, not commensurate with his engagement, nor of the value claimed.

Where the compensation is fixed by agreement, if the services have been performed, the agreement ought to be enforced, unless grossly inequitable. But we do not think the evidence sustains the view claimed for the appellant. On the contrary, it shows that the respondent was active and attentive in his management of the business; was looked to as the responsible head to direct and superintend it, and was present whenever and wherever the duties and interests of that business required him. Tested by the evidence, it cannot be said that he failed to perform, in part, his engagement. All the circumstances detailed show his connection with and superintendence of getting the logs down the river, manufacturing them into lumber and selling the same, and all incidental matters in connection therewith. It may be that the per cent. agreed to be paid is large, but this fact may be more apparent now, when the accounting has taken place, and all the facts can be seen in their bearing of unprofit, than when the contract was made. There is nothing in the evidence, or in the

nature of the transaction, which discloses any undue influence, imposition or fraud. In the absence of these elements, where the parties have made their own bargain, and fixed the compensation, presumably at the time for the mutual benefit and advantage of each, we do not feel authorized, when the results have not proven as profitable to one or the other as may have been expected, to refuse to enforce the agreement allowing the commission.

As before stated, the amount found due by the court below on the mortgage, and for which a decree was rendered, is the sum of twenty-five hundred and twenty-one dollars and sixteen cents, which must be modified, and in lieu of that sum, the decree on the mortgage must be for the sum of twenty-two hundred and sixteen dollars and forty-two cents; but with this exception, and in respect to all other things and sums, the decree of the court below is affirmed.

Decree affirmed.

PAGE & CO. v. PETER GRANT and BRIDGET GRANT.

JUDGMENT CREDITOR—INSOLVENT DEBTOR—COMPLAINT.

It is sufficient, in a complaint in a suit by a judgment creditor to reach property alleged to have been conveyed in fraud of his rights, to state that an execution had been issued upon his judgment, and "duly returned unsatisfied," without alleging the debtor's insolvency, or that he had no other property out of which the judgment could be made.

FRAUDULENT CONVEYANCE—CREDITORS EXISTING AND SUBSEQUENT.

A conveyance by the vendor of property purchased with the debtor's own funds to a third person, with an actual fraudulent intent on the part of the parties to the transaction, to hinder, delay or defraud creditors of the debtor, is void, both as to his existing and subsequent creditors.

APPEAL from Clatsop. The facts are stated in the opinion.

Sidney Dell and J. Q. A. Bowlby for appellants.

The complaint does not state facts sufficient to constitute a cause of suit. It nowhere avers that Peter Grant was insolvent, or unable to meet his liabilities, or that he had no property out of which the judgment could have been made. The only allegation from which this might be *presumed* is, that an execution had been issued and returned "unsatisfied;" the return is not even *nulla bona*. The presumption, from the allegation, should be against the respondents. A defective complaint cannot be cured after verdict or decree. (*Chichester* v. *Vass*, 1 Am. Dec., 509; *Green* v. *Palmer*, 15 Cal., 410; *Wilson* v. *Cleaveland*, 30 Cal., 192, 570; *Guy* v. *Washburn*, 23 Cal., 111; *Hicks* v. *Murray*, 43 Cal., 515.)

There is no averment in the complaint that respondents are without legal remedy. Equity will not interpose where there is a speedy and adequate remedy at law. (*Castle* v. *Brader*, 23 Cal., 75.)

W. W. Thayer and Robb & Fulton for respondents.

Appellants object to the complaint, because it does not show that there *might* be other property with which the execution might be satisfied. This, we contend, is a matter of defence, and they do not allege that Peter Grant had any other property. If it were true that there was other property, the appellants must make out that fact. (*Brady* v. *Foster*, 13 N. Y., 161; *Punkitt* v. *Polack*, 17 Cal., 327; *Renand* v. *O'Brien*, 35 N. Y., 99.)

It will be seen that the respondents took all the necessary steps at law, as laid down in the authorities cited, before commencing this suit.

We admit that fraud must be proven, but it is not expected that we could get the declaration from their own mouths that they intended to defraud us. They will not publish their own fraud, and even on the witness stand will scarcely ever tell the whole truth. For this reason courts of equity will act upon

circumstances as presumptions of fraud, established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict at law. (Story's Eq. Jur., sec. 190; *Elfelt* v. *Hinch*, 5 Or., 255; 3 Greenleaf on Evidence, sec. 254; *Lake* v. *Doud*, 10 Ohio, 421; *Wilcox* v. *Kellogg*, 11 Ohio, 399.)

By the Court, WATSON, J.:

This appeal is brought from a decree of the circuit court of Clatsop county, rendered on the 3d day of February, 1880.

The object of the suit was to subject certain property, standing in the name of Bridget Grant, to the payment of a judgment recovered by plaintiffs, in said court, against Peter Grant, on August 23, 1878, for the sum of two hundred and sixty-two dollars and twenty-nine cents, and costs.

The complaint alleges that defendants are husband and wife. That on August 23, 1878, plaintiffs recovered a judgment against Peter Grant in said circuit court, for two hundred and sixty-two dollars and twenty-nine cents, and costs. That on August 31, 1878, an execution, in due form, was issued out of said court upon said judgment, against the personal and real property of said Peter Grant, to the sheriff of said county. "That the said execution has been duly returned by said sheriff, unsatisfied, and that there is now due to the said plaintiffs, on said judgment, the sum of two hundred and sixty-two dollars and twenty-nine cents, and interest from the 23d day of July, 1878, and costs."

That on July 10, 1877, the said Peter Grant entered into a contract with J. N. Armstrong for the purchase of the property therein described. That afterwards, on the 18th day of July, 1877, and after the greater portion of the debt sued upon, and upon which the judgment was given in said action, had been contracted, and while indebted to plaintiffs, the conditions of the contract between Peter Grant and J. N. Armstrong having been complied with by said Peter Grant, the said Peter Grant and Bridget Grant, conspiring to defraud

their creditors, and to prevent the plaintiffs from collecting their demands as aforesaid, from said Peter Grant, by a certain instrument, fraudulently had said property conveyed and assigned to said Bridget Grant, without any consideration being paid by her, and for the purpose of defrauding his creditors. The prayer is, to have the property applied to the payment of the judgment against Peter Grant, and that the conveyance to Bridget be declared void as to the plaintiffs.

The answer contains substantial denials of the allegations of fraud in the complaint; of Peter Grant's ownership of the property; of the compliance with the terms of the contract referred to, by Peter Grant; and a denial that any of the said debt, except a small amount, was incurred between the 1st of July, 1877, and the 20th day of said month, and an allegation that the small portions of the debt existing on the 18th day of July, 1877, principally existed prior to the contract set up in the complaint.

The court below held the conveyance to Bridget Grant fraudulent and void, and decreed that the property be sold to pay the judgment against Peter Grant, and costs of suit.

Appellants urge that the complaint does not state facts sufficient to constitute a cause of suit, because it does not show that Peter Grant was insolvent, or had no property out of which the judgment against him could be made.

We do not think this proposition can be sustained. Courts of equity entertain jurisdiction, in such cases, for the reason that the remedy at law has failed or proved ineffectual.

The sheriff's return of the execution unsatisfied is the best evidence of such failure of the remedy at law, and cannot be controverted. (*Jones* v. *Green*, 1 Wallace, 330; *McElwain* v. *Willis*, 9 Wend., 559.)

When a judgment creditor has issued an execution and the sheriff has returned it unsatisfied, he has exhausted his legal remedy.

Counsel for appellants base their argument respecting the insufficiency of the complaint, in part, at least, upon the form

of the allegation referring to the sheriff's return. We understand that the pleader is attempting to state the legal effect of the return, and not its language, and that, if denied, proof of a return of *nulla bona* would establish the allegation. And if the sheriff's return is conclusive, it would be idle to allege, in addition to such return, that the judgment debtor was insolvent, or had no property out of which the judgment could be made. It is not correct, as counsel for appellants insist, that such an allegation would not be sufficient but for special statutory provision making it so. The statute is merely declaratory of the rule as it previously existed, as is shown by the case last cited.

The allegation that Peter Grant is the owner of the property must be taken in connection with the other allegations in the complaint, and cannot be held to mean that he was the owner of the legal title. The whole complaint taken together shows clearly that the legal title was not in Peter Grant.

We come now to the question of fraud, which is vital in this case. Upon a most careful examination of all the testimony submitted, we have become fully convinced that the conveyance of the property in dispute, by J. N. Armstrong to Bridget Grant, was the result of an understanding between them and Peter Grant, and was intended by all of said parties to hinder, delay and defraud the creditors of Peter Grant. That the contract for the purchase of said property was made on his behalf, and the price thereof paid by him, or out of his funds for him.

Having found an actual fraudulent intent on the part of the defendant in this transaction, we conclude it makes no difference whether the debt represented in the plaintiff's judgment against Peter Grant was contracted before or after the conveyance to Bridget Grant. Such a conveyance would be void, on account of the fraud as to subsequent as well as existing creditors. (1 Story's Eq. Jur., secs. 361 and 362; *Reade* v. *Livingston*, 3 Johns. Ch., 499, 501; Kerr on Fraud and Mistake, 206, 207.)

As a result of these conclusions, we find there was no error in the decree of the court below, and it must be affirmed, with costs.

Decree affirmed.

COYOTE G. & S. M. CO. v. RUBLE, et al.

RULE OF COURT—COURT AND SUITORS BOUND THEREBY—REHEARING.

The supreme court has the inherent right to prescribe rules for the orderly conduct of its business, not repugnant to law.

Such rules may be changed, modified or rescinded by the power from which they emanated; but, while they are in force, they must be applied to all cases falling within them. No discretion can be exercised as to their application, unless such discretion be authorized by the rules themselves. The court, equally with suitors, is bound by its rules.

A rule of the supreme court, prescribing a certain time within which petitions for rehearing shall be filed after the judgment, order, or decision of the court is announced, vests in the court no discretion to grant a rehearing after the time, limited by the rule, has expired.

By the Court, LORD, C. J.:

Rule 36 of this court provides that all motions for rehearing shall be upon petition in writing, presented and filed within two days after the judgment, order, or decision of the court is announced, and within the same term. This cause was tried and the decision therein rendered at the January term, 1880. At the following July term the respondent filed a motion to set aside the decision and for a rehearing. Argument of counsel, pro and con, was heard upon the question of the authority of the court, to entertain such motion after the time limited by the rule had expired.

The proposition, submitted for argument, was, whether the court had the authority to grant a rehearing after the time,

limited by rule 36, had expired. That rule provides, that "all motions for rehearing shall be upon petition in writing, and filed within two days after the judgment, order, or decision of the court is announced, and within the same term." It is conceded that none of the petitions before us were filed within the time prescribed by the rule, but it is claimed that the right of the court to rehear is an inherent right or prerogative, dependent solely for its exercise upon a proper case requiring relief, and independent of the limitations of this rule.

Without the aid of any statutory regulation, it has been repeatedly decided that every court of record possesses the inherent power to establish and enforce rules for regulating the practice before it, not repugnant to any constitutional or legislative enactments. "Under our system," says Justice McArthur, in *Carney* v. *Barrett*, "all courts have certain inherent powers, to be exercised for the purpose of methodically disposing of all cases brought before them. (4 Oregon, 471.) They can establish such rules in relation to the details of business as shall best serve this purpose, having proper regard for the rights of the parties litigant, as guaranteed and recognized by the constitution and the laws."

It may, then, be safely affirmed, in the absence of any legislative authority, that the supreme court has the inherent right to prescribe rules for the orderly conduct of its business not contrary to law. But if this were questionable, the authority of "every court of justice to provide for the orderly conduct of proceedings before it," is expressly conferred by the statute. (Civil Code, sec. 884, sub. 3.)

The rule under consideration is one of practice, is not unreasonable, nor repugnant to law, and is within the legitimate and unquestioned power of the court to establish. Like all other rules, it has been entered upon the records of this court and published in the Oregon Reports, that every one may read and know them.

The question then occurs, what effect is to be given to this rule? Does it have the force of law, and is it equally bind-

ing on the courts and litigants? In *Thompson* v. *Hatch*, 3 Pick., 512, Parker, C. J., in delivering the opinion of the court, says: "But a rule of the court, thus authorized and made, has the force of law, and is binding on the court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. In the case before us the plea was allowed to be filed on the fifth day of the term, although the rule allows but four days for that purpose. The circumstances were such as would justify that order of the court if it had power to pass it, but we are satisfied that no one judge of the court of common pleas, or of this court, has authority to dispense with rules deliberately made and promulgated, on account of the hardship of any particular case, any more than he would have authority to dispense with any requisition of the legislature itself. The court may rescind or repeal their rules, without doubt, or in establishing them, may reserve the exercise of discretion in particular cases. But the rule once made without such qualification, must be applied to all cases which come within it, until it is repealed by the authority which made it."

In *Hanson* v. *McCue*, 43 Cal., 179, the court say: "The propriety of granting this motion depends upon the construction of rule twenty of this court. This rule requires that the petition for rehearing 'must be filed within twenty-five days after the judgment has been rendered,' and further, 'that the time herein prescribed shall not be extended by the court, and the clerk shall not file a petition after such time has expired.' These plain and positive provisions cannot be avoided upon the ground of accident, or excusable neglect. The filing of a petition for rehearing is not a matter of right. It is a privilege given by the court, governed and limited entirely by its rules. The power to make these rules is given and controlled by the statute. The court, equally with suitors, is bound by them until they are abrogated. We must construe them as statutory provisions would be construed. We can conceive of no case in which the time for filing a petition for rehearing

can be enlarged, or the failure to file excused, under the positive prohibition of the rule."

In *Owens* v. *Ranstead*, 22 Ill., 173, it is said that "every court has an inherent power to prescribe rules, being only limited by their reasonableness and conformity to constitutional and legislative enactments. Without this power it would be impossible to dispatch business—delays would be interminable, etc. Such rules the court can change, modify or rescind, but while they are in force they must be applied to all cases falling within them. No discretion can be exercised as to their application, unless such discretion be authorized by the rules themselves."

"Where a court has established rules for its government and that of suitors, there exists no discretion in the court to dispense at pleasure with their rules, or to innovate on established practice." (*Hughes* v. *Jackson*, 12 Md., 463.)

In *Walker* v. *Ducros*, it is said that rules of court have the force of law, and are not less obligatory upon the judge than upon the parties to the action. Parties litigant might often be subjected to serious inconvenience and to undue advantages where rules of procedure are not strictly adhered to, while on the other hand, by their rigid observance, annoyance from delay, or other sources, would be of less frequent occurrence. Courts are clothed with power to prescribe such rules of proceeding appertaining to their jurisdiction as may be necessary and useful in the exercise of their functions, and which have not been established by law. These rules become in effect laws, which may be modified or repealed by the power from which they emanate, but they ought not to be relaxed, or suspended, to meet temporary convenience, or to be accomodated to the ever-varying circumstances of time. The evils that would arise from a vacillating and uncertain operation of such rules are more and greater than any that would, by such lax operations, be obviated." (18 Louisiana, 703.)

It is not material whether the power of the court, to make

rules for the orderly conduct of its business, is derived from the statute, or from the inherent power which the courts possess for that purpose, as in either case, the rule, to be valid, must not be in conflict with any constitutional provision or legislative enactment. But when deliberately made and promulgated, and not repugnant to law, the decisions are uniform that such rules have the force and effect of law, and are equally binding upon the court and litigants. The court may modify, change, or rescind any of its rules, or it may reserve the exercise of discretion for particular cases, but while they are in force, and without any such qualification reserved, they must be applied to all cases coming within their provisions. As none of these petitions were filed within the time prescribed by the rule, it follows that the rehearing cannot be granted.

Rehearing denied.

STATE v. TILLEY.

HURDY-GURDY DANCE HOUSES.

A house kept for public dancing simply is not a "hurdy-gurdy" house, within the meaning of the act of the legislature, passed October 22, 1864, entitled, "An act to regulate hurdy-gurdy dance houses."

APPEAL from Wasco. The facts are stated in the opinion.

B. Whitten, for respondent.

J. E. Atwater, for appellant.

By the Court, WATSON, J.:

The defendant, Tilley, was indicted by the grand jury of Wasco county, on the 5th day of July, 1880. The part of the indictment charging his alleged offence is as follows:

"Taylor Tilley is accused by the grand jury of the county

of Wasco, state of Oregon, by this indictment, of the crime of keeping a dance house, without first having obtained a license therefor, committed as follows: "The said Taylor Tilley, on the first day of March, A. D. 1880, and at divers times between that time and the finding of this indictment, in the county and state aforesaid, did then and there wilfully and unlawfully keep a public dance house, without first having obtained a license, agreeably to the law for that purpose, and then and there failed and neglected to secure and obtain a license therefor; and then and there did suffer and permit certain persons, as well men as women, to frequent said house, as well in the night as in the day, and then and there to be and remain engaged in public dancing. The said Taylor Tilley being then and there the keeper of said dance house."

Defendant demurred to this indictment, upon the ground that it did not state facts sufficient to constitute a public offence or crime. The court overruled the demurrer, and the defendant thereupon entered his plea of not guilty.

A trial was had, and the jury having found a verdict of guilty as charged in the indictment, the court, on July 28, 1880, sentenced the defendant to pay a fine of five hundred dollars, with the usual alternative of imprisonment in case of default in payment of such fine.

From this judgment this appeal has been brought. As shown by the bill of exceptions, several instructions were asked by defendant's attorneys at the trial, which were refused by the court. To this ruling counsel for defendant excepted, and also excepted to several instructions given by the court.

But we think they raise substantially the same question made on the demurrer to the indictment, and that the same determination will apply.

The indictment was found under the provisions of the act of the legislature passed October 22, 1864, entitled "An act to regulate hurdy-gurdy dance houses." This act declares that "from and after the first Monday in December, 1864, no person or persons shall be allowed to keep any house for the

public dancing commonly called hurdy-gurdies, unless licensed to do so, as provided by this title."

Miscellaneous laws (Code of 1872), page 652, secs. 18 and 19, provide: "Every such person, or persons, so engaged in keeping such hurdy-gurdy house, shall pay for such privilege one hundred dollars per month, and no license shall be granted for a less term than one month." Sec. 20 gives the form of license to be used. It is to "keep a hurdy-gurdy house." Sec. 22 declares that any person who suffers or permits the dancing described in this title, in any house, tenement or building, room or part thereof, owned or occupied, or controlled by him, is to be deemed a keeper of such dance house, within the meaning of this title, and shall be required to license accordingly."

It is plain from an examination of these provisions of the statute, that the legislature intended to exact a license only from those who should keep houses for that species of public dancing commonly called "hurdy-gurdies," at the time of its passage, and that keepers of houses for public dancing, merely, are not within the meaning of its requirements as to obtaining license.

The indictment in this case, neither in terms nor substance, charges the defendant Tilley with keeping anything more than a house for public dancing, and public dancing generally, and in our judgment, the courts are not at liberty to ignore it. We are clearly of the opinion that the indictment in this case does not charge the defendant Tilley with any offence under this statute. It should have charged, if such was the fact, that he kept a house for public dancing, commonly called hurdy-gurdies, by proper allegations, and thereby afforded him an opportunity to defend against the charge on his trial before the jury.

We have not attempted to define the meaning of the term "hurdy-gurdies." nor do we conceive it necessary to do so in the decision of the case before us. The error in the judgment of the court below did not consist in giving a wrong inter-

pretation to that term, but, as we view it, in rejecting, altogether, the limitation, it was designed by the legislature to impose upon the operation of the statute under consideration.

The judgment of the circuit court must be reversed with costs.

Judgment reversed.

HEIRS OF CLARK v. T. A. and J. D. ELLIS.

WILLS—COUNTY COURT—JURISDICTION.

Where a suit is begun by petition in a county court to contest the validity of a will, and to revoke letters testamentary, which is demurred to on the ground that the court has no jurisdiction: *Held*, that the demurrer was properly overruled.

DEPOSITIONS—CERTIFICATE OF COMMISSIONER.

Where a commissioner is appointed by a county court to take the deposition of a witness out of the state, to interrogatories thereto annexed, and return the same in a sealed envelope to the clerk of said county court, and in pursuance of such authority the answer of the witness to each interrogatory is written immediately under it, and the deposition signed by the witness, and appended thereto is the certificate of the commissioner, reciting, among other facts, that "having read said commission, and having administered an oath to said witness that the answers given by him to the interrogatories and cross-interrogatories should be the truth, the whole truth, and nothing but the truth, the examination was proceeded with, and the answer of the witness to each question is written as given by him," and signed by said commissioner, and such certificate was objected to because the same did not conform to the requirements of section 815, nor to titles three, four, seven and eight, chapter nine of the Oregon Civil Code: *Held*, that section 809, title 6, chapter 9, civil code, only requires the commissioner to certify the deposition to the court, and that this is sufficiently done when he certifies that the following, or foregoing, or accompanying, is the examination of the witness, given upon his oath or affirmation, "by me duly administered, in answer to interrogatories hereto annexed to the commission, or as therein stated," and that it was error to suppress said deposition.

Syllabus.

INSANITY—DELIRIUM—PRESUMPTION.

Where the evidence showed that the testator was old, infirm and afflicted with disease which caused him much suffering, and who, at times, and when under the influence of fever, was flighty and wandering in mind, his thoughts tossed about and distracted, his conversation wild and incoherent, his face flushed and fevered, and his actions in marked contrast to his ordinary behavior: *Held*, that such symptoms indicate delirium.

Delirium is a temporary derangement of the mind, and is always preceded or attended by a feverish and highly diseased state of the body. It may vary in intensity from slight wanderings of the mind to more violent mental derangement, and it may be accompanied, in a greater or less degree, with stupor or insensibility.

In such case the rule of law is that a continuing insanity is never to be presumed, where the malady with which the person was affected was in its nature temporary and occasional.

TESTAMENTARY CAPACITY—BURDEN OF PROOF.

Testamentary capacity implies that the testator fully understands what he is doing, and how he is doing it. He must have mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged when he executed the will.

The unreasonableness of a testator's prejudice, the unfairness of his disposition of his property, his disregard of the claims of natural affection, are not of themselves alone sufficient to induce a court to repudiate his will. If he possessed testamentary capacity, and the will was the product of his own free agency, his right to dispose of his property as he pleases is as absolute and sacred as any other right which he possesses.

Where the evidence showed that prior to the execution of the will, the testator was subject to delirious states of mind, which were only occasional and temporary, and superinduced by fever upon a diseased body, but which, during the continuance of such delirious state of mind, visibly affected his mental powers: *Held*, that the evidence must show that these delirious states of mind existed at the time the will was executed, in order to affect its validity.

The presumption of law is always in favor of sanity, and the burden of proof lies on the contestants of the will, unless a previous state of habitual or permanent insanity has been shown, in which case the burden of proof is shifted.

The capacity of the testator is to be tested at the time of the execution of the will, and the evidence of the attesting witnesses, all other things being equal, are most to be relied on.

APPEAL from Union.

W. Lair Hill, for appellant.

E. C. Bronaugh, for respondent.

By the Court, LORD, C. J.:

This proceeding was originally commenced in the county court of Union county, by petition of respondents as the heirs-at-law of William Clark, deceased, against the appellants, to set aside the will of said Clark, and to revoke the probate thereof.

The grounds set forth in the petition are a want of testamentary capacity in the testator, and undue influence exercised over him by the said T. A. Ellis, and J. D. Ellis, his wife, appellants as aforesaid.

From the pleadings it appears, that on the 18th day of May, 1878, the said William Clark made his will, in which the said T. A. Ellis was named as executor, and the said J. D. Ellis was sole legatee and devisee. On the 28th day of May, 1878, the said William Clark died, and on the 8th day of June, 1878, the will was admitted to probate in the county court of Union county, without notice to respondents, and the said T. A. Ellis having qualified as executor, proceeded to administer upon said estate. On the 20th day of June, 1879, the respondents filed their petition to set aside said will and cancel the letters testamentary issued thereon. The said appellants, having been cited, appeared and demurred to the petition, on the ground that the court had no jurisdiction of the suit.

The county court overruled the demurrer, whereupon the appellants answered, and the cause being at issue, a trial was had, which resulted in a decree as prayed for in said petition. From this decree the appellants appealed to the circuit court of Union county, by which court the decree of the said county court was affirmed, and the appeal as to Appia Clark dismissed, she being found not to be the widow of William Clark, by reason of a divorce from him prior to his death.

From this decree of the circuit court an appeal has been taken to this court.

The chief objection made upon the argument of the demurrer was that the county court had no jurisdiction of the subject matter—that the jurisdiction to annul wills is not a matter pertaining to probate, and is not vested in the county court, either by the constitution or by statute—and that original jurisdiction of such causes belongs to the circuit court. In support of this, counsel have cited us to the case of *Brown v. Brown*, 7 Oregon, 285. That was a suit brought to quiet title to certain lands sold by the executors and trustees of Cyrus Olney, deceased. By his will, Olney had devised all his real estate to J. G. Hustler and H. S. Aiken, in trust: First, to pay all his debts, and second, to hold the residue in perpetuity for the benefit of the town of Astoria, etc., and the trustees were appointed executors. The will was duly admitted to probate, and letters testamentary issued to the executors named in the will. For the purpose of paying the debts of Olney, the lands in dispute were sold. Several years afterwards the heirs-at-law of Olney filed a petition in the county court to set aside said will and revoke the letters testamentary, etc., which resulted in a decree as prayed for. The heirs-at-law of Olney claimed to be the owners of the land sold by the executors for the payment of his debts, and in consequence of such claim the purchasers brought suit to quiet their title. One of the defenses was, that the will having been declared void by the county court, the sale of the land was thereby annulled. To this conclusion, that the sale of the land was thereby annulled as the effect of the decree of the county court declaring the will void, the court refused to give its consent, and declared the law to be otherwise; that the legal consequence of the decree of the probate court was not to annul the sale of the land made by the executors under the will before its validity was contested, and while it remained unannulled. The court say: "The probate court had exclusive jurisdiction of the subject

matter in regard to the probate of what purported to be the will of Cyrus Olney. It was duly proved to be his will before that court, and letters testamentary were issued thereon, and until these proceedings were annulled the validity of the will could not be collaterally drawn into question by any one, nor by any other court. Administration of the estate under it could be conducted and enforced as under any other will duly proved. Such being the case, all acts done in the due course of administration, while the will remained unannulled and the letters testamentary were unrevoked, must be held entirely valid."

The jurisdiction of the county court, in a proper proceeding to set aside wills and to revoke letters testamentary, is not questioned. On the contrary, it seems to us, from the facts before the court, and the language used in respect to those facts, such jurisdiction is, at least, impliedly admitted, for the court, in substance, decides that the effect of the decree of the county court in declaring the will void, cannot be to render invalid those acts of the executors done in the due course of administration, before the validity of the will was contested; and while it remained uncancelled, and the letters testamentary were unrevoked. By section twelve of article eight of state constitution, it is provided that the county courts shall have, among other things, the jurisdiction pertaining to probate courts. In pursuance of this provision, the legislature has enacted that the "county court has exclusive jurisdiction, in the first instance, pertaining to a court of probate: 1. To take proof of wills. 2. To grant and revoke letters testamentary of administration and guardianship," etc.

It has already been decided that the judgments and decrees of the county court are to be held conclusive in collateral proceedings, and in every instance, until they are vacated by proceedings on appeal, or successfully impeached. (*Jones* v. *Dore,* 6 Oregon, 188.)

In the case of *Hubbard* v. *Hubbard,* the grounds of contest, and the proceedings, were virtually the same as in the

case under consideration. The will was admitted to probate by the county court *ex parte*, and without notice, and subsequently its validity was contested in the same court, on the grounds of a want of testamentary capacity and undue influence. The court held that where a will had been probated by proceedings *ex parte*, as in this case, and the validity of the will is attacked by a direct proceeding, based on sufficient allegations, it is incumbent on those affirming the validity of the will to re-probate the same *de novo*, by original proof, in the same manner as if no probate thereof had been had, and that the burden of proof in every such proceeding lies upon the party propounding the will, as to every fact not waived or admitted by the pleadings. (7 Or., 43.)

The re-probate required when the validity of the will is attacked, the issue formed in every such proceeding of which the party propounding the will has the *onus probandi*, is a subject matter of the same jurisdiction as the probate of a will of which the county court has the exclusive jurisdiction in the first instance, under the statute above cited. In such a proceeding, if the evidence should satisfy the court that the will admitted to probate, and upon which letters testamentary had been issued by the court, was not the will of the testator, the authority of the court to declare such will void, and "to revoke the letters testamentary," cannot be questioned. In our opinion the demurrer was properly overruled.

The next objection is, that the court erred in suppressing the deposition of Dr. H. B. Drake. The deposition was taken by Robert A. Leggitt, clerk of Wayne county, Michigan, under a commission issued to him from the county court of Union county, Oregon. The commission appoints him a commissioner to examine Dr. H. B. Drake, a witness, and authorizes him at certain days, to be by him for that purpose appointed, to administer an oath to said witness, and to take the deposition of said witness, in answer to the interrogatories thereto annexed, and to have him, the said witness, sign his deposition after the same has been reduced to writing,

and to sign the same himself, and certify the said deposition to the said county court, in a sealed envelope, directed to the clerk of said county court, of Union county. Immediately under each interrogatory, the answer to it is written, and the deposition is signed by the witness. The certificate is annexed to the deposition, and signed by the commissioner, and recites, among other facts, that "having read said commission, and having administered an oath to said witness that the answers given by him to the interrogatories and cross-interrogatories should be the truth, the whole truth, and nothing but the truth, the examination was proceeded with, and the answer to each question is written as given by him." The objection is that the certificate of the commissioner does not conform to the requirements of section 815, nor to titles three, four, seven and eight, of chapter nine, Oregon civil code. A slight examination will make it apparent that neither this section, nor those titles of chapter nine of the code, are applicable in determining the sufficiency of a certificate to depositions taken out of the state, upon written interrogatories.

It is section 809 of title 6, chapter 9, of the Oregon civil code, which provides for the certificate to depositions taken out of the state. This section (809) only requires that the commissioner shall "certify the deposition to the court." And this, Judge Deady says, is sufficiently done when he certifies the following, or foregoing, or accompanying, is the examination of the witness given upon his oath, or affirmation, by me duly administered, in answer to the interrogatories annexed to the commission, or as therein stated. (*Keene* v. *Meade*, 3 Peters, 1.)

This certificate, appended to the examination, states that the witness "testified in the above case as found above; that is, in answer to the interrogatories annexed to the commission." (*Jones* v. *Oregon C. R. Co.*, 3 Sawyer, (U. S.) 528.)

This brings us to the consideration of the evidence.

It appears that the testator was about seventy years of age

at the time of his death; that he was married to his wife, Appia, in Gennessee county, New York, in 1829, and that subsequently they removed to Illinois; that eight children, all of whom are now living, were born of said marriage; that the testator left his home in Illinois in 1850, and went to California "to hunt gold," that up to this last date he had provided for his family; that for several years after his departure, he corresponded occasionally with his family, principally with his oldest daughter, Berinthia; that this correspondence ceased about the year 1860, in consequence, it seems, of a letter of his to Berinthia having been returned to him by her husband; that in 1857 his wife, Appia, procured a divorce in Scott county, Illinois; that in 1864 the testator met, in Salem, Oregon, S. T. Newhard, whose acquaintance he had previously made in Sacramento, California, in 1859; that they "bought provisions together, went to Eastern Oregon, and engaged as partners in business, keeping Hot Lake House, farming and raising stock;" that they have lived together—except a short time before his death—and continued to do business as partners, until his decease; that the testator had been sick some time prior to his death, growing worse in the spring of 1878; that about seven weeks before he died, he went to Ellis', and while there he made his will, by which he disinherited his children, and bequeathed and devised all his property, personal and real, to Mrs. J. D. Ellis, after the payment of his debts, and that about ten days after the execution of said will he died.

It appears from the testimony of Newhard, that during the winter and spring of 1878, the testator was in ill health, and badly afflicted with disease, which, at times, affected his mental powers. He says, "his lungs were almost entirely gone, his liver was badly deranged, and he had an abscess on his leg, under his knee." He suffered, too, from rheumatism, which first manifested itself in the summer of 1867. But in the winter and spring of 1878, his maladies grew worse, and his constitution rapidly gave way before the inroads of

disease, which, at times, and when under the influence of fever, or suffering from acute pain, visibly affected his powers of mind. It seems that about this time he insisted on taking a mud bath, which Newhard tried to prevail on him not to take on account of the weak state of his health. He persisted, and when Newhard fixed the bath for him, he refused to take it then. He did, however, take the bath while Newhard was out at his work, and on his return he told Newhard that he "got in the bath, and it was so hot that it came near burning him, and that he had to make three efforts before he could place himself on the slats."

From that time he became possessed of the notion that Newhard had "fixed a trap" in the bath to suffocate him. He would repeat it over and over again, to his friends and neighbors, when they called to see him. It was an unjust suspicion, and according to our view of the evidence, without any foundation in truth. There is no witness who believes it, and many of them, but without much success, undertake to disabuse his mind of its improbability and groundlessness. It is a suspicion, though, that one of his age, infirmities, and condition of health, under the peculiar circumstances of his situation, and when, according to the testimony of Slater, he complained of "Newhard being cross to him, and not waiting on him properly, said Newhard thought he was a burden to him and wanted to get rid of him; said Newhard would get rid of him, that he was going in a few days to the house of the best woman living—Mrs. Ellis," might be liable to entertain, without furnishing any proof of mental aberration, or a loss of understanding.

About this time, according to the testimony of Newhard, the change in the conduct, conversation and mental peculiarities of the testator became noticeable. He says he would talk silly with any person, and say, "If you see any one tell them Clark is crazy." Yet he must have been conscious of such conditions of his mind, although he may not have possessed the will-power at the time to control his "silly talk," for

Newhard says: "When I would come home in the evening, Clark would say, 'I have been talking like a crazy fool all day.'"

Several other witnesses testify to a similar state of facts. One says, "he talked right straight along, first about one thing and then about another." Another witness says, "he told me a lot of stuff, which he said he had never told anybody else. I got up to start, when he stopped me. He said he did not want anybody to talk when they called to see him, and he still kept on talking—told me if I saw any one on the way, tell them to call and see him; that he had a streak of talking on him, and that he wanted to talk—did not want them to do any of the talking, and to tell them he was crazy."

Another witness says, when he called to see him he was lying on the lounge, and he asked him if any doctor was attending him. He said, "damn the doctors," and burst out crying. At that moment a young man entered the house with a field glass swung over his shoulders, which Clark took for a "pill wallet" of a physician, and when told it was a field glass, he broke out crying again. In some of these conversations he declared it to be his intention to leave his property to "poor widows and orphans, less to the widows, as they might marry again and squander it."

It would seem from the evidence that there were times, or occasions, when he appeared to be in a sort of stupor, from which, when first aroused, his mental faculties were confused and clouded. Slater says: "I knocked at the front door and there was no response to my knocking. I opened the door and saw Mr. Clark lying on the bed. He seemed to be asleep. I spoke to him; he woke up, and did not know me; asked me what my name was. I told him, and he seemed to understand who I was."

The occasion referred to in the evidence of Newhard, when the testator told him he had been sleeping all day, and again the next evening that he had slept all day again, and that he had never done such a thing in his life before, were probably

the effect of stupor, originating in the condition of his health, from which, when aroused, or by a return of consciousness, he thought he had been asleep.

These are the most marked phases of the mental peculiarities of the testator which the evidence exhibits, and have been selected to show the nature of the facts and circumstances upon which his insanity has been predicated. There is, however, a good deal of testimony, both for the contestants and for the proponents of the will, that shows, in our judgment, that these states of mind are exceptional and temporary; that ordinarily he was rational, and in his conversations and conduct he exhibited that degree of sense and judgment which usually belongs to men of his age and intelligence. Besides, the symptoms manifested in his conduct and conversation, taken in connection with his age and sickness, in our opinion, only indicate light-headedness, or delirious states of mind, superinduced by fever; at such times his mind would necessarily be flighty and wandering, his thoughts tossed about and distracted, his conversation wild and incoherent.

It is true that the testimony of two or three of the witnesses indicate that his memory was failing, but this was to be expected in one of his age, and might be said of a multitude of old men, whose competency for any business is never questioned. During this time his business transactions were not numerous nor complicated, but the evidence shows that he was not neglectful of his affairs, and that he fully understood what property he had, and its value.

Newhard must have thought he was competent to do business, for he says: "When I was improving the house he wanted to pay his part of the improvements," which certainly shows, on the part of the testator, just and proper conceptions of his business relations and duty, and it was settled by note. Again, on another occasion, subsequently, he executed to the testator another note, and made some arrangement in the interest of Mr. Pratt, by which he rented for one year the testator's interest in the Hot Lake property.

Some stress was laid on the fact that the testator wanted to have a bond canceled, which evinced his want of ordinary business capacity, but the evidence shows that when the nature of the transaction was explained, he not only understood it, but was satisfied with the bond. There is no doubt, from the evidence, that the testator was peevish, of irritable temper, impatient of contradiction, and at times, when his nervous system was unduly excited, from fever, or racked with pain, that he was delirious, or "out of his head." Under such circumstances, he would necessarily be, as testified to, garrulous and incoherent in his conversations, affected by spasms of crying, his bearing and conduct in striking contrast to his usual habits, his brain confused and clouded, and his volition and judgment temporarily suspended. Some illustration may be found of this in the testimony of Mr. Goodall. He says: "He was sitting in front of the door—seemed to be suffering, quite sick, his face was very much flushed, and apparently had a high fever." In the conversation which ensued he betrayed similar manifestations, and talked very excitedly, and "I told him, finally, his fever was too high, and that he had better talk no more." It never occurred to this witness, who knew him well, that the testator was an insane man, or habitually insane. He attributed his excited conversation and behavior to the fever in his sick condition, for at other times, when he saw him afterwards, he says, "he appeared free from fever, and his conversations were reasonable." This indicates, quite plainly, that these unusual manifestations of the testator, to which witnesses have testified, depended upon feverish states in his diseased condition, and that when his mind was flighty and wandering, or delirious, it was primarily due to this cause, which was occasional and temporary, and succeeded by a return to his normal condition of mind, in which he enjoyed his usual and ordinary vigor of understanding. This, we think, is apparent from the testimony of several of the witnesses for the contestants. In giving the result of the impressions that his looks, conduct and

conversation produced on their minds, it does not seem to us that they wish to be understood as intending to convey the idea or impression that he was permanently insane, or that the mental peculiarities which they observed were habitual.

"At times," says Newhard, "he would talk rather foolish, be sorry for it, burst into tears, and take a crying spell over it." Evidently implying there were other times when his mind was calm and in its normal condition—free from the exciting cause which produced these manifestations. "I could not answer the question as to his mental capacity," says witness McComas, "but I thought he talked very wild that day, for a business man, from what he had talked to me before. But I did not know the cause of this. There might have been something the matter with him I knew nothing of." Mr. McComas was unwilling to give the impression of insanity. He knew he talked differently from what he had before to him, but he evidently felt that it was due to some present cause in his sickness, which he knew nothing about, and which was of a temporary character. Another witness thought the mind of the testator was "liable at any time to drop into natural groves, and seem perfectly rational." Another witness, who thought his mind was weak and confused, considered "he was perfectly at himself part of the time."

These selections, taken from the foremost witnesses for the contestants, are certainly not calculated to impress the mind with the conviction of permanent insanity. At most, the aberrations to which they refer are not habitual, and the character of them, taken in connection with all the facts, and his state of bodily health, make it evident that at times he was delirious from fever, and talked wildly and at random.

The opportunities of several of the witnesses for observing the habits and mental peculiarities of the testator were too limited to entitle any opinion they might express to much consideration. Some only saw him once, and then only for a short time, and others express an opinion on a state of facts upon which it would be unsafe to rely.

"Casual observers," says Mr. Redfield, "those but slightly acquainted with the person, are liable to very great misapprehension in regard to the capacity of aged persons. To a correct estimate upon the subject, it seems to be requisite that one should not only possess general skill and experience upon the question, but that he should either have had long and familiar acquaintance with the particular person, or at least ample opportunity to observe the precise state of the mental powers."

If this be true of aged persons, of whom the testator was one, it certainly applies with much force to the circumstances of his case. In the view thus far taken we have purposely excluded from consideration, with but one exception, the testimony of the proponents of the will. But this view is not inconsistent with the facts upon which their witnesses, the majority of whom were friends and intimate acquaintances of the testator, express the opinion of his sanity. The facts and circumstances which they relate only confirm our opinion that the whole testimony, taken together during this period, shows about this state of facts: That the testator was old, infirm, afflicted with disease, which caused him much suffering, and which, at times and when intensified by fever, deranged his nervous system and produced temporary delirium. That the mental aberration which the testator exhibited was the product of his disease, intensified by fever, which, at such times, clouded his intellectual faculties, and deprived him of mental control and direction.

Mr. Redfield, in his valuable work, says: "The delirium of disease very closely resembles ordinary insanity, so that the patient, when in fever, is often supposed to be insane, and as such has often been removed to the hospital for the insane." It is not strange, then, that some of the witnesses, when they heard the incoherent talk of the testator, and observed his excited behavior, should have thought he was insane.

On this same subject, Chancellor Bland says: "What is commonly called delirium is always preceded or attended by

a feverish and highly diseased state of the body. His thoughts seem to drift about—wildering and tossing amidst distracted dreams. And his observations, when he makes any, as often happens, are wild and incoherent." (1 Bland Ch., 370.)

These delirious states of mind in the testator, were indicated by his spasms of crying, his incoherent talk, his flushed face and fevered look, his excited behavior, and marked change in his habits and mental peculiarities. But the evidence shows that these manifestations were not continuous and permanent, but occasional and temporary, dependent upon the rise and fall of his physical health, and his freedom from fever and suffering.

In such cases the rule of law is, that a continuing insanity is never to be presumed, where the malady with which the testator was affected was in its nature occasional and temporary.

On the 8th day of April, 1878, the testator left his own residence at Hot Lake House, and went to reside at the house of Ellis, a neighbor acquaintance, for the purpose, as it appears, of being nursed and cared for. It was not possible, living alone as he and Newhard did, at their home, for Newhard to give him the care and attention his sick condition required. He did, undoubtedly, the best he could under the circumstances, but the business in which they were engaged necessarily required him to be absent at work during the day, and the testator was too sick to be left alone, as he often was. The testator, of his own accord, went to Ellis', because, as he said himself, he thought Mrs. Ellis was a good nurse, and he would be better provided for, and more comfortable than it was possible to be at his own residence. He remained at Ellis' until he died, which was about the period of seven weeks. He executed his will on the 18th day of May, 1878, and died on the 28th day of May, 1878. During the time he was there, Newhard visited him about once a week, and Mr. Dick two or three times during this period, and these are the

only witnesses (neither of whom was present on the day the will was executed) whose testimony indicates that at the times when they saw him his mind was unsound. On the other hand, Mrs. Peebler and Mrs. Green, witnesses for the contestants, who saw and conversed with him, express an entirely opposite opinion, and think "he was in his right mind." Mr. Goodall visited him two or three times while at Ellis', and on one occasion for the purpose of buying from him some barley, and the conversation and circumstances which he details, show that he was rational, and talked and behaved with sense and judgment. Mr. T. A. Wallace saw him and conversed with him, as also did C. S. Kahler and Mrs. Mary Wallace, and the impression which his conduct and conversation produced on their minds was that the testator was sane, and "in his right mind." The facts and circumstances which they relate of his bearing and conversation, are susceptible of no other conclusion. Mr. Ellis, the executor, and Mrs. Ellis, the devisee of the will, express the same opinion. There is no doubt, from the evidence, that the testator was more comfortable at Ellis', in less pain and more free from fever. Mr. Goodall noticed this. He says: "Each time I saw him at Ellis' he appeared free from fever," and the result was, as the evidence shows, that his conversations were "reasonable," and he displayed that sagacity and judgment which belong to men of his age, intelligence and condition in life. That there was one or two occasions, while at Ellis', when his mind was flighty and wandering, and he exhibited manifestations similar to what was testified to when at Hot Lake, is doubtless true. Banton testifies to a conversation he had with Mr. and Mrs. Ellis, in which Ellis said that "Clark got on a wild tantrum spell the other night." This circumstance, as related by Mrs. Ellis, in her testimony, of his refusal to sleep in his bed-room; his coming out upon his crutches into the sitting-room, and sitting down on the lounge; of his angry and impatient conduct when they tried to persuade him to return; of his sliding off the lounge on the floor, and the arrangements they had to

make for him to sleep there, to pacify him, indicates a feverish state, when his nerves were jarring and his mind flighty, and without much mental control. Nor does there seem to be any disposition on the part of these witnesses to avoid this conclusion. The language of Mr. Ellis indicates what he thought, and the facts in respect to such circumstances are stated in the testimony of Mrs. Ellis. But that this was exceptional, and not his ordinary condition, is made again evident by her testimony. She says: "When not overdone and nervous, as sometimes at night he was, he was clear, wonderfully so, for one of his age, and sick as he was."

It is proper to notice here, that none of the witnesses to whose testimony we have referred, were present at the execution of the will, nor saw the testator that day, with the exception of Mr. and Mrs. Ellis. The will was written by Robert Eakin, an attorney-at-law, and at the request of the testator. Mr. Eakin testifies that about the 11th day of May, 1878, Dr. Drake notified him that the testator wanted to see him at the residence of Mr. Ellis, for the purpose of making a disposition of his property; that, in response, he went and saw the testator, and was then employed by him to draw the will. That the testator told him he wished to will his property to Mrs. Ellis, and gave him the details in reference to the disposition of the interest he owned in the property, and where he could find a description of the real estate, as he could not recollect it. Mr. Eakin asked him in reference to his family, and he said that they had no claim upon him, and he did not wish them to have his property. When Mr. Eakin asked him if he knew they must be mentioned in the will in order to make it valid as against them, he said he did not, and remarked, "you know best;" and, "if that is the case, mention them in the will;" that he wished the will to be drawn right, so that they could get none of his property.

Certainly no one can examine the testimony of Mr. Eakin and reach any other conclusion than that the testator was, at this time, rational and understood what he was doing. All

the statements of the interview are candidly told, and are consistent with the transaction.

A good deal of stress was laid on the fact that he disinherited his children, but this is consistent with his manifest intention when his mental powers were not questioned. A will which he had made some time before excluded them from its benefits, and gave his property to a nephew, which, it seems, he destroyed. Subsequently, while at Hot Lake House, it is in evidence that he repeatedly declared it to be his intention to leave his property to the "poor widows and orphans."

He had been separated from his family for over a quarter of a century. His wife had obtained a divorce, in 1857. He had corresponded with his daughter until about 1860, when his letter was returned under circumstances of insult, and the sting of filial unkindness undoubtedly still rankled in his bosom, and all his acts and declarations, so far as the evidence shows, manifest a deliberate intention to exclude them from his bounty. But the unreasonableness of his prejudices, or the unfairness of his disposition of his property, or his disregard of the claims of natural affection, are not of themselves alone sufficient to induce a court to repudiate his will.

If he possessed testamentary capacity, and the will was the product of his own free agency, the right to dispose of his property by will as he pleases, is as sacred and absolute under the law as any other right.

On the 18th day of May, 1878, the will was executed by the testator. The subscribing witnesses are Dr. H. B. Drake, his physician, and Miss Lillie Blackslee, a young lady twenty-two years of age, and in the employment of Mrs. Ellis. Dr. Drake testifies that the testator requested him, and also Miss Blackslee, to sign the will as witnesses; that during the months of April and May, in the capacity of his physician, he visited him once or twice each week; that the testator was afflicted with tuberculosis of the lungs, which affected his lungs and liver. That "he was mentally sound whenever I saw him;"

that he was clear and rational on the 18th day of May, 1878, when the will was executed; that he considered him sound mentally, and particularly clear on all business matters; that at the time the will was executed he was very weak and confined in bed; that he desired him to witness the execution of the will, because he knew his mental condition, and could testify to the same; and that the testator said at that time that he desired Mrs. Ellis to have the property as he had willed it.

Miss Blackslee testifies that she went to Ellis' about the 5th or 7th of May, 1878, and that she saw him daily while she was there; that she signed the will at the request of the testator with Mr. Drake; that she did not see the testator sign the will, but that Dr. Drake asked him if that was his signature, and he replied that it was; that the will was lying on the table at his bedside when she signed it, and that the testator saw her sign it; that she signed and immediately left the room, but thinks Dr. Drake went out of the room before she signed it; and that he was of sound mind.

The evidence of this witness shows that she had ample opportunity to observe the mental condition of the testator for ten or twelve days prior to the execution of the will. She was there for the purpose of "helping Mrs. Ellis in the housework and care of the old gentleman," and the impression which his conduct and conversation produced on her mind was, that the testator was of sound mind during that time and at the execution of the will.

The testator died ten days after the execution of the will, on the 28th of May, 1878, and four days before he died, and during these last four days, Mr. Pratt took care of him, and he says, "he was in his right mind part of the time, and part of the time he was not;" but that on the day he died, "he wanted me to give him a gun to shoot himself with, and he wanted me to give him a razor to cut his throat with; did not want me to change the hot rocks in the bed, said they were burning him when they were cold, and from these facts I did

not consider him of sound mind." He was evidently delirious, and in a high state of fever on the day of his death.

It only remains to ascertain the law and apply it to the facts of this case. In *Daniel* v. *Daniel*, 39 Penn. St. R., it is said that "testamentary capacity implies that the testator fully understands what he is doing, and how he is doing it; he must know his property and how he wishes to dispose of it among those entitled to his bounty. If he understands, in detail, what he is doing, and chooses with understanding and reason between one disposition and another, it is sufficient."

In *Home* v. *Home*, 9 Iredell, 99, with reference to the amount of testamentary capacity necessary, it is said it is sufficient if the testator knew what he was doing, and to whom he was giving his property; and in 1 Redfield on Wills, 125, 127, it is said that this is about as accurate and brief a definition as can be given.

In *Kinne* v. *Kinne*, 9 Conn., 104, the court say: "Had he an understanding of the nature of the business he was engaged in, a recollection of the property he meant to dispose of and of the persons to whom he meant to convey it, and the manner he meant to distribute it between them?"

In *Stevens* v. *Vancleve*, 4 Wash. C. C. R., Washington, J., said: "To sum up the whole in the most simple and intelligent form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?"

The point of time, then, to be considered at which the capacity of the testator is to be tested, is the time when the will was executed. This is the important epoch. And Judge Washington says: "The evidence of the attesting witnesses, and next to them, of those who were present at the execution, all other things being equal, are most to be relied upon."

In the case before us, none other than the attesting witnesses were present at the execution, and they have testified to the soundness of his mind at that time. The evidence of the attorney who drew the will according to his instructions,

and the positive and uncontradicted testimony of the subscribing witnesses to the will, of the soundness of the testator's mind at the time the will was executed, establish beyond doubt that the testator was rational, and did know and understand what he was doing at the time the will was executed. As was said in the case of *Lee's Heirs* v. *Lee's Executor*, "There was so much deliberation and thought in all this, that even if the testator had been before afflicted with habitual insanity, yet this conduct was sufficient to establish a complete intermission." (4 McCord, 123.)

The facts in that case were much stronger than those in the case under consideration, and even if it be conceded that the manifestations the testator exhibited while at Hot Lake House, show habitual insanity, the evidence is conclusive that they were less frequent while at Ellis', and did not exist when he instructed his will to be drawn, and when he executed it. There is no testimony of the contestants which reaches this point, and in the absence of such, and the uncontradicted testimony of the subscribing witnesses of the testator's soundness of mind at the time the will was executed, we are of the opinion that the testator knew and understood the business in which he was engaged at the time he executed his will, and that such will was the product of his own free agency.

The decree of the court below is reversed.

C. F. LUSE v. W. A. LUSE.

APPEAL—WHAT NOTICE MUST SHOW.

Notice must show with certainty that the decree appealed from is the one disclosed in the transcript of the record from the court below, and fully identify it as such.

APPEAL from Coos.

R. S. Strahan, for appellant.

W. R. Willis and A. M. Crawford, for respondent.

The facts are stated in the opinion of the court.

By the Court, WATSON, J.:

The respondent has filed in this case a motion to dismiss the appeal from insufficiency of the notice. After stating the title of the cause in the court below, the notice proceeds:

"To C. F. Luse, plaintiff, and to G. Webster, Esq., T. G. Owen, Esq., and J. W. Hamilton, her attorneys: You will take notice that defendant, W. A. Luse, appeals from the decree rendered in the court aforesaid on the 2d day of June, 1880, to the supreme court of the state of Oregon."

Then follows a specification of alleged errors, not necessary in a notice of appeal from a decree, and in our judgment not curing the alleged defects in the notice, if we were at liberty to consider them with that view.

The notice is clearly insufficient for the reason that it does not identify the decree it refers to as to the one disclosed in the transcript of the record from the court below, either by reference to the title of the cause, or by such description in the body of the notice itself, as would enable the court to say with certainty that it was the same decree.

This view, we think, is in accordance with the principles announced in the decision of the case of *Christian* v. *Evans,* 5 Oregon, 253, and other cases therein referred to upon this subject.

The motion to dismiss must be granted.

Appeal dismissed.

CHENOWETH & JOHNSON v. LEWIS, et al.

VERBAL AGREEMENT FOR INTEREST IN LAND.

Where a verbal agreement was made for the sale of an equitable interest in land: *Held*, that such agreement was void.

APPEAL from Benton.

The facts in this case are that Sarah E. Wagner, formerly the wife of Jesse B. Lewis, respondent, filed a complaint in equity in which she alleges her marriage, in 1856, with, and divorce in the year 1876 from, the said respondent, and her subsequent marriage, in the year 1878, to Charles Wagner; that during her marriage with the said respondent, J. B. Lewis, they acquired, by residence and cultivation, a donation land claim of three hundred and twenty-two acres, in Polk county, Oregon, and that the north half of such claim enured to her by patent from the United States. That in the year 1858, she and her husband sold this donation land claim for fourteen hundred dollars, and that with this money they purchased other lands in Polk county, Oregon, and that the last mentioned lands were exchanged by them for certain lands, described in the complaint, in Benton county, Oregon.

The appellant further alleges that the said Sarah E. Wagner died a few days after filing her said complaint, and that the defendants, John and Lilly Lewis, are the only heirs-at-law of the said Sarah E. Wagner, deceased, and that they refused to be made plaintiffs on this suit.

The appellants then allege that prior to the commencement of the suit of the said Sarah E. Wagner, she employed the plaintiffs to conduct said suit to final determination, and to compensate them for their services, she sold to the appellants, by verbal contract, an undivided one-half interest in the property or money to be recovered in her said suit.

The separate answer of the respondent, Jesse B. Lewis, admits the interest of the said Sarah E. Wagner in the donation claim, sold for seven hundred dollars, and no more, and that

the money realized from the sale, together with eighteen hundred dollars furnished by said respondent, was invested in other lands in Polk county, which were exchanged for the lands now held by him in Benton county, and alleges further, that in satisfaction of all claim, right, or interest she might have in said property, or other property in his possession, or name, by virtue of her donation right, or otherwise, he conveyed to the said Sarah E. Wagner other valuable real and personal property which was accepted in lieu thereof, and in full satisfaction of the same. The appellants filed a reply, and upon issue joined the evidence was taken, and upon submission to the court a decree was rendered, in favor of the respondents, and the appellants appeal therefrom.

Chenoweth & Johnson, for appellants.

This being a trust fund, arising from a resulting trust, it may be followed into land by parol evidence, and is not within the operation of the statute of frauds. (Perry on Trusts, Secs. 137, 138 and 836.) Appellants claim under an equitable assignment. (Barbour on Parties, sec. 179; 8 How. Pr. R., 514.) An assignee may sue in his own name. (Story's Eq. Pleadings, sec. 153; Pomeroy on Remedies, 132-137; *Grain* v. *Aldrich*, 38 Cal., 514.)

Kelsay & Burnett, for respondent.

The contract or agreement of the appellants, with Sarah E. Wagner, was for an interest in land, and is void because it is not in writing. (Code, page 265, sec. 775; *Fuller* v. *Reed*, 38 Cal., 109; *Millard* v. *Hathaway*, 27 Cal., 144; *Videau* v. *Griffin*, 21 Cal., 391.)

By the Court, LORD, C. J.:

The view we take of this case renders it unnecessary to consider several questions which were discussed at the argument. The pleadings, taken together, exhibit a state of facts from which the law raises a resulting trust in favor of Mrs. Wagner, of an undivided equitable interest in the land in question.

It is true that parol evidence is admissible to establish such a trust, but it is also well settled that the interest of the *cestui que trust* cannot be conveyed by parol. (Perry on Trusts, Sec. 79, and authorities cited.)

The interest of the *cestui que trust* is an equitable interest in land, and a sale or release of the same can only be proved by a conveyance, or other instrument in writing, subscribed by the party granting or releasing the same, or by his lawful agent under written authority, and executed with such formalities as are required by law. Nor is any contract or agreement by the *cestui que trust*, for the sale of such equitable estate or interest in land, valid, or admissible as evidence, unless some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged, or by his lawfully authorized agent. (Civil Code, sec. 775.)

The equitable estate of Mrs. Wagner is admitted, and existed at the time the verbal agreement was made with the appellants, unless she previously released the same by proper instrument in writing, to the respondent, Jesse B. Lewis, in consideration of the real and personal property conveyed to her as alleged. It is unnecessary, however, to consider that question. The agreement was for the sale of an equitable estate or interest in land, which, under the provision of our statute, above cited, is required to be in writing. (See, also, Browne on Frauds, sections 226 to 229; *Hughes* v. *Moore*, 7 Cranch, 176; *Richards* v. *Richards*, 9 Gray, 313; 3 Sum., 435; *Millard* v. *Hathaway*, 27 Cal., 127.) It follows that the judgment of the court below must be affirmed.

Judgment affirmed.

Syllabus.

STATE v. WINTZINGERODE.

INDICTMENT—SUFFICIENCY OF.

An indictment for murder, in the form provided by section seventy of the criminal code, is sufficient.

MURDER—DEGREES OF.

If the acts specified in the indictment constitute the crime of murder in the first degree, under section 506 of the criminal code, it will support a conviction in either degree.

EVIDENCE—COLLATERAL OFFENSES.

Evidence, if relevant to the issue in a criminal action, is not rendered inadmissible for the reason that it tends to prove the defendant guilty of collateral offenses.

INTENT—HOW MAY BE SHOWN.

Evidence of the defendant having procured two guns shortly before the murder, which were found soon after, secreted in the straw, under the head of his bed, in a room in a barn, in which he usually slept, was properly admitted to show his intent, although only one of them could have been used in perpetrating the crime. Such evidence would have been admissible though neither of them had been actually used.

CIRCUMSTANCES ADMISSIBLE.

Evidence that the defendant was seen the day after the murder, in possession of a certain sum of money, in connection with other evidence that he did not possess so great an amount prior thereto, but that deceased did have a similar amount of money of the same kind only a few days before his death, was admissible to connect the defendant with the commission of the murder. It might, in connection with the other evidence offered by the state, justify an inference that it was the fruits of that crime, and the motive for its commission.

CONFESSIONS, ADMISSIBILITY OF—COMMON LAW RULE PREVAILS.

Section 169 of the criminal code has not altered the rule of the common law as to the inadmissibility of confessions induced by the influence of hope, applied to the prisoner's mind by an officer of the law having him in custody on a charge of crime.

When a confession has been improperly obtained by such officer of a prisoner in his charge, by such means, a subsequent confession of similar facts, made by the prisoner while still in custody, upon the same charge, should be excluded, unless facts or circumstances are shown which fairly justify the inference that the influence under which the original confession was obtained, has ceased to operate upon the prisoner's mind.

Whether such influence has ceased is a question of fact to be determined by the court below in which the trial is had, and it is only where the record fails to show that any satisfactory evidence was before that court on the question, that this court will disturb its determination.

APPEAL from Washington.

On the 8th day of January, 1880, Jacob Swanger was killed in Washington county, Oregon, and on the 25th day of May ensuing, Henry Wintzingerode, the appellant, was indicted by the grand jury of said county for the crime of murder, for causing the death of said Jacob Swanger. The body of the indictment is as follows:

"Henry Wintzingerode is accused by the grand jury of the county of Washington, by this indictment, of the crime of murder, committed as follows: The said Henry Wintzingerode, on the 8th day of January, A. D. 1880, in the county of Washington, in the state of Oregon, purposely and of deliberate and premeditated malice, killed Jacob Swanger, by then and there shooting him and beating him on the head with a gun, and by then and there striking and beating him on the head with an axe, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

The appellant being then in custody, was arraigned, and a motion to quash the indictment, and also a demurrer having been overruled by the court, plead "not guilty" to the indictment.

The case was tried at the May term of the circuit court for Washington county, 1880, and a verdict of guilty of murder, in the first degree, returned by the jury, upon which verdict sentence of death was passed by the court, June 10, 1880. From this judgment Wintzingerode has brought this appeal.

The other necessary facts are given in the opinion.

T. B. Handley, E. Mendenhall and *J. M. Bower,* for appellant.

The indictment is insufficient, because it is not direct and certain as to the crime charged. (Crim. Code, secs. 70-72.) Nothing can be taken by intendment, and descriptive words of a penal statute must be strictly followed. The crime charged is unknown to our statute. (Crim. Code, secs. 506,

507.) The indictment and verdict will not sustain the judgment. (Crim. Code, sec. 179; *State* v. *Gaffrey*, 3 Wis., 369; *People* v. *Tully*, 6 Mich., 273; Bishop's Crim. Pr., sec. 565, and cases cited.)

The first confession of appellant was made to officer Mead, and was rightly excluded. (*People* v. *Backus*, 5 Cal., 275.)

Subsequent confessions were erroneously admitted in evidence, as no warning of their consequences had been given the appellant, and the original improper influence had not ceased to operate upon his mind. (1 Whar. Crim. Law, sec. 694. *The People* v. *Jim Ti*, 32 Cal., 60; *State* v. *Chambers*, 39 Iowa, 179; *Commonwealth* v. *Harman*, 4 Penn. St., 269; *State* v. *Jones*, 54 Mo., 478; *Commonwealth* v. *Curtis*, 97 Mass., 574.)

The state was erroneously allowed to prove that before the murder appellant stole a gun from the deceased, and another from an unknown party, and that they were found in his room. This evidence does not fall within any of the exceptions excluding proof of collateral or distinct crimes. (4 Hump., 27; 6 Park., 71.)

John F. Caples, District Attorney, M. F. Mulkey and Thomas H. Tongue, for the state.

In order to prove deliberation the state had a right to show that the defendant disarmed his victim, and provided himself with the instrument of crime beforehand; and because his manner of doing this was criminal, it does not render the testimony incompetent. The question about money was competent to prove that defendant was in possession of the fruits of his crime, and to show his motive and purpose in killing Swanger.

To exclude a confession it must be the product of fear produced by threats. (Crim. Code, sec. 169, p. 362; *State* v. *Potter*, 18 Conn., 166; *State* v. *Freeman*, 12 Ind., 100.)

The existence of fear must be determined by the judge, and

the admission is in his discretion. (1 Greenleaf on Evidence, sec. 219.)

The threat must be sufficient to overcome the mind of the prisoner, in the judgment of the court. (1 Greenleaf on Evidence, 220.)

Our statute, sec. 169, page 362, modifies the common law rule essentially. The evident intention is to allow all confessions of guilt to be given in evidence that are not produced by threats. (*State* v. *Freeman*, 12 Ind., 100; 18 Am. Decis., 404.)

By the Court, WATSON J.:

The first question to be considered is in regard to the sufficiency of the indictment. It was raised by the appellant in the court below by demurrer and motion. That court overruled the demurrer and motion, and these rulings are assigned as error.

In the caption or introductory part of the indictment, the crime whereof the appellant was accused was murder—the degree not being stated. But the succeeding portion charges the commission of acts by appellant which, under our statute, constitute murder in the first degree. (Sec. 506, Crim. Code.)

The indictment is in the form permitted by the criminal code, and is, in our judgment, sufficient. Section 69 provides that an indictment shall contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the name of the parties.

2. A statement of the facts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

The specification in this case clearly shows the crime charged, without reference to the description in the caption, and fixes the degree. But indictments in this form are not only author-

ized by statute, but have been held sufficient by the highest courts in this and other states. (*State* v. *Dodson*, 4 Oregon, 64; *State* v. *Eno*, 8 Minn., 220.)

Bishop lays down the proposition that, "in those states where murder is by statute divided into degrees, a defendant, on a general indictment, or an indictment for murder in the first degree, may be convicted of the offense in either degree, if the indictment is in such form as to embrace all in its actual allegations—the statute making it necessary for the verdict to state which degree." (1 Bishop's Crim. Law, sec. 797.)

Section 183 of the criminal code of this state makes it necessary for the verdict to state the degree, if the defendant is found guilty of any degree inferior to that charged in the indictment.

The next objection urged by the appellant here, is to the rulings of the court below, admitting certain evidence offered by the state, on the trial, in relation to two guns and some money, alleged to have been discovered in the appellant's possession soon after the murder of Swanger.

According to the bill of exceptions in the record, during the trial, and after testimony had been given tending to prove that deceased was killed by blows inflicted by a dull, heavy instrument, and that a rifle, then in court, was subsequently found near defendant's bed, in a barn in which defendant usually slept, a witness, named Delano, was called by the state and allowed to testify, over appellant's objections, that this rifle belonged to the deceased, but had been taken away from the house of deceased at the time it was robbed, which was about three weeks before he was murdered. The same witness also testified that the deceased had, a few days before his death, two twenty-dollar gold pieces and some silver in a common buckskin purse.

Another witness, named Freeman, also on behalf of the state, was permitted to testify that the rifle mentioned by Delano, another gun and a shot-pouch were found together, in and under the straw, at the head of appellant's bed, in the

room in which appellant usually slept, and that the witness did not know who the owner of the latter gun was.

Christopher Dietz, another witness for the state, testified that appellant had lived and worked for him most all the time for two years preceding the murder of Swanger; that he never had any gun during that time, within the knowledge of witness, and that the first time witness knew of his having any gun was after the murder, when two guns were found in his room.

The two guns mentioned by the witness, Freeman, were then exhibited to the witness, Dietz, identified by him as those having been found in appellant's room soon after the murder, and were given in evidence to the jury.

Dietz also testified that appellant had only two or three dollars before the murder. Mr. Dietz and the two Webber girls, also witnesses for the state, testified that he had money in a purse, on the evening of the day following Swanger's death; the Webber girls testifying that they saw him on the day following the murder, with something over thirty-two dollars in his possession.

All of this evidence was objected to by appellant, and exceptions taken to its admission.

Appellant claims that this evidence tended to prove that he was guilty of other offenses not connected with the commission of the crime of murder, for which he was being tried, and that his defense before the jury was thereby greatly prejudiced, to the serious injury of his substantial rights.

It is not contended that if the evidence admitted and objected to was relevant to the issue, on the trial of the indictment against appellant for the murder of Swanger, its admission was error, although it did incidentally tend to disclose the commission of other distinct offenses. (1 Wharton's Crim. Law, sections 647, 650.)

But appellant urges with great earnestness, that the facts established, or attempted to be established, by this evidence,

were not relevant, and afforded no inference as to his guilt in regard to the murder of Swanger.

But we think they were relevant, and that the evidence was properly admitted. Any evidence tending directly to show that the appellant was, at the time of the alleged crime, in possession of the instruments used in perpetrating it, or if the instruments used could not be precisely identified, then of the instruments capable of being used, or adapted for use in its commission, in the manner proven, was admissible. (3 Greenleaf on Evidence, secs. 32 and 33; *People* v. *Larned*, 3 Selden, 445; *Commonwealth* v. *Williams*, 2 Cush. 586.)

It is no valid objection to this evidence that it shows the appellant had two guns in his possession, while he could only have used one in committing the crime. The evidence given in the bill of exceptions does not disclose which was used, but if it had the admission of the evidence would still have been proper.

Finding both guns together, in the prisoner's possession, so soon after the murder, and evidently secreted, might, in connection with the other evidence in this case, justify the jury in concluding that he had obtained possession of them and collected them together, in contemplation of committing the murder of which he was accused. Any act of preparation to commit a crime is admissible on the question of intent.

So if neither of the guns in evidence had actually been used in committing the murder, but the circumstances under which the prisoner obtained and kept possession of them would justify the inference that he had obtained them for that purpose, such circumstances might be shown as bearing on the question of his intent.

It was not error either to allow the state to prove that one of these guns belonged to Swanger, and was taken away from his house at the time it was robbed, only a short time before the murder. Finding it in the prisoner's possession so soon after the murder, secreted in the manner proven, in connection with the evidence concerning the robbery of the house,

the theft of the gun, only some three or four weeks previous, afforded a very strong inference for the jury that the prisoner obtained it at the time of the robbery of the house, and must have had it in his possession at the time of the murder.

The evidence of Christopher Dietz certainly tended to prove that the prisoner must have procured the two guns only a short time before the murder, and kept them secreted. This was the object of his testimony—not to prove that the prisoner had committed other distinct crimes to obtain the guns.

The testimony in relation to the money stands even on stronger grounds. Its tendency was to connect the prisoner directly with the commission of the murder, and also to disclose a motive for its commission. It was for the jury to consider whether or not the money which was seen in his possession on the day succeeding the murder of Swanger, was the fruits of that crime.

We come now to the questions presented by the exceptions, taken by appellant at the trial, to the admission of evidence of his confessions, made while in custody, upon the charge of having murdered the deceased.

The difficulty in the way of a satisfactory determination of these questions, is greatly augmented by the serious doubts we have felt as to the proper effect to be given to our own statute upon the subject.

Section 169 of the criminal code, provides: "A confession of a defendant whether in the course of judicial proceedings, or to a private person, cannot be given in evidence against him when made under the influence of fear produced by threats; nor is a confession only sufficient to warrant his conviction without some other proof that the crime has been committed."

It is insisted on behalf of the State that this section has altered the common law rule on the subject, and that only those confessions can now be excluded which have been "made under the influence of fear produced by threats."

In support of this view the case of the *State* v. *Freeman*, 12 Ind. 100, and *State* v. *Guild*, 18 Am. Decis., 404, have been cited. We do not find either to be in point. The former was decided on a statute essentially different from ours. It declares that "the confessions of the defendant made under inducements, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats." The latter treats of the subject on common law principles solely.

A statute identical with ours, in the state of Minnesota, does not seem to have been considered by the courts of that state as in any manner changing the common law rules as to the admissibility or inadmissibility of confessions, although we have not been able to find any direct decision upon the question. Long after the statute was enacted, the supreme court of Minnesota, in the case of the *State* v. *Staley*, 14 Minn., 110, referring to the common law authorities, say: "The rule seems well settled that if any advantage is held out, or harm threatened of a temporal or worldly nature, by a person in authority, the confession induced thereby must be excluded."

Nor have we been able to find where the common law rules have been modified or abrogated in any state except Indiana, under its peculiar statute, to the extent of admitting confessions induced by promises of favor, by officers of the law, made to prisoners in their custody.

It is obvious that the inducements to confess, contained in promises, may be as powerful as any which threats could convey, where both come from the public officer having the prisoner in his custody and under his control.

But apart from such considerations, we are not aware of any principle of law which would justify the construction contended for by respondent.

Here is a declaratory statute, couched in affirmative words wholly, and, unless negative words must be implied, it does not abrogate any rule of common law relating to the admis-

sibility of confessions in criminal trials. (Potter's Dwarris on Statutes and Constitutions, 56.)

Is there any ground here, then, for employing negative words? We think not. The statute purports only to extend to one class of confessions, viz.: Those induced by threats. It does not even mention the other class, to wit: Those induced by promises or intimations of favor from persons in authority and having the party confessing in their custody.

These two classes are distinct and rest on different foundations; and we are not able to perceive how one class can be effectual by implication merely, from legislation which only affirms the principles of the common law as to the other class.

In *Jackson* v. *Bradt*, 2 Caines, 169, it was held that "if a statute, without any negative words, declares that all former deeds shall have, in evidence, a certain effect, provided such and such requisites are complied with, this does not prevent their being used as testimony in the same manner as if the act had never passed."

Upon the whole we are satisfied that our statute is wholly affirmative and that the common law rules, governing the admissibility of confessions are still in force in this state.

This brings us to the consideration of the nature of the inducements held out to appellant by the officers of the law, while he was in their custody, and in consequence of which he maintains his confessions were made, which were afterwards permitted to be proven against him on his trial. The language, used by officer Mead to appellant, then a prisoner in his custody, under arrest, as shown by the bill of exceptions, was: "It would be better for you, Harry, to tell the whole thing." Thereupon the prisoner made his first confession about the killing of Swanger.

Upon this state of facts the court below excluded the testimony. But another witness, named Cameron, was offered by the state, who testified that he was the officer in charge of the county jail at the time of appellant's arrest. That the first or second day after the arrest, and while appellant was a

prisoner in his charge, witness said to him: "This is a pretty bad scrape you have got into. How did it happen?" In reply the prisoner answered: "That he went to Swanger's house to borrow money; had a gun with him; knew Swanger some time. Swanger asked me in, and we talked a while, and I asked him to loan me some money; Swanger then got mad and ordered me to leave. He accused me of having his gun; I denied it; I started to leave, and deceased picked up an axe and ran after me with it. I was going away from the house, and deceased was trying to kill me with the axe, and I shot and struck deceased with the gun; I killed Swanger in self-defense. I took the body in the house. In going away from the house I passed the spot where Swanger fell, and seeing a purse on the ground, that had fallen from his pocket, I picked it up, thinking I might have it and take it home."

This testimony was admitted over the appellant's objections.

Dr. Bailey, another witness for the state, also testified to confessions made to him by the prisoner while in custody, and soon after the confession was made to Cameron.

Appellant made the same objections to this testimony, but they were overruled, and the testimony admitted.

We have no reason to doubt the correctness of the ruling of the circuit court rejecting the testimony of officer Mead as to the confession made to him by the appellant.

There seems to be no conflict among the numerous authorities as to the rule, that confessions made by a prisoner while in custody, and induced by the influence of hope or fear, applied by a public officer having the prisoner in his charge, are inadmissible in evidence against him.

The precise form of words in which the inducement is presented to the prisoner's mind is immaterial. It is sufficient if they convey to him the idea of temporal benefit or disadvantage, and his confession follows in consequence of the hopes thereby excited.

Accordingly, where an officer said to his prisoner, immediately after arresting him: "If you are guilty you had better

own it," the confession made in reply was excluded. (*State* v. *York*, 37 N. H., 175.)

Saying to the prisoner that "it will be warm for him if he does not confess," or that it will "be better for him if he does," is sufficient to exclude the confession, from constant experience. (2 East P. C., 659; *Commonwealth* v. *Curtis*, 97 Mass., 578.)

Mr. Greenleaf says: "Before any confession can be received in evidence in a criminal case, it must be shown that it is voluntary. The course of practice is to inquire if the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him." (Greenleaf on Evidence, sections 219, 222, 223; *Commonwealth* v. *Tuckerman*, 10 Gray, 190, 191.)

But it is needless to multiply citations on this point. A question equally as important arises upon the admission of Cameron's testimony, showing the confession of appellant to him. Appellant claims, and the authorities fairly support the position, that the confession having been originally obtained by officer Mead, improperly, through the inducements held out by him, his subsequent confessions to Cameron and Dr. Bailey, and others, were inadmissible, without showing that the motives for his original confession had ceased to operate.

Mr. Greenleaf cites, with evident approbation, the rule laid down in the *State* v. *Guild*, 18 Am. Decis., 404, above referred to on this subject. In this case, upon much consideration, the rule was stated to be, that although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts, may be admitted, if the court believes that from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. And adds, citing *Roberts' case*, 1 Denio R., 259, 264, "in the absence of any such cir-

cumstances, the influence of the motives proved to have been offered, will be presumed to continue and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected." (1 Greenleaf on Evidence, section 221; to the same effect, *State* v. *Jones*, 54 Mo., 478; 1 Wharton's Criminal Law, section 594; *Commonwealth* v. *Harman*, 4 Penn. St., 269; *Van Buren* v. *State*, 24 Miss., 512.)

The circuit court had the undoubted right to try the question whether the original influence had ceased when the subsequent confessions were made, and if the record before us disclosed any fact or circumstance to justify the belief that they had in fact ceased, when such subsequent confessions were made, we should not disturb its determination. But no such facts or circumstances appearing by the bill of exceptions, which purports to give all the testimony in substance, the subsequent confession to Cameron being on the same or at farthest the day succeeding the original confession to officer Mead; the prisoner being still in custody, on the same charge; the inducement to make the original confession being still in full force and not withdrawn, and no warning having been given, we cannot escape the clear and firm conviction that the same influences which induced the original confession to officer Mead, and which the circuit court, with better facilities for arriving at a correct conclusion than this court possesses, held inadmissible, because it was so induced, were in full operation upon the appellant's mind when subsequent confessions were made, and that therefore these confessions should have been excluded on the trial, and not allowed to be given in evidence against him.

For this reason we are of the opinion that the judgment of the circuit court must be reversed and a new trial had.

Judgment reversed and a new trial ordered.

HYLAND v. BLODGETT.

DRAFT—ORDER FOR CHATTELS.

An order for the payment of a certain sum in lumber, does not legally import an undertaking by the drawer that the payee shall obtain the chattels, nor that the drawer will be answerable to him for their value, on the drawee's refusal to accept or pay the order.

BILLS OF EXCHANGE.

The law and incidents of a bill of exchange do not attach to such an instrument.

APPEAL from Benton. The facts are stated in the opinion.

Chenoweth & Johnson, for appellant.

Defendant moved for a non-suit in the circuit court, claiming for the first time want of notice. This motion should not have been allowed under the pleadings, because it was inconsistent with the plea of payment. Respondent should be held to his plea of payment, because it is the only defense pleaded. (Van Sandford's Pleadings, 561 and 596; Bliss on Pleadings, secs. 343 and 344; Edwards on Bills and Notes, pages 134, 210, 649; Code, page 120.)

Respondent, after being told that McCullough had not accepted or paid the order, promised to pay it. This promise is evidence that he had been duly notified of the non-acceptance and non-payment. (Edwards on Bills, 650, 653, 645; 14 Mo., 48; 23 Wend., 378.)

J. W. Rayburn, for respondent.

Admitting that the rules governing the presentment, and notice of non-acceptance and non-payment of bills of exchange, are applicable to a case like this, the motion for a non-suit was properly granted. (Parsons on Contracts, page 277; *Johnson* v. *Arrigoni*, 5 Or., 485.)

This is not a bill of exchange. It does not come within any of the provisions of the law merchant, and none of its doctrines can be applied to it. (*Coyle's Executors* v. *Satterwhite's Administrators*, 4 Monroe, 121; *May* v. *Lansdown*, 6 J. J. Marshall, 165.)

By the Court, LORD, C. J.:

This was an action brought in a justice's court upon the following order:

"Mr. McCullough, please pay to B. F. Hyland, or bearer, ninety dollars in lumber. "WM. BLODGETT."

The complaint alleges the presentment and demand of payment, in lumber, of the said McCullough, his refusal to accept or pay it, and notice to the respondent of non-acceptance, &c. To this followed the answer and reply, and a judgment of non-suit; but, which, owing to the view we take of the case, it is unnecessary to further particularize.

The instrument of writing, set out above, is an order payable in lumber, and not a bill of exchange, and the appellant, by making the demand and giving the notice which would charge the drawer of a bill of exchange, does not thereby entitle himself to maintain an action on this order.

In *Sears* v. *Lawrence*, 15 Gray, 269, this identical point was decided. The action was brought on an order "to pay to the order of Willard Sears three thousand four hundred and seventy-nine dollars and seventy-three cents, in good merchantable lumber," &c., and Metcalf, J., in delivering the opinion of the court, says: "An order for the payment of a certain sum in chattels does not legally import an undertaking by the drawer that the payee shall obtain the chattels, nor that the drawer will be answerable to him for the value of them, on the drawee's refusal to accept, or pay the order. The law and incidents of a bill of exchange do not attach to such an instrument. The principle is that such orders for commodities do not come within the provisions of the law merchant, and none of its doctrines can be applied to it." In *Coyle's Executors* v. *Satterwhite's Administrator*, 4 Monroe, 124, it is held that "all drafts or orders drawn for other commodities, operate only as an authority to receive the contents, and the holder of them is not bound to apply either the speed or the formalities required in conduct-

ing a bill of exchange," and that when suit is instituted it must be based on the original cause of action. Upon this point, however, we express no opinion, as that question would depend upon matter not now before the court. The judgment of the court below is affirmed.

Judgment affirmed.

RICKARD v. RICKARD.

DIVORCE—EVIDENCE—ADULTERY.

Where adultery between parties closely related in blood is charged as a ground for divorce, the proof ought to be clear and convincing, and not rest in mere inferences from equivocal circumstances.

APPEAL from Benton.

R. S. Strahan, Wm. R. Willis and J. W. Rayburn, for appellant.

John Kelsay, John Burnett and N. B. Knight, for respondent.

By the Court, WATSON, J.:

The appellant brought this suit for a divorce, in the circuit court for Benton county, upon the grounds:

First—Cruel and inhuman treatment and personal indignities, rendering her life burdensome.

Second—Adultery by respondent with one Mary Meats.

The answer denied both these charges, and the court below, on the evidence, entered a decree for the respondent. The appeal is from this decree.

The parties to the suit were married in Benton county, November 21, 1871, and lived together there, as husband and wife, until June 2, 1879, when appellant went to the house of

her parents, some twelve miles distant, and has remained there ever since.

Three children were the issue of this marriage—one girl and two boys. The girl is dead. The boys are both living, named Bay and Ray, aged respectively, six and four years.

Mary Meats is respondent's half-sister. He is forty-nine, and she is some ten years younger. He brought her and her sister out with him from Illinois, in the fall of 1866, and she lived with him and kept house for him from that time until his marriage with the appellant. About a week after his marriage, Miss Meats went away, and was absent for several months, when he brought her back, and she has remained at his house ever since. During this period she seems to have been engaged in the work about the house and farm, and in taking care of the children. The valuable character of her services during this long period cannot be denied.

During the earlier and much greater portion of this period, Mr. and Mrs. Rickard seem to have lived together as agreeably and with as little domestic infelicity as ordinarily falls to the married lot. It is true she testifies that he ceased to love her soon after their marriage; became sullen and morose in her society, and in 1876 struck her once, on the shoulder, while in a fit of anger.

But her subsequent conduct, we think, fully justifies the inference that none of these matters created any deep or annoying impression in her mind—most certainly not to the extent of rendering her life burdensome, or raising apprehensions for her future security. Nor do we think these observations of hers upon his general demeanor toward her, or this isolated act of physical violence, if it actually occurred as she has testified, followed as they were by years of peaceful, and, to all external appearances, congenial domestic intercourse, and in no manner connected with their after differences, can have any weight in the final decision of this case.

In any possible view that can be taken of the evidence, it is apparent that the unfortunate misunderstandings between

these parties, which have resulted in their hopeless estrangement and final separation, had their origin in Mrs. Rickard's deep distrust and bitter aversion for Mary Meats. Whether guilty or innocent, Mary Meats was at the bottom of the trouble. In substance, the evidence offered, which we deem of vital importance, is as follows:

Laura Rickard, the appellant, testifies to her husband's habitual indifference and neglect towards herself, and his constant attention and deference to Mary Meats. That the latter left their house about a week after their marriage, and remained absent for several months, when the respondent brought her back. That afterwards, when the subject of her remaining with them came up, she told him she wanted him to send her (Mary Meats) back to the States to her sister. He refused to do so, and she said no more. This was in 1876. That after he brought her back to their home, he would pull her down on his lap; put his arms around her waist; sometimes lay his hands on her breasts; romp with her; sometimes bite her, when she would refuse to go to bed; sometimes they would go to bed at the same time, and witness would hear her laughing and telling him to quit; and one time witness was sitting in the sitting room, adjoining the bedroom, undressing the children, and after undressing one of them, she went to the door of the bedroom and saw him lying down on the bed, over on Mary Meats; he saw witness and went to bed. That he was in the habit of taking Mary Meats with him when going out to work on the place where they lived, or other places belonging to him, in the neighborhood, and remaining away with her all day. That about the middle of April, 1879, she went to bed early one night, and left Mary Meats and her husband sitting up together. In about half an hour Mary Meats came in and went to bed, her bed being in the same room. A half hour later her husband came into the room, blew the light out and got into bed with Mary Meats, and stayed there about half an hour, when he came to bed with witness. Witness said nothing, for the reason that she

was afraid. She heard "not a great deal of noise; about like a person getting into bed." She says, in answer to cross-question 2163, "Did you hear any noise in any manner, in the bed, after they retired, or any whispering?" that she did not approve of their conduct, but thought it best to wait, say nothing, and see what they would finally do.

It is certain, from all the testimony, that she made no open charge of undue intimacy between her husband and Mary Meats until May 24, 1879. She was quite ill from the 18th of May up to the time she went to her father's house, June 2d, and remained so for three or four weeks after that date.

Abigail Calloway, appellant's mother, testifies that she was sent for, about the middle of May, to come and see her daughter, on account of her sickness, and went and attended upon her two days and nights, and then returned home. She was called back to her daughter's house two days afterwards, and remained there, attending upon her and nursing her, until June 2d, when her daughter went home with her; that while she was there she discovered that the respondent was sleeping in the same bed room where Mary Meats slept—a different room from where his wife was sleeping. That she went into the room where they slept, one morning, and saw him in bed and Mary Meats dressing herself beside the bed; that she only saw the one bed in that room; that when she was there the first time, he slept in the same bed with his wife, and Mary Meats occupied a bed in the same room. Some time after she went there, the second time, Mary Meats took the two children and went into a different bedroom to sleep. Rickard then slept several nights in the bed that Mary Meats had previously occupied, in the same bedroom where his wife slept; then he moved out of that room and went and slept two or three nights in the same room that Mary Meats occupied with the children.

W. R. Calloway, appellant's father, testifies that he was at his daughter's house on several occasions during her illness in May and June, 1879, and that two nights while he was there,

the respondent slept in the same bedroom where Mary Meats slept, while his wife was lying sick in a different room; that he knew this from seeing respondent pass in and out of the bed room night and morning, and from hearing respondent, Mary Meats and the children talking in there, after they had gone to bed; that respondent neglected his wife during her sickness, and did not show her the attention, or make the provision for her comfort, he should have done.

Annie Brown testifies that she stayed at the house two nights during appellant's sickness, in May, 1879; heard respondent, Mary Meats, and the children talking in their bedroom about bed time, and saw him pass in and out of this bedroom night and morning; that there was only one bed, and a pallet spread upon the floor, in this room.

Lillie Taylor, sister of the appellant, aged nineteen, in April, 1879, testifies that she staid at appellant's house one night about 1875; slept in the same bed with Mary Meats, which was in the same bedroom where appellant and respondent slept, in another bed; that about twelve o'clock at night the respondent got up out of his own bed, came over to the bed where witness and Mary Meats were sleeping, and put his hands under the quilts; witness turned over and respondent went back again to his own bed.

J. G. Wygall testifies that he was at their house about New Year's, 1877, and stayed all night; got up in the morning and went into the sitting room; heard one of the children making a fuss in the adjoining bedroom; opened the door and looked in, to see what was the matter; saw two persons lying in the bed together, and pulled the door to and went away. Appellant was in the kitchen at the time, and witness had not then seen either respondent or Mary Meats about that morning, and believes that they were the persons he saw lying in the bed together.

Emma Smith, another sister of appellant, testifies that she was at the latter's house in September, 1879, on Sabbath day; that she and the appellant had been sitting during the after-

noon out in the shade of the house; that when it was time to go home, she went into the sitting room to get her bonnet, and as she passed the bedroom door, saw the respondent and Mary Meats lying on the bed together.

There is an abundance of testimony to show that all three of the parties most interested in the result of this case, are esteemed to be highly respectable in the community in which they live.

The respondent and Mary Meats both, in their testimony, positively contradict the appellant and her witnesses, on every material point in their testimony.

The counsel for appellant contends for two propositions: First, that the evidence established the charge of adultery. Second, that even though the charge of adultery has not been proved, still the respondent's conduct with Mary Meats, in his own house, of which his wife was cognizant, taken in connection with his neglect of his wife's comfort and happiness, and his refusal to send Mary Meats away, when his wife made known to him her deep distrust and intolerable dislike for her, constitutes a case of cruel and inhuman treatment, and personal indignities, rendering life burdensome, under the provisions of our statutes on that subject.

In determining each of these issues, the conceded fact that the respondent and Mary Meats are brother and sister of the half-blood—children of the same mother—should never be lost sight of. Blood relationship, in so near a degree, justly disarms suspicion and avoids any criminating inference from familiarities however strange or unusual, but which do not unmistakably impart guilt.

If he was guilty of this great crime with his half sister, the proof upon which the court is asked to find that fact ought to be clear and convincing, and cannot be made out by circumstances which the close relationship of the parties renders equivocal.

After making such allowances as we deem proper, on account of the great interest which the principal witnesses on

either side have in the result, and their honest mistakes or imperfect recollections, we are compelled to say that the charge of adultery has not been established by the evidence.

It is not difficult to perceive how Mrs. Rickard might have been mistaken about her husband coming into the bedroom, blowing out the light, and then getting into bed with his half sister. The beds were in the same room, one on either side of the door that led into it from the sitting room, and not more than four or five feet apart, but little more than the width of the door. She testifies that her husband did, after blowing out the light, get into bed with Mary Meats, but does not say she saw him do so; also, that it was light enough in the room, after the candle was blown out, to see the bed where Mary Meats slept, but not that she did see it. And her testimony, that all the noise she heard "was about like a person getting into bed," would indicate very strongly that her conclusions were drawn from what she heard and not from what she saw. She admits that she was jealous of her husband and Mary Meats before this happened, and hence, no doubt, the merest trifle was sufficient to awaken her suspicion. But her own conduct towards both these parties, then and afterwards, shows conclusively, we think, that however jealous and distrustful she may have been, she was not satisfied of their guilt, as she must inevitably have been if she had seen what she testifies did actually occur. She made no complaint to anyone, uttered no word of remonstrance to either of the offending parties; gave no sign of terrible mental agony, which must inevitably have followed the conviction that she had been the victim of such an outrageous and intolerable wrong; but went right along until the 24th of the following May, just as though nothing had happened to disturb her peace or mar her happiness.

If the transaction itself were not so unreasonable and so extremely improbable, her subsequent conduct alone would stamp it as a mere jealous fancy, which she herself had no real confidence in until long afterwards, when sick, feverish,

and confined to her bed, and her old feeling of jealousy inflamed to a still higher pitch, in all reasonable probability, by the impressions of those around her, her fierce suspicions at last found utterance. That there is still even greater probability of mistaken impressions, in the testimony of her sister, Lillie Taylor, will hardly be controverted. The transaction to which she testifies occurred over four years previous to the date of testifying to it, and when she was only thirteen or fourteen years old. The beds were, as we have already seen, in the same room, and with only a narrow passage to the door between them. How she knows the respondent put his hands under the quilts and touched Mary Meats she does not explain. She was awake, but he did not touch her, so far as her testimony shows. It was midnight, in the winter season, and the respondent, in groping along the narrow passage between the two beds, to or from the door, in the darkness, may have jostled against the bed where witness was lying, or placed his hand upon it, thus giving the witness the impression she has testified to. Her statement that he put his hands under the quilts and touched Mary Meats, at midnight, without stating any means of knowledge, cannot be treated as anything more than a groundless surmise on her part, and as entitled to no weight whatever.

J. G. Wygall's testimony is of the same character. He saw two persons in bed, and from that and other facts, comes to the conclusion that these two persons were the respondent and Mary Meats. But he does not pretend to identify them from what he saw, and gives not a single fact tending to identify them as the persons he saw in bed together. Virtually he draws his conclusion from seeing two persons in bed together—knowing that Mrs. Rickard was out in the kitchen at the same time, and not having seen either Rickard or Mary Meats around, while he also knew they were about the house somewhere, as well as the two children. Not having attempted to describe or identify the two persons he saw in bed together, they might have been and probably were either the two boys,

or Rickard or Mary Meats with one of the boys; but there is no reasonable probability whatever that they were Rickard and Mary Meats.

This testimony is without any weight whatever in our view of it, and hardly deserving of such extensive comment. It is enough to say, generally, in regard to the rest of the testimony on behalf of the appellant, that it discloses no fact or circumstance tending, in our judgment, to establish the charge of adultery.

The respondent's unconcealed affection for his half sister, his attention to her comfort, his deference to her wishes, the frank and open familiarity which marked his conduct toward her, and even his sleeping in the same room where she slept with the children during a portion of the time his wife was confined to her bed, in another room, there being two beds in the room where he and his half sister slept, are each and all entirely reconcilable with his entire innocence, and justify no inference to the contrary.

There is another feature of the conduct of respondent towards Mary Meats which, in our judgment, tends strongly to negative the existence of any criminal relation between them. There is nothing in the evidence even tending to show that they ever made any attempt at secrecy or concealment. This is unlike adultery, which has always been recognized as peculiarly "a crime of secrecy and darkness." But we look in vain through the testimony in this case for any such criminating indications. The doors are always open; there is no precaution against detection and exposure, and no embarrassment or confusion following on discovery. If they are guilty their case is without a parallel within the scope of our investigations.

But we deem it entirely unnecessary to pursue this proposition further, and turn our attention to the other. Conceding that if the respondent's conduct, in connection with Mary Meats, had been of such a character as to justify his wife's inference of the existence of criminal relations between them,

carried on in her own house, and he should persist in such a course against her remonstrances, and refuse to send Mary Meats away, with knowledge of his wife's distrust and mental suffering, occasioned by such conduct, it would have constituted a case of cruel and inhuman treatment and personal indignities rendering life burdensome, under our statute, even though no guilt existed in fact. The fact of actual guilt could not add to the intensity of her mental suffering, occasioned by a full belief, on sufficient grounds, in its reality. And if he knowingly induced such a belief, with its consequent mental suffering, in his wife, he should be held responsible. Still the testimony produced by appellant does not make out such a case, as we have already seen, in examining it upon the first proposition. Her suspicions were not justified by any phase of her husband's conduct with Mary Meats. They did not perceptibly affect her own conduct toward either of these parties, until long after she had full knowledge of all the facts upon which they rested. Her husband was not even cognizant of their existence in her mind, until the 24th of May, 1879, when she openly charged him with living with Mary Meats as a wife, and demanded that the latter should be sent away, as the only condition upon which she herself would remain in his house.

Granting that Mrs. Rickard was sincere in her belief in her husband's guilt, but that her belief was mistaken and groundless, and that his conduct was not only innocent in reality, but also free from such grave improprieties as would justify her suspicions, we see no reason to hold him responsible for the unhappy consequences of her mistaken judgment. His refusal to turn his half sister out of his house, after such a charge had been openly preferred against her in connection with his own name, was plainly justifiable. Indeed he could not have done otherwise, without in some measure sanctioning the truth of that charge, and subjecting both himself and her to unmerited reproach and public shame. We are satisfied that the respondent only did what was clearly his duty to

do under the circumstances, and that the appellant had no cause to complain.

The decree of the court below is affirmed, with costs.

Decree affirmed.

PENCINSE v. BURTON.

PRACTICE—APPEAL—UNDERTAKING.

An appellant cannot, under subdivision four of section 527, of the civil code, have permission to file a new undertaking for appeal, without making it appear, to the satisfaction of the court, that his omission to file a sufficient undertaking within the time allowed by subdivision two of said section, has occurred through unavoidable accident or excusable mistake.

APPEAL from Wasco.

J. E. Atwater, for appellant.

W. Lair Hill, for respondent.

By the Court, WATSON, J.:

A motion was filed in this case by the respondent, to dismiss the appeal upon several grounds. At the hearing, however, all these grounds were expressly waived by respondent's counsel, except the three last, to which the attention of the court was exclusively directed. They are as follows:

"No sufficient undertaking for the appeal was filed.

"It does not appear that the surety on the undertaking for appeal possesses the qualifications required by law.

"It appears by the record that the circuit court had no jurisdiction to reverse or modify the judgment of the justice's court, upon a writ of review."

Previous to the hearing, appellant's counsel filed his cross-

motion for leave to file a sufficient undertaking, but stating no grounds therefor.

In regard to the last objection made by respondent, it is proper to say, that it has not been the practice of the court heretofore to determine such questions, involving the merits of the case below, on a mere motion to dismiss, and without the aid of counsel's brief and arguments directed exclusively to those questions, we are not willing to establish a precedent in this or any other case, at variance with the practice of the court in this respect.

For these reasons we shall confine ourselves exclusively to the objections raised as to the sufficiency of the undertaking.

In the rule laid down in this court, in *Holcomb* v. *Teal*, 4 Oregon, 352, and uniformly adhered to ever since, there can be no question but that the back of the affidavit, showing the qualifications of the surety on the appeal bond, is a fatal defect, and unless the court can now grant the appellant leave to file a new and sufficient undertaking, the appeal must be dismissed.

While the defect in the undertaking is not as plainly pointed out by the motion to dismiss as it probably might have been, we nevertheless think it shows the ground of the objection with sufficient certainty.

As the qualifications of a surety on an undertaking for an appeal must appear in an affidavit filed with such undertaking, an objection that "it does not appear that the surety possesses the requisite qualifications," would denote, very strongly, either the absence or insufficiency of the required affidavit. We hardly think the motion misleading, and counsel for appellant does not claim to have been misled by it.

The question then is, can the court, upon the state of facts before it, give the appellant permission, under subdivision four of section 527 of the civil code, to file a sufficient undertaking? We are of the opinion that such permission cannot be granted.

Conceding that the cross-motion was filed in time, still there is no showing that the notice of appeal was given in good faith, and the omission to file an affidavit showing the qualifications of the surety on the undertaking for appeal occurred through any excusable mistake or unavoidable accident.

For aught that appears to the court, the appellant may not have given his notice of appeal in good faith, or may not have intended from the outset to give a good and sufficient undertaking, such as the statute requires.

The permission to file a new undertaking, under the subdivision of the section above referred to, is not a matter of course, but depends on the fact whether the omission to file a sufficient undertaking in the first instance occurred through mistake or not.

In this case there is no showing of any mistake—no claim, even, that there was any—and the permission cannot be granted.

The appeal is dismissed.

LADD & BUSH v. FERGUSON and McFADDEN.

COSTS—SET-OFF—JUDGMENT—ASSIGNMENT.

Where a judgment has been obtained against a sheriff for the possession of property wrongfully seized and detained by him, under process, and for costs of the action, the plaintiffs in such process are not entitled, in equity, to set-off against such judgment for costs, a judgment held by them against the party recovering such judgment against the sheriff, although they have indemnified the sheriff for such seizure and detention.

A written assignment of the costs and disbursements to be recovered in such action, executed before the entry of judgment, by the plaintiff therein to his attorney, in consideration of professional services rendered in such action, is valid, and would prevent any right of set-off from attaching, if such right could otherwise have been made available.

APPEAL from Benton. The facts are stated in the opinion.

John Kelsay and M. S. Woodcock, for appellants.

A purchaser and assignee of a judgment for a valuable consideration, and without notice, takes it subject to the right of set-off between the parties. In this case, the assignee had notice. (Freeman on Judgments, secs. 127, 128; 23 Cal., 596, 626; 13 Wis. 534; Wat on Set-Offs, p. 394, sec. 362, and note; *Id.* p. 178, 179.)

Where a person purchases a judgment after verdict, and before judgment is entered, it is *pendente lite,* and he takes it with notice. (Watt on Set-Offs, p. 388 and note.)

An assignee of a future judgment takes it subject to the equities existing between the parties, and with notice of all that the record and proceedings in the action disclose. (Freeman on Judgments, sec. 425; 23 Cal., 626; 2 Cal., 507; 13 Wen., 647, 654, 655.)

The insolvency of Ferguson is an equitable ground of set-off, which cannot be diverted by assignment. (16 Iowa, 204; 23 Cal. 628, 629; 26 Texas, 305, 306.)

John Burnett and W. S. McFadden, for respondents.

Sol. King was the real and only party defendant in the action of *Ferguson* v. *King;* the action of replevin only lies against the party in the actual possession of the goods. (See 134, Wells on Replevin; 3 Sandf., N. Y., 707.)

If the appellant King, were allowed in this way to take advantage of his own wrong (and through him, appellants, Ladd & Bush), the practical effect would be to defeat the purposes of the exemption law. (Code, p. 164, sec. 279; 18 Cal., 388; 7 B. Mon., Ky., 586; 32 Renna., 82.)

Independent of the authorities cited, the appellants have no equitable standing in this court, for the reason that the judgment in the case of *Ferguson* v. *King* cannot be set-off against the judgment of Ladd & Bush. Upon the record in the two cases, the debts are not mutual, or due to and from

the same persons. (11 Paige, 517; 4 John. Ch., 11; 6 Cow., 261; 3 Wend., 400.)

Even if appellants had an equitable set-off, it could not be allowed, where it would infringe on another right of equal grade. (2 Watts, 228.)

An assignment made by a party to his attorney of a verdict and the judgment to be entered upon it, to pay the attorney for his services in the action, is upon a good valid consideration. (8 How., 319; 9 How., 16.)

By the Court, WATSON, J.:

The appellants brought this suit in the circuit court for Benton county, to have a judgment in favor of Ladd & Bush against Ferguson set off against a judgment in favor of Ferguson against King, for costs. The facts disclosed by the pleadings and stipulation of parties filed in this cause were these:

Ladd & Bush commenced an action in the circuit court for Benton county, against Ferguson, to recover money, and caused an attachment to issue and to be placed in the hands of King, as sheriff of that county, with a request that he should levy it on certain personal property belonging to Ferguson. This he did, but Ferguson claimed the property as exempt from execution, and demanded its release. King, however, upon the request of Ladd & Bush, retained possession of the property, under the writ, and refused to release it. Ferguson brought an action for its recovery, in the same court, against King alone, and obtained a verdict therefor on April 17, 1879, upon which judgment was duly entered on the following day, for the possession of the property, and costs of action, taxed at fifty-five dollars and five cents. Ladd & Bush also recovered judgment in their action against Ferguson, on April 15, 1879, for one hundred and fifty-three dollars, and twenty dollars attorney's fee, and costs, which was duly entered in the judgment lien docket of said court the same day.

The respondent, McFadden, was an attorney-at-law, and in

his professional character represented Ferguson in both of said actions. Previous to his retainer, Ferguson agreed that he should have for his services whatever costs might be recovered in the action against King. After the verdict, but on the day previous to the entry of judgment thereon against King, Ferguson executed to McFadden a written assignment of the costs and disbursements he might recover under such judgment, in consideration of his services rendered in said actions.

With the exception of such exempt property, Ferguson was without means, and wholly insolvent; and the judgment of Ladd & Bush is still wholly unpaid.

Upon this state of facts, the court below made a decree dismissing the suit, and for costs and disbursements to respondents, and from this decree this appeal has been brought.

The appellants claim that Ladd & Bush are the real parties in interest in the judgment against King, and that the assignment to McFadden is subject to their right of set-off, both of which propositions are controverted by respondents.

We will examine each briefly in its order. It is admitted that real parties in interest, although not nominal parties, are entitled, in equity, to the benefit of set-off, to the same extent as they would be if nominal parties.

In this case Ladd & Bush are not parties nominally to the judgment against King. At the most that can be claimed for them, they may be held to have indemnified King against any damage or loss he might sustain by reason of the seizure and detention of Ferguson's property. Their request that King should do so, and his compliance therewith, in good faith, notwithstanding Ferguson's claim that the property was exempt from execution, would create an implied contract of indemnity of this character. (2 Hilliard on Torts, 227, 228; *Weld* v. *Chadbourne*, 37 Me., 221; *Shriver* v. *Harbaugh*, 37 Penn. St., 399.)

But Ferguson had a good and complete claim against King alone, and if it had been possible for him to join Ladd & Bush

in his action to enforce it, it was not necessary, and he did not see fit to do so, but brought his action and prosecuted it to final judgment against King alone.

The claim of Ferguson for the possession of this property, against King, based upon an unlawful taking and detention by him, was in no sense a claim against Ladd & Bush, and neither is the judgment obtained upon that claim for the possession of the property and the costs, in the controversy here, a debt of Ladd & Bush due Ferguson or his assignee, either in form or substance.

They do not owe this debt, either as real or nominal parties, to Ferguson or his assignee, and there is no method by which it can be asserted against them, or made a charge upon their property. They are utter strangers to this judgment and the debt it represents.

Their contract of indemnity with King is wholly collateral to this judgment. It does not even appear from the record that they are conclusively bound by it to indemnify King. They were not parties to the action in which it was obtained, and they did not appear, and were not notified to appear, so far as the record shows, and defend it. They are still at liberty to contend, if they wish, and prove, if they are able, that the property was rightfully levied upon and held by King under the writ, or maintain any other defense, in an action by King against them on their implied contract of indemnity, notwithstanding the judgment that has been recorded against King. (*Gist* v. *Davis*, 2 Hills Ch., 335; Freeman on Judgments, sec. 184; *Satterlee* v. *Ten Eyck*, 7 Cowan, 480.)

We do not think that Ladd & Bush are in any sense parties to this judgment against King, or that their being King's indemnitors gives them any right to the set-off which they contend for.

Upon the second proposition, we are satisfied to hold in accordance with the doctrine laid down in *Rooney* v. *Second Avenue R. R. Co.*, 18 N. Y. 368; and *Ely* v. *Cook*, 28 N.

Y., 365. These cases sustain such assignments of costs as is shown in this case, and the right to set-off does not attach as against them.

It is the opinion of the court that there is no error in the decree appealed from, and it must, therefore, be affirmed.

Decree affirmed.

LAMBERT v. SMITH.

DEED—CONSIDERATION—BARGAIN AND SALE—INTENT.

A Deed of bargain and sale is void for want of a valuable consideration expressed therein, unless such consideration is proved or shown to exist.

The insertion of such consideration in the deed is merely ceremonial, and the amount is not material, but it must be expressed in the deed or proven independently of it.

A deed inoperative as a bargain and sale for want of consideration expressed, if it contain other apt words, may enure and be operative as a grant or feoffment, in which no consideration need be stated to carry into effect the intent of the parties.

By the word intent is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular mode, or form of conveyance, but the intent that the land shall pass at all events, one way or the other.

GRANT, SELL AND CONVEY.

The use of the word "convey" in a deed is equivalent to a *grant* at common law, and passes the title, and "is, in meaning and effect, sufficient to answer the requisites of a grant of common law."

A deed containing the words "bargain, sell and convey" is operative as a grant.

COMMON LAW—STATUTE OF USES.

When conveyances may operate either at common law or by the statute of uses, the former generally prevails.

APPEAL from Yamhill. The facts are stated in the opinion.

Fenton & Magers, for appellant.

Appellant relies upon only one assignment of error, that is,

that the court erred in rejecting the deed marked exhibit "E," and instructing the jury that it was void for want of consideration expressed. No objection was made to this deed other than that there was no consideration expressed in it. (On this point see 8 Or., 428; 50 Cal. 429, 450; 52 Cal., 496, 672.)

And if the only object of expressing a consideration in a deed of bargain and sale, after the statute of uses, was to prevent a resulting trust in the grantor, this is no longer essential. Our statute goes further, and declares that a seal is primary evidence of a consideration. It affirms the old common law doctrine that obtained before the statute of uses. (Code, sec. 1, p. 515, sec. 743, p. 258; 102 Mass., 541; 9 Kansas, 26; 11 Maine, 320; 2 E. D. Smith, 416.)

E. C. Bradshaw, for respondent.

The pretended deed from W. R. Smith and wife to the appellant, was void for the reason that there was no consideration expressed therein. In a deed of bargain and sale, or for any interest in land, there must be a consideration expressed. (Code, p. 264, sec. 775, sub. 6; 3 Wash., 320, 321, 322-329; 2 Black, Com., 338; 4 Kent's Com., 460.)

By the Court, LORD, C. J.:

The facts in this case are that the plaintiff brought an action in the usual form to recover certain real property described in the complaint. The answer of the defendant denies all the allegations in the complaint, and alleges, separately, that he is the owner in fee simple and in possession of said premises. The reply denies the new matter set up in the answer.

The cause was tried before a jury, who, under instructions of the court, returned a verdict for the plaintiff.

The bill of exceptions shows that the plaintiff introduced as evidence a deed from Jonathan Smith and wife to William R. Smith, of date February 23, 1878, of the land described in the complaint, also that the plaintiff recovered judgment for a certain sum of money therein named, against the said Wil-

liam R. Smith, on the 6th day of January, 1880; that execution was issued thereon, that the property described in the complaint was levied on and sold at sheriff's sale, and that the plaintiff was the purchaser of the same; that an order of confirmation of said sale was duly made by the court, and that subsequently the sheriff executed a deed to the plaintiff of the said premises; whereupon the plaintiff rested his case, and the defendant offered in evidence a deed from William R. Smith and wife to the defendant, of date December 19, 1879, to said premises, which was objected to on the ground that no consideration was expressed in said deed, which the court sustained, under exception, and the deed was rejected.

The only assignment of error relied upon is the rejection of the deed executed by W. R. Smith and wife to the appellant to the land in question. The deed is in the usual form of bargain and sale, except no consideration is expressed in the deed, and the record discloses that the appellant rested without offering to prove a consideration. The words used in the deed are, "have bargained, sold and conveyed, and by these presents do bargain, sell and convey, to Jonathan Smith, the following described premises," etc.

Chancellor Kent, in his commentaries, says: "There are some deeds to the validity of which a consideration need not be stated. It was not required at common law in feoffments, fines, and leases, in consideration of the fealty and homage incident to every such conveyance. The law raised a consideration from the tenure itself, and from the solemnity of the act of conveyance. (Kent's Com., 465.)

At common law a consideration was presumed in all cases of contract by deed, irrespective of the fact whether the contract by deed was executed or executory. A deed of feoffment, or grant, which were common law conveyances, required no consideration to be expressed. The other modes of conveyance, such as fine, recovery, lease and release, covenant to stand seized, and bargain and sale, which were subsequently resorted to, grew out of statutes, or originated in

fictions of the courts, as has been said, to get rid of the statutes, required no consideration to be expressed, except in two solitary cases of covenant to stand seized, and bargain and sale. Of these two forms of conveyance, the consideration of natural love and affection, between near relatives by blood, and also by marriage, was sufficient to support the covenant to stand seized, and the deed of bargain and sale was the only form of conveyance which required a valuable consideration to support it.

It becomes important, then, to inquire the reason of this exception, in deeds of bargain and sale. Some time before the reign of Henry the Eighth, it is said in Burton on Real Property, the court of chancery had begun to exercise a jurisdiction over land by virtue of its own power as a court of equity, and through the inability of the courts of law to compel the conscientious performance of agreements. The considerations which were thought sufficient for giving obligatory effect to such agreements, were of two kinds. They consisted either in money or money's worth, or the affection which a party had for his wife, or any of his relatives. Hence there arose two new modes of conveyances, which, though disregarded by the courts of law, were operative in equity, viz., a bargain and sale for a valuable consideration, and a covenant to stand seized to the use of a relation, etc. Now it is plain that prior to the enactment of the statute of uses, that a bargain and sale of land was nothing more than a contract to convey land, which, if made upon a valuable consideration, a court of chancery would enforce the contract by decreeing a legal conveyance.

"Upon the payment of a valuable consideration, a bargain might be made by the owner of land, with a bargainee, to sell it, and a use would be thereby created. By the court of equity the holder of land would be coerced according to the trust, to allow the beneficiary to enjoy the land, or to convey it to him." (*Ocheltree* v. *McClung*, 7 West Va., 237.)

The payment of a valuable consideration was an important

factor in creating the use—which the courts of chancery held to raise the use—and to authorize the equitable jurisdiction of the court to carry the contract into effect.

Thus matters stood until the enactment of the statute of uses, 27 Henry 8, which by an exercise of legislative power, converted equitable into legal estates. Under this statute the instrument or deed, founded upon a valuable consideration, gives or creates the use, and the statute, supplanting the court of chancery, immediately adds the legal estate.

As said in the Touchstone, "the effect of this bargain and sale is to transfer the use, and by means of the statute of uses, the property—the legal estate." (Sheppard's Touchstone, 222.)

Where, then, a deed of bargain and sale is executed upon a valuable consideration, a use is raised in the bargainee, to which the statute, superseding the action of a court of chancery, immediately transfers the legal estate. This is why it is said that the necessity of a consideration came from the courts of equity, where it was held requisite to raise a use, and when uses were introduced at law, the courts of law adopted the same idea, and held that a consideration was necessary to the validity of a deed of bargain and sale. (4 Kent's Com., 543.)

If there is a valuable consideration, although it is not expressed in the deed, it may be averred, and if proved, the bargain and sale is good, but it must exist. (Sheppard's Touchstone, 323; Smith on Real Property, 523; Kent's Com., 543; *Van Rensalaer's Ex.* v. *Gallup*, 5 Barb., 459.)

But it is claimed that the seal imports a consideration, and renders it unnecessary that a consideration should be expressed or proven to exist, in a deed of bargain and sale; that the seal attached to a deed must be held to be conclusive proof of a consideration, except when the deed is attacked in a direct proceeding to set it aside in equity.

The general principle of law is that a consideration is essential to every contract. It is true, it is stated in Chitty on

contracts, (6) that in case of a contract not under seal, a consideration is absolutely necessary to give it validity, whereas, a writing sealed and delivered is supposed to express fully and absolutely the intention of the parties by whom it was executed. But the fact that no consideration need be expressed in a sealed instrument, does not preclude the essentiality or existence of a consideration of some sort. We take it that the idea of the law is, that the act of sealing is a solemn and deliberate act, which implies caution and fullness of assent, and hence the doctrine of the law that the seal imports, or is itself evidence of a consideration. For this reason it is not essential to the validity of a sealed contract that the consideration should be stated. This is how it comes that deeds at common law did not require any consideration to be expressed, but the consideration would be presumed.

But, as before observed, deeds under the statute of uses constitute an exception to other conveyances, growing out of the reason of their origin, and the adoption by the courts of law of the rules applied in equity, after the enactment of the statute of uses. Prior to that statute, it was upon the payment of the consideration that a bargain was made, or that an agreement to sell land raised a use in the bargainee, of which a court of chancery took jurisdiction, and would decree a legal conveyance. The statute superseded, took the place of the decree, and annexed the legal estate to the use, but without changing or affecting the nature of the evidence required to raise the use. This is the reason why courts of law retained the doctrine of equity, and required, where the contract of sale became one act under the statute of uses, that the same evidence of a consideration should be necessary to support a deed of bargain and sale.

The insertion of a consideration in a deed is merely ceremonial, and the amount is not material. A "pepper corn" is said to be sufficient, but it must be expressed in the deed, or proved independently of it. (*Wood* v. *Chapin*, 3 Kernan, 517; 5 Barber, 459; *Jackson* v. *Fish*, 10 Johns., 456.)

In the case under consideration, the respondent objected to the introduction of the deed in question, upon the ground, "that said deed contained no consideration, and was void for want of a consideration expressed," which objection the court sustained, under exception, and the deed was rejected. The record does not disclose any offer by the appellant to prove a consideration independent of the deed, and in the absence of such offer, and the want of a consideration expressed in the deed, if the deed be one of bargain and sale only, it is inoperative as such, and the ruling of the court was not error. If a consideration in fact existed, although not expressed in the deed, the authorities agree that it might be proved, and in the absence of such proof, the deed was, as the court said, "void on its face," considered only as a deed of bargain and sale.

In this state the statute of uses has not been adopted in terms; but conceding the fact, without deciding it, that it does constitute a part of our common law, the question arises whether the deed which was rejected, if inoperative as a bargain and sale for the want of a consideration expressed, may not, to carry into effect the intent of the parties, be operative and valid as a grant in which a consideration will be presumed. The courts are said to be anxious so to construe deeds as to carry into effect the intent of the parties, if it do not contravene any fundamental rules of law. (4 N. H., 28.) And "by the word intent is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but the intent that the land shall pass at all events one way or the other." (4 N. H., 21, and authorities cited.)

Our statute designated no forms in which the conveyance shall be made, except that it shall be made by deed. (Oregon Code, 515.)

In *Field* v. *Columbet*, 4 Sawyer, 527, Judge Field says: "Any words in a deed indicating an intention to transfer the estate, interest or claims of the grantor will be a sufficient conveyance, whether they be such as were generally used in a

deed of feoffment, bargain and sale, or of release, irrespective of the fact of possession of the grantor or grantee, or of the statute of uses."

In Lomax's Digest it is said, when a deed may enure in different ways, the person may have his election which way to take it. Thus, if a deed be made by the words *dedi et concessi*, this in law may amount to a grant, feoffment, gift, lease, release, confirmation or surrender, and it is the choice of the grantee to plead or use it in one way or the other. And in the application of these principles of construction to carry into effect the interest of the parties, if a deed of bargain and sale be inoperative for the want of a consideration expressed, and there are other sufficient words in the deed to create a grant or feoffment in which a consideration will be presumed, the courts will not hesitate to give effect and make operative such words, when it is plain that the parties intended the deed as an effective conveyance. A deed of bargain and sale may operate as a feoffment, if it contain, among its operative words, "give and grant," and is accompanied by livery of seizin proved or presumed. (1 H. and J., 527.)

Our registry laws have dispensed with the common law requisite of livery of seizin, and is the equivalent to it. So, too, "a gift" may be good without a consideration, being in effect a deed of feoffment. (5 Iredell, 30.)

In *Berry* v. *Price*, 1 Mo. 555, the deed was inoperative as a bargain and sale, and the court say: "So then the deed stands without a consideration expressed on the face of it. But no consideration was proved on the trial. We must take the record as it is, and for the want of this, the deed cannot have effect as a bargain and sale. Can it then inure as a deed of feoffment?" Again, "in this deed the words are 'grant bargain, sell and enfeoff,' so that there are clearly words here sufficient to create a feoffment. If this deed is to be considered a bargain and sale, what is to be done with the words 'grant and enfeoff?' They have no effect; but give them effect, and the deed operates as a feoffment."

In the deed under consideration, the operative words are, "bargain, sell and convey." In a note to Cornish on Purchase Deeds, it is said that the only accurate words in a deed of bargain and sale are, "bargain and sell," as where conveyances may operate, either at common law or by statute, the former generally prevails, and cites 8 Rep., 93; C. Litt, 272, *a*. So that if there are other words than "bargain and sell," such as "grant," or "enfeoff," and the deed may operate, either under the statute of uses, or at common law, the common-law mode of conveyance will be preferred. Certainly, then, if the deed is inoperative under the statute, for want of a consideration expressed, and there are other apt words which would make the deed a valid conveyance at common law, they ought to prevail.

What, then, is to be done with the word convey, and is it the equivalent of grant? In a conveyance the word *convey* means to transfer the title or property. (Burrell's Dict.) And in *Edelman* v. *Teakel*, 27 Penn. St. R., 27, Judge Black says: "The word convey means to transfer title from one person to another." This is giving the same legal effect to the word *convey* as *grant*, which has "become a generic term, applicable to the transfer of all classes of real property." (3 Wash. on Real Property, 163.)

In New York the operative word of conveyance is grant; but Chancellor Kent says: "As other modes of conveyance operate equally as grants, any words showing the intention of the parties would be sufficient," and in the note it is said that the word *convey*, or the word *transfer*, would probably be sufficient; that is, as we understand, would have the force and effect of *grant*. (4 Kent's Com., 492.)

The word, then, "convey" or "transfer," in a deed, is of equivalent signification and effect as *grant*. To construe the deed simply as a bargain and sale is to ignore the word "convey," and to give it no effect in the conveyance which is executed with the formalities required by the statute. The deed does not contain the word *grant*, but it does the word *convey*,

which is a word of present conveyance, and the equivalent of transfer or grant.

In *Patterson* v. *Cornelius' Heirs*, 3 A. K. Marshall, 621, it is held that the use of the word "convey" is equivalent to a grant at common law, and passes the title. The court say: "Especially the term 'convey,' we conceive, is in meaning and effect sufficient to answer the requisites of a *grant* at common law."

The deed is executed and acknowledged with the solemnities required by the statute, and contains a word which indicates an intention to pass the title, to "convey," that is, grant or transfer the estate. If the word *grant*, instead of the word *convey*, had been used in the deed, there would be no difficulty in declaring it operative as a grant at common law. What reason is there, then, if the word *convey* is the equivalent of a *grant*, at the common law, that the intent of the parties may not be carried into effect, by declaring this deed to operate as a grant? The words "bargain and sell" may be stricken out and the deed is still complete as a "conveyance," and by the term "convey" operate as a grant. (Code, 523, sec. 57.)

It follows that the judgment of the court below must be reversed and a new trial ordered.

YOUNG v. PATTON.

OFFICIAL UNDERTAKING—CITY MARSHAL.

Under the charter of the city of Oakland, the marshal is not required to file an official undertaking to qualify him to perform any duties under the city ordinances.

ADJOURNMENT OF TRIAL.

Where the circuit court adjourned a trial, to enable a party to procure certified copies of certain papers from the records of the city of Oakland, which were essential and material to a meritorious defense: *Held*, that the court did not abuse its power.

APPEAL from Douglas. The facts are stated in the opinion.

W. R. Willis, for appellant.

The court cannot postpone a trial on the ground of absence of evidence, except on motion and affidavit, showing its materiality and the diligence used to procure it. (Civil Code, sec. 177; 17 Cal., 123, 128.)

When the jury has been completed and sworn, the trial shall proceed in the order prescribed by the statute, unless the court, for special reasons, otherwise direct. (Civil Code, sec. 174.)

The respondent could not legally qualify as marshal of the city of Oakland, without filing an official undertaking; for the statute making him marshal also makes him a constable. (Session laws of 1878, page 123, section 3; Code, page 697, sections 37 and 38.)

R. S. Straham and Hermann & Ball, for respondent.

There was no error in allowing the jury to separate during the trial. (Civil Code, section 196.)

The charter of the city of Oakland does not require the marshal to give a bond. (Session Laws of 1878, page 128, section 12.) There is no pretense that a bond had been required by ordinance. In such case his certificate and oath of office were all that was necessary to qualify him to act. The certificate of election is conclusive, in every proceeding,

except a direct one to try the title to the office. (Dillon on Municipal Corporations, sec. 716; *Warner* v. *Myers*, 4 Or., 76; Cooley on Con. Law, 624.)

By the Court, LORD, C. J.:

This is an action of replevin, brought in the county court of Douglas county, to recover the possession of a span of horses, or the value thereof (two hundred dollars) in case delivery could not be had. The complaint is in the usual form.

The answer denies the wrongful taking and detention, and then alleges that on the 14th day of December, 1878, the defendant, Patton, was duly and legally marshal of the city of Oakland, in Douglas county, which city was duly incorporated, October 17, 1878. That under and by virtue of an ordinance of said city of Oakland, adopted by the board of trustees of said city on the 28th day of November, 1878, it was unlawful that any horses or mules should be permitted to be at large on the streets of said city.

That it was the duty of respondent, by virtue of his office of marshal of said city, to take possession of all horses or mules as above mentioned, and retain the same until reclaimed by the owner thereof.

That on the 14th day of December, 1878, said horses were at large on the streets of the city of Oakland, contrary to the provisions of said ordinance. That respondent, in the performance of his duties as marshal aforesaid, took said horses into his possession and detained the same, which is the same taking and detention mentioned in the complaint.

The reply denies each material allegation contained in the answer.

A jury was called and sworn, the plaintiff stated his cause of action and the issues to be tried, and the defendant stated his defence.

The plaintiff then introduced the evidence on his part, and rested his case.

Defendant then, to maintain the issues on his part, called as a witness George Settler, and asked him: "Did you bring the records of the city of Oakland with you?" He answered that he did not.

The court then, without any written motion, and without any affidavit, ordered the trial of this cause to be postponed to enable the defendant to procure certified copies of papers relating to the city of Oakland, and the jury were allowed by the court to separate, under the instruction that they should not converse with any one about said cause, nor with each other, and that they should not, before the cause was finally submitted to them, express any opinion about the same, and go at large until the 14th day of May, 1880.

To all of which plaintiff then and there excepted.

The jury were called and the trial proceeded with, May 14th, 1880, and the court charged the jury that the defendant, Arthur Patton, could legally qualify as marshal of the city of Oakland, Douglas county, Oregon, without filing any official undertaking.

To which the plaintiff then and there excepted.

In the county court judgment was given against Arthur Patton for the horses and costs, and Patton appealed to the circuit court, where judgment was rendered against the plaintiff for one hundred and sixty-six dollars and seventy cents, costs and disbursements, from which judgment appellant appeals to this court.

Two questions are presented by the bill of exceptions, and assigned as error in the notice of appeal. First, did the court err in adjourning the trial for the purpose of allowing the respondent to procure certified copies of papers from the records of the city of Oakland? And, second, was it necessary to qualify respondent to act as marshal that he should first execute a bond?

To the first proposition it is claimed, that the court has no power to delay or postpone a trial without a motion upon affidavit, as prescribed by section 177 of the code. Ordin-

arily this section is invoked before trial to secure a postponement to some later day in the term, or to the ensuing term in the circuit, according to the circumstances of the case. And to induce the court to grant the application, the affidavit must make a sufficient showing of the requirements under that section. But after the trial commences, and during its progress, courts of original jurisdiction, from necessity, are clothed with discretionary authority, which it is difficult to define and limit by any general rule.

Our code has provided that a "court or judicial officer has power to adjourn any proceeding before it, from time to time, as may be necessary, unless otherwise expressly provided by this code." (Civil Code, sec. 910.)

From the nature of the case, the court trying a cause, witnessing all the proceedings, and being from personal observation familiar with all the attendant circumstances, has the best opportunity of forming a correct opinion upon any matter presented, which involves the exercise of this power. It is true, all their decisions are subject to review for error, but in all such cases the ruling of the court will be presumed to have been in accordance with the merits and justice of the case, unless the party complaining shows, unequivocally, that the court has been guilty of an abuse of its discretionary powers, and that his rights have been injuriously affected by such abuse.

In the case under consideration, during the progress of the trial, the court adjourned any further proceedings in the case for two days, after admonishing the jury as required by section 196 of the civil code, to enable the respondent to procure certified copies of papers from the records of the city of Oakland. The materiality of this evidence was apparent to the court, and to require the trial to proceed without it was, in effect, to deprive the respondent of his defense.

In the *State* v. *Lyons*, Coxe, 403, 412, an adjournment was allowed after a case had been partly tried, in order to enable the defendant to obtain a copy, or use a particular document.

In *Liggett* v. *Boyd*, 3 Wend., 379, Marcy, Justice, says: "After a trial of a cause has been commenced, it is entirely in the discretion of the court to delay until a party can procure the attendance of a witness, who is casually and unexpectedly absent at the moment he is called, and it is scarcely possible to conceive a case where this court would interfere with the decision of a circuit judge on such application. In this case, however, the court refused to delay the trial, but, as the facts show, because the defense was not meritorious, and entitled to the favorable discretion of the court."

It is the exercise of a power, the propriety of which must depend, to a great extent, on the peculiar circumstances of each case. It ought, undoubtedly, in cases of this character, to be sparingly indulged, and always with due regard to the legal rights of the parties, and only when the justice and merits of the case require it. But under the section above cited, the court has power to adjourn any proceeding before it from time to time as may be necessary, and this court would not undertake to interfere with or review the discretion with which the circuit court is invested, in the exercise of that power, unless it contravenes some express provision of the law, or was manifestly an abuse of the power confided to the court by the law. Under the peculiar circumstances of this case, where the respondent had a meritorious defence, which would have utterly failed without the intervention of the court, we are not prepared to say that the court abused its discretion in the exercise of this power.

The second objection is, that the respondent could not legally qualify as marshal of the city of Oakland without filing an official undertaking. Section 3 of the charter of said city provides, that the marshal shall be the executive officer of the town, a constable, etc., and section 12 provides, among other things, that the inspectors shall give certificates of election to the successful candidates, and deliver the poll books to the recorder elected, and that the officers thus elected shall qualify before some officer legally authorized to administer

oaths, and shall, within five days thereafter, enter upon their respective duties. The certificate of election, and taking the oath as above specified, are the only requirements of the charter to qualify the officer to enter upon the discharge of his duty as a town officer or marshal. No official undertaking is required, nor is it necessary, to qualify the officer to perform any duty under the ordinances and charter of the city.

The proceedings in this case show that the respondent was acting as a town officer, or marshal, in enforcing an ordinance of the city, and to perform such duty, as such officer, no official undertaking is required. The judgment of the court below is affirmed.

Judgment affirmed.

HODGES & WILSON v. SILVER HILL MINING COMPANY.

CORPORATIONS—INSOLVENCY—STOCKHOLDERS' LIABILITY.

The general principle of law is that no suit can be maintained against the stockholders until a judgment has been obtained against the corporation, and an execution issued and returned *nulla bona*, but this principle is subject to some qualification.

Judgment and execution returned *nulla bona*, are only evidence of, and constitute one kind of proof of insolvency. Although the proof may be declared to be sufficient by statute, it does not exclude other methods.

Where a corporation is without any assets or property whatever, and notoriously insolvent, it is not necessary in such case to obtain a judgment against the corporation and return of execution *nulla bona*, before the liability of the stockholder can be enforced in equity. It is a maxim of the law that the law will not attempt to do an act which is vain, or to enforce an act which would be fruitless.

LIABILITY SEVERAL AND LIMITED ON UNPAID STOCK.

The liability of a stockholder, under article IX, section 2, of the constitution, is a several and limited liability, as to which each stockholder stands alone, irrespective of the amount for which other stockholders are liable.

Argument for Respondents.

When it is made to appear by proof, that some of the stockholders of a corporation are insolvent, the solvent must pay the proportion of the insolvent, to be apportioned among them according to the amount of their stock subscribed and unpaid.

PRO RATA JUDGMENT.

Where a decree apportioned the payment of a judgment obtained against a corporation *pro rata* among the defendant stockholders, according to the amount of each of such stockholders' stock subscribed and unpaid, and there was no evidence or other fact showing that any such stockholders were insolvent: *Held*, there was no error in the decree.

APPEAL from Linn. The facts are given in the opinion.

Chenoweth & Johnson, for appellants.

Contend that each stockholder of the corporation is liable to the extent of his stock subscribed and unpaid. (Constitution of Oregon, Article XI., section 3; 17 Ohio, 187.) The obligation is several as well as joint. (*Masters, et al.*, v. *Lead Mining Co.*, 2 Sanford's Ch. R., 301.)

The decree should be against the respondents, or either of them, and leave them to enforce contributions among themselves. (31 Barb., 84; Barbour on Parties, 476; 7 N. Y., 147; Abbott's Digest of Law of Corporations, 396; 17 N. Y., 458.)

Stockholders are liable like partners to creditors, except the liability of each is limited to the amount of stock subscribed and unpaid. (14 Wis., 700, 762; 33 Conn., 516.)

Weatherford & Blackburn, for respondents.

No suit can be maintained against the stockholders of a corporation until judgment has been obtained against the corporation, and an execution issued and returned *nulla bona*. The stockholders are only secondarily liable, and as against the corporation the appellant had a perfect and complete remedy at law. (43 Mo., 453; 118 Mass., 536; 4 Allen, 239; 85 Penn. St., 75; 17 Ohio St., 86; 45 Iowa, 604; 7 Or., 334; Thompson on Stockholders, sec. 317.)

This suit cannot be maintained, because it was not com-

menced on behalf of all the creditors. (*Bush* v. *Cartwright*, 7 Or., 337.)

By the Court, LORD, C. J.:

This is a suit in equity, to fix the liability and recover the amount of a certain indebtedness, against the stockholders of the above-named corporation. The allegations of insolvency, and the amount of the capital stock subscribed and unpaid, are not denied, and, of course, stand admitted.

The court below found that the corporation was indebted as alleged; was without any means or property, and insolvent and unable to pay the same, and that the defendant stockholders each subscribed the sum of fifteen thousand dollars, which was unpaid, and rendered judgment against the corporation for the amount of said indebtedness, and ordered that the plaintiffs have execution, as in actions at law, to enforce the decree against said defendants *pro rata*, to be computed by the clerk.

Before proceeding to pass upon the question submitted by the appellants, it becomes necessary to notice an objection of the respondents to the sufficiency of the complaint. The objection is, that a suit cannot be maintained against the stockholders of a corporation until a judgment has been obtained against the corporation, and an execution issued and returned *nulla bona*. This is the general rule, and ordinarily to be pursued, but it is subject to some modifications. With but one exception, all the authorities cited to sustain that proposition are from those states where statutes have made such a proceeding a prerequisite, before the liability of the stockholders can be enforced. But an examination of some of them will, at least, show instances in which the condition of the corporation, such as dissolution or insolvency, render this proceeding to judgment and return of execution *nulla bona* unnecessary. We have no legislation in respect to this matter.

In the case of *Ladd & Bush* v. *Cartwright*, 7 Oregon R.,

329, there was nothing in the pleadings or record to show that the corporation was insolvent, or that any effort had been made to collect the debt, not even so much as a demand for its payment, and the court say: "For all that appears in the complaint to the contrary, it may be that this corporation is not only engaged in carrying on its ordinary business for which it was organized, but entirely solvent, and ready to pay off this demand on presentation."

We do not understand that the court intended to convey the idea that if the corporation was shown to be insolvent, and without any assets or property whatsoever, it would nevertheless be necessary to impose the fruitless task and additional costs of obtaining judgment against the corporation, and a return of execution *nulla bona.*

"A judgment and execution unsatisfied are evidence of insolvency, of inability to collect. They are, however, evidence *only*, and the fact may be established as well by other evidence; among other modes, by assignment, and by continuous suspension of business, or other notorious indications." (92 U. S. R., 161, and authorities cited.)

"Judgment, and execution returned *nulla bona,* only constitute one kind of proof of insolvency, although the proof may be declared to be sufficient by statute, it does not exclude other methods." (Thompson on the Liability of Stockholders, secs. 320 and 321.)

All that certainly can be said is that the return of *nulla bona* is the best evidence of insolvency, and the failure to pursue this course may be supplied by other proof that the principal is notoriously unable to pay his debts. (2 American Leading Cases, and authorities cited.)

The law does not require useless things, and we are at a loss to conceive what possible object could be accomplished by bringing a suit against an insolvent corporation, except for the purpose of accumulating costs, and increasing the burdens of the stockholders. Admitted to be an insolvent corporation, and without any assets or property whatever, it

seems to us that the mere bringing of a suit would be idle, vain, fruitless and unnecessary. As was said by Chancellor Kent, in *Trustees of Washington* v. *Nicoll*, 3 Johns., 56: "It is one of the maxims of the common law, which is a dictate of common sense, that the law will not attempt to do an act which is vain, or to enforce an act which would be fruitless."

From the proceedings in this suit it appears that the whole amount of stock subscribed by each stockholder is unpaid. Our constitution provides that the stockholders of all corporations and joint stock companies shall be liable for the indebtedness of such corporation to the amount of their stock subscribed and unpaid, and no more. (Article 9, sec. 2.)

To the extent of the stock subscribed and unpaid, each stockholder is liable for the indebtedness of the corporation. It is a several, distinct and limited liability, as to which each stockholder stands alone, irrespective of the amount for which others are liable, except that if he pays more than his proportion of such debts, he may, as in other cases, have contribution from his co-shareholders. In the absence of any legislation providing for the enforcement of this liability, the implication of law is that the common law would supply a remedy.

Our predecessors, however, conceived that the remedy in equity, where the rights of the corporation, the stockholders and creditors, could all be adjudged in one suit, upon principles of equality and justice, would be more appropriate, adopted the remedy in equity for the enforcement of such liabilities. (*Bush* v. *Cartwright*, 7 Oregon R., 329.) And this suit is brought in pursuance of the remedy established as applicable to such cases, and is a sufficient answer to the argument that the action should be at law.

It seems that the only indebtedness of the corporation is the claim of the appellants, or at least that is all that is made to appear in this suit. The amount of stock subscribed and unpaid of each stockholder is more than sufficient, many

times, to liquidate the amount of the judgment against the corporation. That fact, however, would not make it less oppressive in principle to select some one of the number of the defendant stockholders, and compel him to liquidate the judgment, because the amount of such judgment did not exceed the amount of his stock subscribed and not paid in, as claimed in the argument. It seems to us such a theory would frustrate some of the principal objects for which the remedy in equity was adopted; among which was that to enable the court to order such contribution amongst such stockholders as would be equitable, to raise the money to pay such claim.

This mode secures the payment of the indebtedness ratably, fixes, according to the liability, the burdens of such payment, and avoids the necessity of a multiplicity of suits.

But the question is propounded, who is to lose in case some of the stockholders are insolvent—the stockholders, or the creditors? Certainly not the creditors, so long as any of the stockholders, who are solvent, owe a sufficient amount on their stock to pay the indebtedness. In that event the indebtedness would have to be apportioned among those who were solvent, not to exceed, of course, the amount of each of such stockholder's liability on his stock subscribed and unpaid.

It is claimed that this principle has been violated in the case under consideration; that in the apportionment no regard was paid to the solvency or insolvency of the stockholders, and that for this reason, a portion of the debt is uncollectible. This is mere assumption, and not sustained by the record.

There is not a single fact, or scintilla of evidence to be found anywhere, in the proceedings of this suit, to show that the fact of the insolvency of any one or more of the defendant stockholders was brought to the attention of the court. In the absence of any proof the court cannot distinguish the insolvent from the solvent stockholders, or do otherwise than to apportion the indebtedness among them, fixing each stockholder's liability according to the amount of his stock subscribed and unpaid. How was the court to know who were

solvent and who were insolvent? There is no evidence to instruct the court on this subject, not even so much as a suggestion. If any one or more of the stockholders were insolvent, the fact of such insolvency, like any other material fact, must be proved, and when proved to the satisfaction of the court, the decree would be moulded accordingly. In such case the decree of the court would be against such stockholders as are found to be solvent for the whole amount of the judgment rendered against the corporation, to be apportioned between them *pro rata,* according to the amount of each of such stockholder's stock subscribed and unpaid. As there is nothing to show that any of the defendant stockholders are insolvent, it follows that there is no error in the decree of the court below, and the same must be affirmed. Decree affirmed.

MINARD *v.* DOUGLAS COUNTY.

PUBLIC HIGHWAYS—NOTICE—HOW AND BY WHOM SERVED.

The notice of the application for laying out a highway, required by the statute to be given to interested parties, must be signed by the petitioners.

Semble, that the proof of service should state where the notices were posted.

APPEAL from Douglas. The facts are stated in the opinion.

Kelsay & Burnett, for appellant.

Wm. R. Willis and R. S. Strahan, for respondent.

By the Court, WALDO, J.:

This is an appeal from the judgment of the circuit court for Douglas county, dismissing a writ of review directed to the county court of said county acting as a board of county commissioners.

On the first day of September, 1879, a petition was presented to said court, acting as a county board, signed by the requisite number of freeholders, praying said court to lay out and open a road upon a route therein described, and the following copy of the notice and proof of service was filed with the petition:

"NOTICE.—All persons concerned are hereby notified that application will be made to the county court of Douglas county, Oregon, at the next session, for laying out and locating a county road beginning at the northeast corner of the town of Looking Glass, in section 35 in township 27 S., in range 7 W., in same county and state; thence north to the southwest corner of Peter Burns' lot, in section 36 in said township and range; thence in an easterly course on the line and grade of the Coos Bay military wagon road, as now traveled, to the west line of Stephen Minard's fence; thence around the foot of the hill on the original survey line and grade of said Coos Bay wagon road to the South Umpqua river at Owen's ferry, opposite the town of Roseburg.

"A. H. KENNEDY,
"July 28, 1879. Attorney for Applicants."

"STATE OF OREGON,
"County of Douglas. } ss.

"A. H. Kennedy, being first duly sworn, upon his oath, says: I gave notice, by advertisement posted at the place of holding county court, and also in three public places in the vicinity of said proposed road, thirty days previous to the presentation of said petition (in the notice hereunto annexed mentioned) to the county court, notifying all persons concerned that application will be made to said county court at their next session for laying out a county road, as in said notice mentioned, a true and correct copy of which notice is above set forth. A. H. KENNEDY.

"Subscribed and sworn before me this first day of September, 1879. T. R. SHERIDAN,
"County Clerk."

Upon such petition and notice, such proceedings were had by the county court that, on the 8th day of January, 1880, the said proposed road was ordered to be opened and declared to be a public highway.

On the 7th day of April, 1880, the appellant, a land owner, a portion of whose land had been taken for the use of the road, presented his petition for a writ of review to the circuit court for Douglas county, and a writ was thereupon issued, directed to said board, commanding them to certify their proceedings to said circuit court, and upon a hearing upon the return to said writ, judgment was rendered dismissing the writ, from which said judgment appellant appeals to this court.

Section 3, General Laws of Oregon, page 721, requires that when a petition for laying out a road is presented for the action of the county court, it shall be accompanied by satisfactory proof that notice has been given by advertisement posted at the place of holding county court, and also in three public places in the vicinity of said proposed road, notifying all persons concerned that application will be made at the next session of the county court for laying out said road.

The laying out and opening of a public road through the land of a private person is a taking of his property for public use, and notice must be given him of the proceeding. Says Campbell, C. J., in *Strachen* v. *Drain Commissioners*, 39 Michigan, 170: "We must hold, as was held in *Swan* v. *Williams*, 2 Mich., that although the statute is silent on the subject of notice, its necessity is implied when private property is invaded."

In *Langford* v. *Ramsey county*, 16 Minn., 375, it was laid down, that an act of the legislature to locate and establish a state road from the city of St. Paul, in the county of Ramsey, to the city of St. Anthony, in the county of Hennepin, and appointing three commissioners to determine the damages to owners of land taken for the road, without notice to such owners, was *void*.

"In all judicial, or quasi-judicial proceedings affecting the

rights of the citizen, it is a fundamental principle that he shall have notice." (*Cahoon* v. *Coe*, 57 N. H., 598. See also, *State* v. *Road Commissioner*, 12 Vroom, 89; *Dickey* v. *Tennyson*, 27 Mo., 370; *Abbott* v. *Lindonbower*, 42 Mo., 161; *Corliss* v. *Corliss*, 8 Vt., 389; *Howard* v. *Hutchinson*, 10 Maine, 335; *Siefert* v. *Brooks*, 34 Wis., 384; *Lancaster* v. *Pope*, 1 Mass., 86.)

The right to notice springs out of this principle: The power of the government to take private property for public purposes is not absolute. It is qualified by the obligation to make compensation to the owner. This compensation cannot be made *ex parte*. Thus, in *Lancaster* v. *Pope*, above, Thatcher, J., says: "The counsel for the town has referred the court to the tenth article of the bill of rights of the constitution, to prove that property cannot be appropriated to the public use without compensation; and he says, justly, that this constitutional provision will be violated in this instance, unless by 'seasonable notice' the town has an opportunity to defend its interest."

The office performed by such notice is explained in *Dupont* v. *Highway Commissioners*, 28 Michigan, which was a case of the laying out of a highway, alleged to be void, among other reasons, because the record failed to show that notice had been given to interested parties. "The notice," says Cooly, J., "is in the nature of process." See also *Siebert* v. *Linton*, 5 W. Va., 57; *Wolford* v. *Lebanon*, 4 Colorado, 117; *Schneider* v. *McFarland*, 2 N. Y., 462; *Cruger* v. *Hudson River Railroad Company*, 12 N. Y., 200, 201; *Scammon* v. *City of Chicago*, 40 Illinois, 146; *Driver* v. *McAllister*, 1 Wash. Ter., 368.

According to the theory of the common law, all power of judicature flowed from the crown, and courts had no power to compel a party to appear, or to proceed to the determination of a cause, until the king, by his original writ, had issued his command to the sheriff to summon the defendant before them. Here "the state is the sovereign by whose power alone the

citizen can be compelled to appear in its courts to answer an action brought against him." (*Curtis* v. *McCullough*, 3 Nevada, 210; *Curry* v. *Hinman*, 11 Ill., 420.)

Hence, since the notice is in the nature of process to bring a party before a tribunal exercising judicial powers, it must be given by some one authorized by the state to give it.

Notice, in the sense of the statute, does not mean knowledge. Actual knowledge, or the want of it, cannot be shown. It means the statutory instrumentality of knowledge—the formal process, emanating from the source and served in the manner prescribed by the statute. The advertisement is the process and the posting in the public places is the service. The notice, then, must be issued by persons authorized by law to issue it; and it seems clear that this fact must be shown on its face by proper authentication, as more formal process must show it. No person can be summoned before a legal tribunal but in pursuance of law, and by persons authorized by law to summon him.

Turning now to the statute, we find that the petition must be signed by the petitioners, and that such petition, when presented, must be accompanied by proof that notice has been given to all interested parties. The parties moving in the proceeding are the petitioners, and it is clear that they are authorized by the statute to give notice, because they are compelled to furnish proof that notice has been given. This necessarily implies, in the absence of other provision, that they are authorized to give the notice. "Whenever a power is given by a statute, everything necessary to the making it effectual, is given by implication." (Pot. Dwarris on Statutes, 123.)

This much plainly appears: That the authority of the petitioners to give the notice is as effectually supplied by intendment as though it had been given by express words. "That which is implied in a statute is as much a part of it as what is expressed."

Now, whoever asserts more than this—whoever asserts that

the statute which authorizes the petitioners to give notice, also authorizes one not a party to the proceeding to invest himself with the sovereign power of the state for the purpose of giving notice—must show affirmatively where that power is to be found. It is certain it must be gotten from the statute, if at all, by implication. It is said that the statute does not require any particular person or persons to give the notice, and therefore any person may give it. But at the first step in the construction of the statute, we find the petitioners invested with this power. We find that the notice which these powers are empowered to give, is in the nature of process to bring a party into court; and, further, that no person can exercise such power unless specially authorized, which, as to the petitioners, as we have seen, is deduced from the statute by necessary implication. Hence, if such power is found in the statute, it cannot be by implication in the sense of implying that which is necessary to make the act effectual. But by what other or less degree of implication can it be found there? Where a plain, simple, sensible construction has been given to a statute, nothing more can be incorporated into it by implication. And, further, since the statute requires notice to be given, it must be some one's duty to give it. It cannot be the duty of a stranger. It must, therefore, be the duty of the petitioners; and hence, the proposition that the statute does not require particular persons to give the notice, cannot be true.

The able counsel for the respondent, among other cases, cited *Wright* v. *Wells*, 29 Ind., 354, which was an appeal from an order of the board of county commissioners abolishing a highway. It seems that the statute required notice of intention to present a petition, to be given "by publication three weeks successively, in a newspaper published in the county, or by posting up notices in three of the most public places in the neighborhood of the highway." Objection was made rather to the affidavit filed as proof of service, than to the form of the notice itself. On this point, the court merely say,

"it is proper to notice an objection made in argument to the notice itself, claiming that it was void, because not signed by one or more of the petitioners. We do not think a signature to the notice is required by the statute." Counsel admitted that notice would have been in due form if signed by one of the petitioners. No good reason can be given why signing by but one petitioner should be sufficient. We might very well acquiesce in the decision so far as it passed upon the objection actually made. But if the case is to be regarded as holding that under a statute like our own, the notice need not be signed by the petitioners, or signed at all, it is entitled to no weight. In another part of the case the court went so far as to hold that the county commissioners acquired jurisdiction, where the only proof of service shown by the record stated no more than due notice had been given.

The case of *The People* v. *Carpenter*, 24 N. Y., 86, arose under an act of the legislature of New York, entitled an act to vest in the board of supervisors certain legislative powers, and relates to the alteration of the boundaries of towns, or to the erection of new towns. The second section of the act provided that notice in writing of the intended application to divide a town, subscribed by at least twelve freeholders of the town to be affected, should be posted in five of the most public places of the town, four weeks previous to the intended application, and a copy of such notice should also be published in the county newspapers. The notice published in the newspapers did not contain the names of the twelve freeholders. The court say, on this point, that the statute did not require the notice published in the newspapers to be so subscribed. The decision is an interpretation of the words "such notice," as used in the statute, and is to the effect that the names of the freeholders subscribed to the notices published in the public places were not a part of such notices. The process of reasoning by which this conclusion is reached is not set forth. The proceeding was not judicial, which alone is sufficient to exclude the case from being considered authority here.

Peavey v. *Wolfborough*, 37 N. H., 286, was a case where the town objected to the acceptance of a report of the commissioners of highways ordering the laying out of a highway, because, among other reasons, the notice was signed by but one of the commissioners as chairman. But the notice purported on its face to be given by the board as its act, and that the notice was signed by but one member of the board as chairman, only involves the question of proper attestation where a written notice is to be given by a board.

Eaton v. *Supervisors*, 42 Wis., 317, was also cited for the respondent. It was a case where a notice of appeal was not signed by the appellant, or by any one for him. The court held the notice bad; but add that they were not prepared to say that when a written notice is required to be given by a party under a statute, or rule, not expressly directing it to be signed, and when the party himself serves the notice unsigned, the absence of signature may not be cured by service in person. This case is not in the respondent's favor, since, where the notice is constructive, the service cannot be made in person, and there would be nothing to cure the defect of want of signature, if it could be cured in that way, which the court do not say, but merely decline to express an opinion.

Looking now to the cases cited by counsel for appellant, we find in *State* v. *Otoe County*, 6 Neb., 129, 133, a statute requiring, "whenever the inhabitants in any county desire the opening of a new road, or the discontinuance or change of any road heretofore established, they shall give at least twenty days' notice, by posting the notice on the court-house door, and at three other places in the vicinity of the road sought to be located." Under this statute it was held that the notice must be signed by the petitioners. Counsel for respondent seeks to avoid the force of this authority on the ground that the statute expressly says that "they" (the petitioners), shall give notice; but, as has been shown, that is what our statute impliedly says.

It appears, too, from the case of *State* v. *Officer*, 4 Or., 180,

that there is a dictum by this court, shadowing forth the same view. Bonham, J., in delivering the opinion in that case, says: "The county court, in its proceedings for the location of public highways, to condemn the lands of private persons to public use, is only required to cause constructive notice to be given by the petitioners of their application for that purpose."

Again: If the notice be viewed but as an incident in the proceeding, coming from one party to another, not as an implied mandate, but for the purpose of giving knowledge of some step in the case, it is still essential that the notice should be signed by the petitioners. The notice must come from an authentic source—that is, from the petitioners. (*Kilmer* v. *Hathorn*, 78 N. Y., 228; *Fry* v. *Bennett*, 16 How. Pr., 402.)

In Potwine's appeal, 31 Conn., 381, 384, the court say: "In legal proceedings, and in respect to public matters, the word notified is generally, if not universally, used as importing a notice given by some person whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it or be notified."

The fact that the notice is to be in writing, implies a signing. The words, in writing, import, by their own proper force, that everything essential to a valid notice must be in writing. (*Graves* v. *Adams*, 8 Vermont, 134; *Taylor* v. *Burnap*, 39 Mich., 739; Road Notices, 5 Harr., Del., 324; *Verder* v. *The Town of Lima*, 19 Wis., 291, 292.)

The posting up of proper notices being essential to the jurisdiction of the court over the proceedings to lay out the road, the defect is not cured by the appearance of the appellant. (*Burch* v. *Detroit*, 32 Mich., 43; *the King* v. *Croke*, Cowper, 26, 30; *Dwight* v. *City Council of Springfield*, 4 Gray, 107.)

It would seem, also, that the proof of the posting of the notices should be more definite than what is found in the general statement that they were posted "in three public places in the vicinity of the road." The following authorities, indeed, support the sufficiency of the proof found in the

record: *Wright* v. *Wells*, 29 Ind., 354; *McCallister* v. *Shuey*, 24 Iowa, 362; *Carr* v. *Fayette County*, 37 Iowa, 608.

But if the question: "What is a pubic place?" be a mixed question of law and fact, as laid down in *Cahoon* v. *Coe*, 57 N. H., 572, and *Russell* v. *Dyer*, 40 N. H., 173, the proof furnished by the affidavit of A. H. Kennedy is plainly insufficient. In *State* v. *Williams*, 25 Maine, 561, in a statute requiring a notice to be posted in a public and conspicuous place, the court say that the proof should show the place where the notice was posted. The record should show the facts, so that the court can see whether the notice has been posted in a public place or not. (*Dupont* v. *Highway Commissioners*, 28 Mich., 362; *People* v. *Commissioners*, 14 Mich., 527; *State* v. *Officer*, 4 Oregon, 184.)

But any question as to the sufficiency of the proof of service becomes unimportant where the record discloses, as it does in this case, that no legal notice has been given. The proceedings of the county court were void and should have been quashed.

The judgment of the circuit court must be reversed.

CREIGHTON v. LEEDS, PALMER & CO.

JUDGMENT LIEN.

Section 266 of the civil code of Oregon provides: "From the date of the docketing of a judgment, as in this title provided, or the transcript thereof, such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed."

JUDGMENT FIRST DOCKETED TAKES PRECEDENCE.

Leeds, Palmer & Co. recovered a judgment against B., February 4, 1873. C. recovered judgment against B., November 9, 1876. B. acquired title to real estate, June 10, 1878, which was levied upon and sold under C.'s judgment. L., P. & Co. afterwards issued an execution against B. and sought to subject the same land to the lien of their judgment: *Held*, that the judgments ranked upon said after-acquired property in the order of their dates of docketing.

APPEAL from Benton. The facts are sufficiently stated in the opinion.

Chenoweth & Johnson, for appellants.

R. S. Strahan and J. W. Rayburn, for respondents.

By the Court, WALDO, J.:

This suit was brought by the respondent in the circuit court for Benton county, to enjoin the sheriff of said county from levying an execution on certain lands purchased by respondent at an execution sale. The facts are, that on the 4th day of February, 1873, the appellants, Leeds, Palmer & Co., recovered a judgment against Simeon Bethers. On the 9th day of November, 1876, the respondent also recovered a judgment against said Bethers. Each judgment was docketed at the time it was recovered, and remained unsatisfied, when, on the 10th day of June, 1878, Simeon Bethers acquired title, by descent, to the tract of land in question. The respondent made the first levy on said land, and purchased the same at the execution sale. After said levy, in November, 1879, the appellants had leave to issue an injunction on their judgment of February 4, 1873, and thereupon placed an execution in the hands of Sol. King, sheriff, to subject the said lands to the payment of the judgment.

The point in controversy arises under section 266, page 160, of the civil code of Oregon: "From the date of the docketing of a judgment as in this title provided, or a transcript thereof, such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which may be afterwards acquired therein."

The appellants claim that judgments rank on after-acquired property in the order of their dates of docketing, while the respondent insists that if two judgments have been docketed against a defendant, they will both attach to subsequently acquired property at the same moment, and neither will have

priority over the other on account of its prior docketing or rendition, and cites Freeman on Judgments, sections 355, and 356; *Michaels* v. *Boyd*, 1 Ind., 259, and *Moody* v. *Harper*, 25 Miss., 484.

Appellants claim that the text and the authorities cited are not in point in the construction of the statute. That under the statute it is priority of docketing, and not priority in point of time at which the lien attached, that determined the right of priority of payment. The question is on the construction of the statute. In construing a statute we must never lose sight of its object and intent. While the immediate object of the statute is to provide for judgment liens, the primary object is to secure the payment of judgment debts. In giving a lien, the object is to compel the debtor to satisfy the debt. This compulsion is exercised by means of the lien; that is, giving to the creditor the right, running with the land, to have the debtor's lands applied to the satisfaction of the judgment.

The right to satisfaction accrues as soon as the judgment is entered; for the entry of judgment fixes the date at which the creditor chooses to avail himself of the power of the law to compel the payment of his debt. If the lien is co-extensive with the judgment obligation, there will be no distinction in right of preference between property in existence when the judgment is recovered, and that afterwards required. A law releasing after-acquired property from liability to be taken and applied to the satisfaction of a judgment, would impair the obligation of the contract. Future acquisitions are liable for contracts, and to release them from this liability would impair their obligation. (*Sturgis* v. *Crowninshield*, 4 Whea., 198.)

In *Neely* v. *Henry*, 63 Ala., 263, the court say: "In the absence of statutory or constitutional exemptions, the law subjects to the payment of debts any and every beneficial interest of the debtor in property, real or personal, whether the interest is legal or equitable, held severally, jointly or in

common with others. Nor is there any intendment that the parties have in view only the property which the debtor may own at the time of entering into a contract, or to which he may then have an inchoate right. Subsequently acquired property is as liable to the payment of debts as that which the debtor may own at the time of creating a debt. A state law which sought to release such property from liability for the payment of past debts, would impair the obligation of contracts, and violate the constitution of the United States."

It follows that if the lien was strictly an incident of the judgment—if the judgment, *per se*, gave the lien to enforce payment, the right of priority as to all property, after-acquired or otherwise, would naturally be co-extensive with the priority of the judgment. The lien is a right to take with a preference over all adverse interests. There was that in its origin under the statute of 13 Edw., 1, which prevented any preference as to after-acquired lands, but this was because the lien was an incident of the writ of execution, either of its issuance, or the *actual present* right to issue, and hence could not relate back to a period prior to the existence of that which created it. This will be shown by a reference to its origin under the statute giving an *elegit*.

In *Bliss* v. *Clark*, 39 Ill., 595, the court say: "At common law, a judgment created no lien on real estate, nor could it be sold on execution. But as trade became developed, and was fostered by the Government, it was found necessary to subject it to the payment of debts. The first enactment having that object was the statute of Westminster, 2, adopted the 13 Edw., 1, ch. 18, which was usually called the statute *de mercantoribus*. It authorized the judgment creditor to sue out the writ of *elegit*, by which the sheriff was required to have all of the debtor's goods liable to execution appraised and delivered to the creditor in satisfaction of his debt, and if insufficient for the purpose to deliver to him a moiety of his freehold estate until he shall have execution of his judgment. The court in analogy to a *fieri facias*, held that this writ

created a lien on the real estate of the debtor from the test of the writ. Thus it will be seen that it was the writ, and not the judgment, which created the lien."

So, in *Scribner* v. *Deans*, 1 Brock., 170, Chief Justice Marshall, in delivering the opinion of the court, says: "The judgment in favor of John Allen having been first rendered, would constitute the first lien, had there been no stay of execution. The rank of that judgment depends on the question whether the lien takes place at the rendition, or at the time when execution may issue on it. It must be admitted that a judgment at common law did not bind lands, and that there has been no statute which in direct terms creates the lien. But courts have so construed the statute, which gives the *elegit*, as to infer a lien from the power to take the lands in execution. The lien, then, grows out of the right to issue the *elegit*, and is, consequently, inseparably connected with that right."

It is important to note the distinction declared in these cases—that the lien is, correctly speaking, an incident or consequence of the writ, not of the judgment, because out of this fact grew the principle that there were no priorities between judgment liens on after-acquired property. It followed inevitably from this principle that as to all judgments in existence when the property was acquired, no lien could have a preference, because the right to take the lands in execution, which created the lien, accrued to each creditor at the same moment. The lien could not relate back beyond its origin in the power to take the lands under the writ. It was not a potential right, but an existing present right to take, that created the lien.

The same principle is applied in *Michaels* v. *Boyd*, 1 Ind., 259, and in *Moody* v. *Harper*, 25 Miss., 484. The statutes cited in those cases say nothing about after-acquired lands. In *Moody* v. *Harper*, the court were of opinion that the legislature did not have such lands in view when they enacted the statute.

In *Stiles* v. *Murphy*, 4 Ohio, 92, the court declared a like opinion on a similar statute. In *Michaels* v. *Boyd*, 1 Ind., 259, the court also founded its opinion, not on anything declared by the statute, but on the principles of the common law, as the authority cited shows. These cases are not in point in the construction of our statute.

In re Boyd, 4 Sawyer, 264, Deady, J., after describing the character of the lien that grew out of the statute 13 Edw., 1, says: "Now, the modern statute lien of a judgment, as provided in sections 266-8, of the Oregon civil code, is altogether different from this. In the latter case the lien arises, not from the judgment, but from the docketing thereof. Without the entry on the docket, there is no statutory lien. Neither is this statute lien contingent upon the issuing of an execution and levy. It is absolute even against the conveyance of the same premises by the judgment debtor. Being a creature of the statute, and not an incident or consequence of the judgment, its existence and validity depend on a docket entry in conformity with the statute. It is a strict legal right or advantage, and must stand or fall by the statute which gives it. (*Miama Ex. Co.* v. *Turpin*, 3 Ohio, 504; *Douglas* v. *Huston*, 6 Ohio, 162; *Buchan* v. *Sumner*, 2 Barb. Ch., 193; *Isaac* v. *Swift*, 10 Cal., 81; *Ackley* v. *Chamberlain*, 16 Cal., 183; *Bowman* v. *Porter*, Id., 221.)"

Under the statute there is a present inchoate right of lien created, *per verba de praesenti*, to take effect by relation when the property is acquired. The statute does not say there shall be a lien from the date of the acquisition of the property. It expressly makes the lien upon after-acquired property date from the date of the docketing of the judgment.

The legislature must be presumed to have meant what they have expressed. The court has no power to dispense with the words in the statute, "from the date of the docketing." "Statutes are to be interpreted so as to give effect to all the words therein, if such an interpretation be reasonable, and be neither repugnant to the provision nor inconsistent with the

objects of the statute." (*United States* v. *Bassett*, 2 Story, 389.)

But it may be suggested that a lien cannot commence at a period anterior to its own existence, and consequently the statute cannot mean what it says—that there shall be a lien on after-acquired property from the date of the docketing of the judgment.

A lien may not commence, but it may easily have a preference over adverse interests, to create which, and to prevent such adverse interests from dispossessing the creditor of his debt, is its object—by relation to a period before it actually took effect.

Thus in *Sturgis* v. *The Bank of Cleveland*, 3 McLean, 140, a mortgage was recorded July 2. Afterwards, but at the term of court commencing on the first of the same month, a judgment was recovered against the mortgagor. *Held*, that the judgment was the paramount lien. The statute of Ohio, under which the question was decided, read: "The lands and tenements of the debtor shall be bound for the satisfaction of the judgment against such debtor from the first day of the term at which the judgment shall be rendered." Whether, under this statute, the judgment was entered before or after the recording of the mortgage, was of no importance. As the court, in *McLean* v. *Rocky*, 3 McL., 237, say, the legislature had an undoubted right to say, as declared in the above statute, a judgment shall be a lien upon lands and tenements from the first day of the term at which it was rendered.

Sturgis v. *The Bank of Cleveland* is an instance of a lien relating back to a period, and taking effect against adverse interests, before the judgment itself existed. So there is no difficulty in this case in regarding the lien as relating back to the date of docketing the judgment. This is the construction warranted by the plain language of the statute, and there is not only an inherent difficulty in the construction, but it has analogies in admitted principles of law.

Thus, where the husband acquires property after marriage,

and dies, the inchoate right of dower of the widow becomes vested in such property, and relates back before the acquisition of the property, to the date of the marriage, to the exclusion of all adverse interests, acquired against the husband after marriage, though before the date of the acquisition of the property. Yet the inchoate right of dower cannot be said to be an interest in lands which the husband has not yet acquired. The result is produced by the operation of the right which gives the estate, and which has the power to invest the estate when acquired, with the priority it possesses. The relation to the date of the marriage is one of law, and to accomplish certain purposes, and is as effectual to exclude adverse interests as though the estate had then actually vested.

So of the judgment lien. There may be an inchoate right of lien—a remedy for the satisfaction of claims against the debtor—which may possess a similar power of taking effect by relation. Such, it seems obvious to the court, is the lien created by section 266 of the civil code.

It follows that the judgment of the court below must be reversed.

Judgment reversed.

McFADDEN v. FRIENDLY.

CHATTEL MORTGAGE FOR FUTURE ADVANCES.

A chattel mortgage is a good consideration for an agreement to make future advances of goods; and a written agreement, which shows on its face that such agreement to deliver goods is secured by a chattel mortgage, purports to have been made on a good and sufficient consideration.

TRIAL BY COURT—FINDING OF FACT.

A finding of fact in a trial by the court, which shows that the cause of action set up in the complaint had been made out, and that the defense set up in the answer is untrue, is sufficient.

APPEAL from Benton. The facts are stated in the opinion.

Chenoweth & Johnson and J. R. Bryson, for appellant.

The complaint is fatally defective, because no consideration was alleged for making the contract or writing sued upon. (10 Johns., 417; Edwards on Bills, 315; Van San. Pleadings, 554.)

The agreement to furnish goods to McCullough, was an agreement to give him a credit, for a special purpose, and was a mere accommodation, and he could not have maintained an action against Friendly. (Edwards on Bills and Notes, 315, 316, 678.)

Kelsay & Burnett and W. S. McFadden, for respondent.

There were no exceptions to the findings by the circuit court, and no motion for a new trial. The appellant cannot now attack them on the ground that there should be additional findings. (*Green* v. *Clark,* 31 Cal., 591; *Hallock* v. *City of Portland,* 8 Oregon, 29; *Pralus* v. *Jefferson,* 34 Cal., 554.)

Only the material issue need be found. (*Fink* v. *Canyon Road Co.,* 5 Oregon, 301; *Philomath College* v. *Hartless,* 6 Oregon, 159.)

By the Court, WALDO, J.:

This action is founded upon the following writing:

"CORVALLIS, Dec. 23, 1878.

"This is to certify, that upon a settlement this day made by and between Max Friendly and W. S. McCullough, an agreement was made to obtain goods for the payment of the men and the various expenses attending the logging and saw-mill expenses. It was agreed that said W. S. McCullough was entitled to a credit of sixteen hundred and fifty-seven dollars, for goods, at the store of Max Friendly, at Corvallis, and that said amount was included and a part of the sum of $5,920, named in the chattel mortgage this day made.

"MAX FRIENDLY."

The complaint alleges an assignment of this instrument to the respondents, and a demand on Friendly for the sum of two hundred and sixty-seven dollars in goods, the amount of goods alleged to be due and unpaid, and the refusal of Friendly to deliver the same.

The answer consists of specific denials, and a separate defense, each and all of which are denied in the reply.

The court finds, as conclusions of fact, that the plaintiffs, for a valuable consideration, are the assignees of the said instrument in writing, and that there was due and unpaid thereon at the time of said assignment, and then, the sum of two hundred and sixty-seven dollars.

We must conclude from these findings, that the court found the denials and the separate defense set up in answer to be untrue, and that the facts set up in the complaint were true. When the court found against each and every denial and defense set up in the answer, this fact is fully declared by finding the cause of action alleged in the complaint to be made out. By such a finding the court passes upon all of the material issues of the case. It would not add to our knowledge of the facts found, were the findings set forth separately on each issue tendered by the answer.

In *McEwan* v. *Johnson*, 7 Cal., 258, under a system of pleading and practice similar to that in this state, a finding "that the facts stated in the plaintiff's complaint are true," and "that the facts stated in the defendant's answer are untrue," were held sufficient. (See also *Pralus* v. *Pacific G. & S. M. Co.*, 35 Cal., 35; *Breeze* v. *Doyle*, 19 Cal., 105.)

In legal effect such is the finding of fact in this case, and must be held valid if there is a cause of action set up in the complaint. A chattel mortgage for advances in the future is good.

It follows that the giving of such a mortgage is a binding contract, which cannot be set aside at the will of either party. The party agreeing to deliver the goods is bound to deliver them so long as the other party has not violated his contract.

The agreement in the case appears, on its face, to be an agreement for future advances, secured by a chattel mortgage, made on the same day. That this was a chattel mortgage given by McCullough to Friendly is not expressly stated, but is almost necessarily implied. It is said in *Barney* v. *Newcomb*, 9 Cushing, 56, that "where the true import and meaning of a written instrument is doubtful, and the intention of the parties cannot be determined from its language, the right doctrine is, that it shall be construed most strongly against the person using the doubtful language, and in favor of him who has been misled, and advanced his money upon it." Friendly signs the original, and expressly agrees to deliver goods to McCullough. That the mortgage to secure the advances of goods was, also, a transaction between the same parties, is a plain inference, and, as against Friendly, must be presumed, and thus a good consideration to support his agreement is deduced from the face of the instrument. It follows that the judgment of the court below must be affirmed.

Judgment affirmed.

TOWN OF LA FAYETTE *v.* CLARK.

JURISDICTION OF CITY RECORDER—APPEAL—REVIEW.

The charter of the town of La Fayette gives the recorder jurisdiction over complaints for the violation of town ordinances, and makes him, *ex-officio*, a justice of the peace.

C. was fined by the recorder for a violation of an ordinance of the town, and appealed to the circuit court, where the judgment of the recorder was affirmed. On an appeal from such judgment: *Held*, That the jurisdiction of the recorder over complaints for the violation of town ordinances, belonged to him in his office of recorder, not as a justice of the peace.

That an appeal, as a mode by which a cause may be retried on the facts, is a privilege existing by statute, not by common law, and that an appeal not having been expressly provided by statute, review was the proper remedy.

APPEAL from Yamhill. The facts are sufficiently stated in the opinion.

W. D. Fenton, for appellant.

E. C. Bradshaw and H. Hurley, for respondent.

By the Court, WALDO, J.:

This is an appeal from the judgment of the circuit court for Yamhill county, affirming a judgment of the recorder of the town of La Fayette, imposing a fine on the appellant, Clark, for the violation of a town ordinance. The case was brought up to the circuit court by way of appeal.

The transcript, as certified, was found not to contain a copy of the complaint upon which the case had been tried before the recorder. An order was thereupon made and served on the recorder to complete the transcript, to which he made answer that the complaint could not be found, and that he could not comply with the order. A motion was then made by the respondent, and granted by the court, to dismiss the appeal and affirm the judgment of the recorder, and from this judgment of the circuit court this appeal has been taken.

The first question that arises is upon the mode of procedure adopted by the appellant to bring the case into the circuit court. If an appeal was not authorized by law, that court did not acquire jurisdiction over the case, and its judgment, affirming the judgment of the recorder, is void.

Section 3 of the act, entitled, "An Act to incorporate the town of La Fayette, in Yamhill county, Oregon" (Session Laws, 1878, page 127), provides that among the other officers of the town, there shall be a "recorder, who shall be the clerk of the board of trustees, and assessor, and *ex-officio* justice of the peace within the limits of the town of La Fayette." By section 7: "The recorder shall be *ex officio* justice of the peace, and have jurisdiction, civil and criminal, pertaining to that office, and shall have jurisdiction over all violations of city ordinances, and may hold to bail, fine or commit persons found guilty thereof."

The charter has no provision giving an appeal from the judgments of the recorder for the violation of town ordinances.

The respondent assumes that the statutes governing appeals from judgments of justices of the peace apply to and govern the recorder sitting as a town magistrate. But this cannot be true, unless, when so sitting, the recorder is exercising the jurisdiction and performing the duties of a justice of the peace. As recorder and judicial officer of the corporation his duty is confined to the administration of the ordinances of the town. (*Meagher* v. *The County of Storey*, 5 Nev., 244.)

As justice of the peace he administers the laws of the state. The two offices are as distinct as though held by different persons. The recorder is not, therefore, acting as a justice of the peace when discharging the duties of his municipal office. There is a conclusive reason why this cannot be true, found in article 4, section 23, subdivision one, of the constitution of Oregon, prohibiting the passage of special or local laws regulating the jurisdiction and duties of justices of the peace. An act extending the jurisdiction of a justice of the peace over complaints for the violation of town ordinances, would be in conflict with this provision of the constitution. It would confer upon a justice of the peace, exercising jurisdiction within certain prescribed limits, powers not conferred upon such officers generally, as a class.

When a justice of the peace, exercising jurisdiction within certain prescribed limits, is invested with powers not belonging to justices of the peace generally throughout the state, the act conferring such jurisdiction is a local law. (*Kerrigan* v. *Force*, 68 N. Y., 383; *The People* v. *Supervisors*, 43 N. Y., 10; *Wheeler* v. *Philadelphia*, 77 Penn. St., 348; *The People* v. *Cooper*, 83 Ill., 589.)

An appeal lies by statute from the judgments of the recorder acting as a justice of the peace. But when sitting as a recorder, there is no provision for an appeal from his judgments to be found either in the charter of the town of La Fayette or in any general law of the state. Appeals for the

removal of causes from an inferior to a superior court for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted where they are expressly given by statute. (*The Schooner Constitution* v. *Woodworth*, 1 Scam., 512.)

In *United States* v. *Wonson*, 1 Gal., 5, Mr. Justice Story says that the word appeal comes from the civil law, and as a mode by which a cause may be retried on the facts, is a privilege existing by statute, and not by common law, and is considered by our courts as a mere legislative and not a constitutional privilege. He further says that many learned men have regarded its transfer into our system as a mischievous novelty.

The circuit court, therefore, had no jurisdiction of the case. Review was the proper remedy.

Judgment reversed.

MARCH TERM, 1881.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

MARCH TERM, 1881.

OREGON RAILWAY COMPANY *v.* CITY OF PORTLAND.

CORPORATIONS—APPROPRIATION OF PUBLIC PROPERTY.

Under the provisions of the statute, without an agreement with the local authorities, a corporation cannot appropriate a highway or public grounds, already dedicated to a public use, to its exclusive use and occupation.

In such case the grant of power to take property appropriated to public uses, cannot be exercised in such a manner as would obstruct or subvert such public uses.

The appropriation of a public levee by a railroad corporation, for the purpose of erecting thereon permanent structures, such as depot buildings, side tracks, etc., would create such obstructions as would defeat or extinguish the public use, and is not within the grant of power, without an agreement with the local authorities as prescribed by the latter clause of section twenty-eight.

APPEAL from Multnomah. The facts are stated in the opinion.

Ellis G. Hughes, for appellant.

That there is in every state government the right of eminent domain, to which all property is subject, whether corporeal or incorporeal, is a principle well recognized, and it is in fact through this power only that all internal improvements in a state are carried on. (*West River Bridge Co.* v. *Dix*, 6 How., 531; *Beekman* v. *Saratoga*, 17 Conn., 461; *Wellington, et al.*, v. *Petitioners*, 16 Pick., 102.)

Nor is the control over it lost by the fact of its being already devoted to a public use. (*Locks and Canal* v. *Lowell*, 7 Gray, 226; *Eastern R. R. Co.* v. *Boston and Marine R. R. Co.*, 111 Mass., 128.)

The one only thing necessary to authorize the taking of public grounds or lands devoted to one public use for another public use, is a legislative authority therefor. (*Matter of City of Buffalo*, 68 N. Y., 179; *Matter of Boston and Albany R. R. Co.*, 53 N. Y., 576.)

That these grounds are public grounds is admitted. Being such, though within the corporate limits of the city of Portland, they are under the control of the legislature. The legislature has in plain and unmistakable terms declared that the public use to which they were devoted as public grounds is subordinate to the uses of a railroad, either for track, side-track or depot purposes, and that they may be taken for such use either on being designated therefor by the proper authorities of the city, or without such designation, if such authorities fail or refuse to make a designation of some public grounds on request. The city has no rights therein which are not subject to the most absolute control by the legislature at any time. (*Darlington* v. *Mayor of New York*, 31 N. Y., 191; *People* v. *Kerr*, 27 N. Y., 170; Dillon on Municipal Corporations, sec. 43.)

J. N. Dolph, Shattuck & Killin, and J. C. Moreland, for respondent.

The doctrine that corporations, who derive power from the legislature to take property by the right of eminent domain, cannot exercise such power in reference to property already dedicated to public use, without an express grant, cannot be contradicted. (77 N. Y., 248.)

Land already devoted to another public use cannot be taken under general laws, when the effect would be to extinguish a franchise. (Mills on Eminent Domain, sec. 47; 7 Wall., 272; 1 Newberry, 541.)

The privilege of condemning land for a railroad cannot be extended to land already devoted by the state to another public use. (Mills on Eminent Domain, sec. 351; *St. Louis R. R. Co.* v. *Blind Institution*, 43 Ill., 303.)

The provisions of the statute, fairly interpreted, simply grant a right of passage—a right to lay and use a track only over the streets or public grounds—leaving such street or grounds in all respects, as far as practicable, subject to all of the uses for which they were used before. No buildings or obstructions other than a simple track can be tolerated without an agreement with the municipality. (Secs. 26, 27 and 28, Miscellaneous Laws, page 530, and authorities above cited.)

By the Court, LORD, C. J.:

This is an action to condemn a certain tract of land, known as the public levee, in the city of Portland, to the use of the plaintiff, a railway limited corporation, for depot purposes; grounds, side tracks, and other purposes.

Among other things, the complaint alleges that it is both necessary and convenient for the plaintiff to have for depot grounds, and for occupation by it for a depot, and for laying its track and side track, and other purposes, those certain premises situated in the city of Portland, etc. (describing the same), and that said premises are public grounds within said city, having been dedicated to the use of the public as a public levee, and are now held by and are under the general control of the city of Portland, the defendant, for use by the general public, as a public levee. That the plaintiff did apply to and request the mayor and common council of said city, they being the authorities of said city, having power to act for it in that behalf, to set aside and designate the said premises for the use of the plaintiff, and for the purposes and uses aforesaid, but that said authorities did wholly fail and refuse to designate said premises for the use of the plaintiff, or to designate any other grounds in said city for said use.

A demurrer to the complaint was sustained, and judgment was given dismissing the complaint, and plaintiff appeals.

For the purposes of this case, the demurrer admits the facts alleged to be true, and the only question presented by this state of facts is, whether the statute in relation to corporations has invested the plaintiff with the power and authority to enter upon and take possession of property held by the defendant, and dedicated to the use of the public, and erect thereon permanent structures for another and different use, although public, than the original use to which it is already dedicated, without the consent of, or any agreement with the local authorities, when the effect of such appropriation must be to extinguish such original use as a public levee, and make the use of the railway corporation exclusive. It can hardly be controverted that the appropriation of this property by the plaintiff for depot grounds, side tracks and other purposes of the corporation, is inconsistent with, and would extinguish its use as a public levee, and the possession of the railroad corporation would be as absolute and exclusive as property taken under the statute from private individuals. (Miscellaneous Laws, pages 530, 531, 532 and 534; Laws of 1878, pages 104 and 105.)

Under these laws the plaintiff has the right to enter upon any lands between the termini of its road for the purpose of examining, locating and surveying the line of such road, and to appropriate sixty feet in width for its road, and in addition thereto, to appropriate a sufficient quantity of such lands for the necessary side-tracks, depots and water stations, etc., where the land belongs to private individuals. And it is provided in the event the corporation cannot agree with the owners thereof as to the amount of compensation to be paid for the same, an action may be maintained against the owners to have the same condemned and appropriated to its use. (Section 40 of title three, chapter seven, Miscellaneous Laws.)

But it is contemplated by this statute that it may become necessary and convenient for the corporation, in the location

of its road, to appropriate a public road, street or alley, or public grounds, or some part thereof, and the only grant of power in relation to this subject is to be found in sections 26, 27 and 28, of the statute above cited.

Section twenty-six provides for the appropriation of any part of any public road, street or alley, or public grounds, when within the limits of an incorporated town, by an agreement with the county court upon the terms and conditions upon which the same may be appropriated or used by the corporation, and in case of failure of the parties to agree, such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of the road. But whenever such highway or public ground is taken by a private corporation by agreement with the local authorities mentioned in section twenty-six, then the corporation may place such gates thereon, and receive such tolls thereat, as may be consented to by such agreement, and none other.

Section twenty-seven provides—and this is the one to which our attention has been particularly directed—that whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in section twenty-six, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities having charge of the same shall designate, and in case such local authorities shall fail or refuse to make such designation within a reasonable time, when requested, such corporation may make such appropriation without reference thereto.

But the latter clause of section twenty-eight provides that when the same is appropriated, *as in this case*, without such agreement as is provided in section twenty-seven, such corporation shall not place any gate, or other obstruction, on the public highway or grounds appropriated, nor charge or receive any tolls from any person passing over or along the same.

In construing statutes of this character, the authorities are uniform in holding that, "to take property already appropriated to another public use, the act of the legislature must show the intent so to do by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent." (Mills on Eminent Domain, section 46, and authorities cited.)

The power conferred must be given in express terms, or by necessary implication, or the corporation will not be permitted to appropriate property already devoted to a public use to its exclusive possession. When the power given can be exercised under certain circumstances, indicated by the statute, independently of the local authorities and without their consent or agreement, the authority to locate the road upon property devoted to another public use must be strictly pursued, and no intendments will be indulged of an exclusive use by the corporation, unless by the direct terms of the grant of power, or by necessary or unmistakable implication, it is manifest that the public use is to be extinguished and the use of the corporation is to be exclusive. Nor will the power be inferred to invade the privileges of the public, and to take property dedicated to a public use, where the uses to which it is sought to be condemned by the corporation, are of such character as to necessarily make the occupation exclusive, and to deprive the public of all benefit or use in the premises, unless the legislative intent to authorize such an interference with the rights of the public are plainly manifested in express terms, and are free from all doubt or uncertainty as to such intent.

No implied supremacy of such particular or exclusive use and occupation by the corporation will be tolerated, or permitted to override and subvert the public use to which the property is already dedicated, upon a mere naked grant of power, and without the direct sanction of the legislature. The reason of the principle is that the grant of power is in derogation of common right, and is not to be extended by

implication, and the statute conferring this power must be strictly pursued.

But while it is true that corporations, authorized by legislative enactment, cannot exercise such power over property already dedicated to a public use without an express grant, the doctrine of the law has not been carried to the extent of holding that no authority can be conferred upon corporations to obtain any rights to use property appropriated to public uses.

"Such a rule," Judge Miller says, "would prevent the extension of railroads in large cities, and arrest improvements of this description, to an extent that would be detrimental to the public interests, as well as to the advancement of facilities for increasing the means of transportation of the products of the country from distant points to the great centers of trade and commerce, where they may be made available in promoting the prosperity of the community, and returning to the producer the avails of his labor." (*In the matter of N. Y. C.*, etc., 77 N. Y., 249.)

There can be no doubt that the public have an interest in extending reasonable facilities to such corporations to carry into effect the purposes of their incorporation, because, in so doing, the convenience, comfort and prosperity of the community is greatly augmented by the increased means of transportation, and in view of these objects, and to enjoy the public benefit to be derived therefrom, our legislature has enacted the provisions of the statute above quoted, and also prescribed the terms and conditions upon which a public road, street or alley, or public grounds, may be appropriated by such corporations for the location and construction of its road, when the same shall be necessary or convenient.

In construing section twenty-six, in connection with the restrictions imposed by section twenty-eight of the statute, in the case of *Douglas County Road Company* v. *Canyonville and Galesville Road Company*, 8 Oregon, 102, the principle of strict construction was applied to the power dele-

gated to corporations to appropriate highways or public grounds. The court say: "The statute contemplates that in the construction of a road by a corporation, it may be sometimes necessary, or convenient, to use a part of a highway, as where it passed through a defile, or where it is difficult to construct a road alongside of the public highway, and in such cases, it is provided that the public road, or so much thereof as may be necessary and convenient, may be used, or in the words of the statute, 'may be appropriated by the corporation.' The word appropriated is not, however, to be understood here in the same sense as in the appropriation of lands belonging to private individuals, where the corporation becomes entitled to the property. By the appropriation of a part of the highway the corporation acquires no right, except to use the public road in common with all others traveling upon it, unless it makes an agreement with the county court, as provided in section twenty-six."

Nor, upon this point, was there any diversity of opinion in the court. Judge Boise, in his dissenting opinion, said: "For the county court has no power to prevent the corporation from using such county road, and their using the same for the purposes of travel would be no public injury, and the rights of the public are protected by the inhibition of the corporation from collecting tolls on such portions of the road as are taken and used on the line of the corporate road, unless the same is allowed to be collected by an agreement with the county court."

In the absence of an agreement with the county court, fixing the terms and conditions upon which the public road may be appropriated by a corporation, the principle laid down by the court was, that the corporation only acquired an easement in the lands held and occupied for a public use, a right of way, which might be enjoyed in common, but without detriment to the public, or materially interfering with the public use to which the lands were devoted. No intendment was allowed, or tolerated, that a corporation without any agreement with

the county court, under the naked power conferred, could, in the exercise of the power delegated, extinguish the public use in the highway, and devote the same to its exclusive use and occupation.

It must be obvious that if the same principle of reasoning is to be applied to the construction of section twenty-seven, when it is sought by a corporation to appropriate a highway or public grounds, within the limits of an incorporated city, without an agreement with the local authorities, it is fatal to the claims of the plaintiff.

In the case under consideration, it is averred that the plaintiff applied to the defendant to set aside and designate the public levee for the use of the plaintiff for depot grounds, laying side tracks, and other purposes, and that the defendant failed and refused to designate said premises, or any other public grounds of said city, for the use of the plaintiff, and it is claimed that by reason thereof, the plaintiff has the authority, under section twenty-seven, to appropriate the levee, and to erect thereon a depot, and such other adjuncts as are necessary and convenient for the purposes of its incorporation.

It cannot be denied that the appropriation of this property for such purposes, must, in the nature of things, utterly destroy the public use, and deprive the public of all benefit and use in the property as a levee, and make the use and occupation of the same by the corporation exclusive as of property taken from private individuals, under the statute. But the latter clause of section twenty-eight provides that when the property mentioned in section twenty-seven is appropriated without such agreement, as in this case, such corporation shall not place any gate or other obstruction on the public highway or grounds appropriated. Here is an express inhibition, in the absence of an agreement with the local authorities, to "place any gate, or other obstruction," upon the grounds appropriated. Why not place any gates or other obstruction upon the highway or public grounds? The answer is, to prevent the public from being barred out, or obstructed

in the use of the highway or public grounds upon which the corporation may locate its road.

The inhibition is designed to protect the public rights, and to prevent the public use in the highway or public grounds appropriated, from being obstructed or subverted. The power to appropriate does not include the right to erect gates or other obstructions, which would deprive the public of the beneficial use and enjoyment of the highway or public grounds, without an agreement with the local authorities. That would be devoting the highway or public grounds to uses expressly inhibited, and utterly inconsistent with the public use.

Now, it cannot be gainsaid, that to permit the plaintiff to erect a depot, side tracks, and all the adjuncts, included in "other purposes," upon this levee, would be to create a permanent obstruction of the public use, and to give the plaintiff the exclusive use and occupation of the premises. Without an agreement, the power of the plaintiff to appropriate the highway or public grounds must be without obstruction to the public rights, or materially interfering with the public use to which the property is already devoted; or, in other words, as Judge Kelly said in respect to highways: "By the appropriation, the corporation acquires no right except to use the public road in common with all other persons traveling upon it." In such case no gates or other obstructions, of whatever character, can be erected to shut out or extinguish the public use. It seems to us, to give the provision under consideration, upon the state of facts presented, the most liberal construction consistent with what may be conceived to be the design of the legislature, nothing more certainly was intended or meant—than to give a right of way over the highway or public grounds appropriated. It was certainly not contemplated, nor do we think it can be inferred by any reasonable implication, as insisted by the plaintiff, that under the circumstances of this case, without any agreement with the local authorities, and in the face of

an express inhibition against placing obstructions upon the grounds appropriated, that the corporation can devote this levee to the purposes claimed, and shut out the public from all benefit in its original use.

We should certainly not be disposed to hold that the corporation would be permitted to obtain any other rights over the highway or public grounds than the right to lay and use its track over the streets or public grounds, leaving such streets or grounds in all respects, as far as practicable, subject to all of the uses for which they were used before. No permanent obstructions, such as depots, etc., which must necessarily obstruct or extinguish the original public use, can be tolerated without an agreement with the local authorities, as provided by the statute. Under a grant of the right of way, Mr. Mills says, in his work on Eminent Domain: "The company, in the location, may lay such number of tracks as are essential to the convenient transaction of business, and for that purpose, may make any necessary alteration in the grade or surface of the highway. But where there is an entire conversion of the streets, by permanent structures of various kinds, to such uses as virtually block it up for all the purposes of a street, such use cannot be justified, or included under a grant of a right of way. The street cannot be occupied as a depot yard, for cars to stand in while they are loaded and unloaded, nor can the track on the street be raised on embankments, so that it cannot be used by ordinary vehicles, nor can the street be obstructed by earth, timber or rails, so as to interfere with its use. The company must for itself provide sufficient ground for depot purposes, and cannot use the public street for such purposes. That would be devoting the public street to purposes entirely inconsistent with the grant of a mere right of way, which must mean a way at the ordinary grade." (Section 200 and authorities cited in the notes.)

But it is insisted that the local authorities having failed to act upon the application of the plaintiff, or to designate other grounds for the use of the corporation, that the power to ap-

propriate highways or public grounds still remains unimpaired, and is not to be defeated by the failure or refusal of the local authorities to act—that the want of an agreement with the local authorities as to the property to be appropriated, or the designation by them of other property for the purposes requested, is not the fault of the plaintiff, and cannot therefore operate to prevent the plaintiff from appropriating the property for the purposes claimed.

This view excludes altogether the restrictions imposed under the latter clause of section twenty-eight, and subordinates the public use to the purposes of the corporation, without even showing such an absolute necessity for the use of this particular property, that, without it, the purposes of the corporation would fail, or be wholly defeated. If this inhibition against placing obstructions upon the public property appropriated, can be ignored and set at naught, by devoting the property to uses utterly inconsistent with the public use, and which, in this case, must subvert it, and create an exclusive use in the corporation, then it would seem to us that the requirement of an application to the local authorities to designate such property, or other property, is a useless and unnecessary requirement. The power to appropriate becomes as extensive, if not more so, without the consent of the local authorities as with it.

Under such a construction any public property, no matter to what public use it may be devoted, can be appropriated for depot grounds, engine houses, and other purposes, however inconsistent with the public use, or detrimental to the public convenience, comfort or prosperity. Such a claim implies a supremacy to corporate uses over all other public uses to which the property may have been dedicated, and, carried to its logical results, property appropriated to the highest uses of state, and upon which may be erected permanent structures at vast public expense, must yield to the higher purposes of the corporation, when the same shall be necessary or convenient to the location and construction of its road.

No authority has been cited, nor have we been able to find any, under a grant of power like this, where the doctrine is maintained. To authorize the taking of property already appropriated to the public use, the grant of power must be in express terms, or by necessary implication, or it does not exist.

In the *St. Louis R. R. Co.* v. *Trustees Ill. Inst. for the Blind*, 43 Ill. 305, under an act much broader in its language than the provision under consideration, the court say: "The language of this enactment is broad and comprehensive, and would literally embrace the right to appropriate any property owned by the State. But failing to grant any property specifically, can it be inferred that it was intended that property owned and already appropriated by the State to permanent and specific purposes, could be taken?" Again: "The language of the act is broad enough to embrace any property of the State necessary to the construction of depots, turn-outs, engine houses, and other buildings necessary for the completion and operation of the road, and yet we apprehend that it would hardly be contended that this grant would embrace all of the grounds and buildings connected with this institution. And yet we are unable to draw the line where the power would cease to appropriate the property." And the court held that the corporation had no power under this enactment to appropriate any portion of the grounds, or property belonging to the State, and used for the purposes of the institution. (See also, *Matter of Boston and Albany R. R. Co.*, 53 N. Y., 575.)

It follows from the views expressed, that upon the record presented by this case, the judgment of the court below must be affirmed.

Judgment affirmed.

LADD & BUSH v. SEARS.

EVIDENCE—PRACTICE.

Where the only objection made, at the trial, to the admission of books in evidence is that they "were not books of original entry," no other ground of objection will be considered on appeal. The party making a specific objection waives all other grounds not covered by it.

ACCOUNTS—BOOKS OF ORIGINAL ENTRY.

A cash book and depositor's balance book, belonging to a bank, shown to have been fairly and correctly kept, in which, after banking hours, each day, the various items of money deposited and drawn out during the day, are copied from "tags" and "checks" containing the proper date of the transaction, concerning each item entered at the time, or when the items so copied into the cash book are immediately, and in the regular course of business of the bank, transcribed into the depositor's balance book, both of such books are admissible in evidence as books of original entry.

FRAUD—GENERAL GOOD CHARACTER.

When the gist of the action is money had and received, an allegation in the complaint that the defendant obtained the amount sought to be recovered by imposition and fraud, does not entitle him to introduce evidence of his general good character for honesty and integrity.

APPEAL from Marion. The facts are stated in the opinion.

Rufus Mallory, for appellant.

The onus of proof is on the respondent. The facts admitted show a *prima facie* case in favor of appellants. It is the usage of the bank not to pay money to a depositor on his check unless he has the money or its equivalent in the bank. The delivery of the draft to Sears by the teller is presumptive evidence that he had paid for it. A thing delivered to another is presumed to belong to him (Civil Code, sec. 166). In relation to the admissibility of books as evidence, appellant cited 15 Am. Dec., 196; *Woodbury* v. *Woodbury*, 50 Vt., 152; *Kolwitz* v. *Wright*, 37 Texas, 82; *Wall* v. *Dovey*, 60 Pa. St., 212; *Lawhorn* v. *Carter*, 11 Bush, 7; *Jones* v. *Long*, 3 Watts, 325; *Hall* v. *Gilden*, 39 Me. 446; 1 Greenleaf Ev., 117; *Shoemaker* v. *Kellogg*, 11 Pa. St., 310; *Karr* v. *Stivers*, 34 Iowa, 123; 1 Phil. on Ev., 371; *Curran* v. *Crawford*, 4

Serg. & R., 3; *Moody* v. *Roberts*, 41 Miss., 74, 77. Books are not evidence of what they *do not*, but of what they *do* contain. (15 Am. Dec. 198; *Morse* v. *Potter*, 4 Gray, 292; *Mattocks* v. *Lyman*, 18 Vt., 98.)

E. C. Bronaugh, for respondents.

Error must be affirmatively shown. It will not be presumed. (1 Oregon, 51, 341; 4 Oregon, 64, 5 id. 191.)

As to the claimed error in admitting the cash book and depositors' balance book in evidence, we submit that both of these books are shown by the evidence recited in the bill of exceptions to have been books of original entry, made so nearly contemporaneous with the transaction recorded, as to be part of the *res gestæ*, and, therefore, clearly admissible. (1 Greenl. Ev., secs. 118, 119, 120, and notes; *Davidson* v. *Powell*, 16 How. Pr., 467; *Bank of Monroe* v. *Culver*, 2 Hill, 531; *Merrill* v. *Ithaca and Oswego R. R. Co.*, 16 Wend., 586; 12 Pick., 139; *Landis* v. *Turner*, 14 Cal., 573; *Humphreys* v. *Spears*, 15 Ill., 275; *Price* v. *Torrington*, 1 Smith's Leading Cases; Code, 247, section 680.)

By the Court, WATSON, J.:

This was an action to recover money, commenced and tried in the circuit court for Marion county. Plaintiffs obtained a verdict and judgment for five hundred and thirty-nine dollars and sixteen cents, and costs, and defendant appealed.

The complaint alleged facts showing that the defendant, on October 10, 1879, obtained from their bank, in Salem, Oregon, the sum of five hundred dollars more than he was entitled to draw therefrom, by means of imposition and fraud, practiced upon their employes in the bank, inducing them to believe he was entitled to said sum on account of previous deposits, which amount he had refused to pay back to plaintiffs.

The answer denied each material allegation in the complaint in relation to the defendant having obtained said amount, or any part of it, without being entitled thereto and contained

some new matter which was put in issue by the replication.

The only issue made by the pleadings was whether defendant had paid into the bank the said sum of five hundred dollars, which he drew out by a check on Ladd & Tilton, of Portland, Oregon, on October 10, 1879.

The errors relied on by appellant to secure a reversal of the judgment which was rendered against him in the court below, are predicated on certain rulings of that court upon the admission of evidence at the trial. We will consider them in the order in which they were presented to us at the hearing.

After introducing testimony showing that, in the regular course of business, a deposit of money in the bank was accompanied by a "tag," filled out by the depositor, with his name, and the date and amount of the deposit, which was immediately placed upon the cash file, and the name and amount thereon entered in the cash book of the bank, at the close of the day's business, and such entries again copied at the same time, from such cash book into the depositors' balance book, and each of said books made to show the depositor's full account correctly, the plaintiffs produced and identified said books and offered them in evidence. Defendant objected to the admission of the books on the ground that they were not books of original entry.

The objection was specific, and the attention of plaintiffs as well as the court directed to a single point. But the defendant now assails the rulings of the court below admitting said books, on the ground that they were incompetent, and inadmissible to prove that he did not deposit in the bank the five hundred dollars in controversy, because they contained no entry whatever in relation to such deposit; also on the ground that they were not the best evidence—all the facts they contained having been previously testified to on behalf of plaintiffs, by the parties who kept the books. We do not think either of these grounds was covered by the original objection, and therefore neither of them can be considered. This objection did not raise any question as to the entries such

books might contain in regard to the transaction in controversy, nor as to the effect of such entries as evidence upon the issue in the case. The sole question was whether the books, being of the nature and kept in the manner proven, were or were not books of original entry.

Whether they contained entries which would be in favor of or against the defendant upon the issue involved, or afforded no legitimate ground for inference either way, was not a question before the court under the objection taken, and could not be.

The books were books of original entry, or not, regardless of the question whether they contained any entries in relation to the defendant. Had these points been sufficiently disclosed by the objection, plaintiffs might have withdrawn their offer to introduce the books, or if not, the court might have reached a different conclusion.

The principle which confines the party making an objection to a ruling at the trial below, strictly to the objection so made, when the cause is brought into the appellate court for review on errors alleged to exist in such rulings, is both sound and just, and conclusively settled upon authority. (*Elwood* v. *Deifendorf*, 5 Barb., 398; *Mallory* v. *Perkins*, 9 Bosw., 572; *Button* v. *McCauley*, 38 Barb., 413; *Garrett's Admr.* v. *Garrett*, 27 Ala., 687; *Walker* v. *Blossingame*, 17 Ala., 810; *Nolan* v. *Harris*, 6 N. Y. (2 Seld.), 345.)

The objection made was not equivalent to a general one for incompetency. It specified a particular ground of incompetency, and we have no right to look beyond that in determining as to the correctness of the ruling excepted to. Upon the question properly before us under such objection, we feel no hesitation in deciding that the books referred to were properly admitted in evidence as books of original entry. The abstract of evidence given in the bill of exceptions shows them to have been the books in which the ordinary business transactions of the bank were regularly kept. The entries were made in them each day, after banking hours, from the

"tags" and "checks" containing the memoranda of the day's business. This proof entitled them to admission over the objection made. (1 Greenleaf on Evidence, secs. 117-120, and notes; *Davidson* v. *Powell*, 16 How. Pr., 467; *Bank of Monroe* v. *Colver*, 2 Hill, 531; *Smith* v. *Sanford*, 12 Pick., 189; *Tomlinson* v. *Borst*, 30 Barb., 42.)

Passing to the next question, which arises upon the objection to the testimony of J. H. Albert, the teller of the bank, explaining his delay in discovering the mistake which he claimed to have made in paying out the five hundred dollars to the defendant, on the supposition that he was entitled to that amount, on account of former deposits, when in fact he was not entitled to it, we are convinced that the court below committed no error in overruling the objection and admitting the evidence.

This delay covered a period of between two and three weeks, and some explanation was both proper and necessary to entitle his testimony to its proper weight before the jury, under the circumstances. His testimony upon this point presented the facts and circumstances which affected his subsequent conduct, and rendered it entirely consistent with the facts directly in issue, which he had also testified to on the trial. (*Pollard* v. *Bates*, 45 Vermont, 506 and 507.)

The objection to this part of the evidence was general, for incompetency and uncertainty. Conceding that it would have been well taken and sufficient if the testimony objected to had shown, on its face, an attempt to prove the contents of a written instrument, without producing the instrument, or accounting for its non-production, still it is impossible to determine, from the statement of the testimony given in the bill of exceptions, that such was the case.

The statement of the evidence given by the witness on this point is, "that he, as teller of the bank, had some correspondence with one J. K. Sears, who had furnished some collateral, and was to be allowed to overdraw his account." The legal presumption in such cases is in favor of the correct-

ness of the rulings of the lower court, and error must affirmatively appear in the record, or that presumption will prevail. And in our opinion it should prevail in this instance over any inference to the contrary which can be derived from the statement contained in the record in relation to the testimony objected to.

Besides it is quite evident from the whole of the record considered together upon this point, that no such question was presented to or determined by the lower court.

Upon the only remaining question we are equally well satisfied that there was no error. The offer by defendant to introduce evidence of his general good character for honesty and integrity was properly overruled. While the complaint charged him with imposition and fraud in obtaining the sum of money in controversy, such allegations were not essential to plaintiff's cause of action, and need not have been either alleged or proved. The gist of the action was money had and received, and the right of plaintiffs to recover, and the amount of recovery in no wise depended upon the proof of any fraud or evil motive on the part of the defendant, in any part of the transaction.

There was no error in any of the rulings excepted to, in our view of the law applicable to the case, and the judgment of the circuit court must be affirmed with costs.

Judgment affirmed.

Lord, C. J., did not sit in this case.

HUGILL v. KINNEY, et al.

FORGED INSTRUMENTS—ESTOPPEL.

An offer of a reward of five hundred dollars was published over the names of the appellants in the *Weekly Astorian*, payable upon the conditions therein named. The plaintiff performed the conditions entitling him to the reward, and brought his action to recover the same. The appellants denied that they offered the reward, and denied that they authorized the publication. At the trial, the jury were instructed that if knowledge of the published offer of reward (though its publication was in no way authorized by them) came to the defendants, and they did not object to, countermand, or deny it, they were liable: *Held*, That the appellants were not estopped to deny the publication.

APPEAL from Clatsop. The facts are sufficiently stated in the opinion.

Milton Elliott, for appellants.

F. D. Winton, for respondent.

By the Court, WALDO, J.:

The facts in this case are, that some time in the year 1877, there appeared over the names of the defendants, in the *Weekly Astorian*—a newspaper published in Astoria, Oregon—an advertisement purporting to be an offer of reward, of which the following is a copy:

"$500 REWARD.

"The above sum will be paid for evidence which will convict of a crime any person or persons cutting or injuring any net or nets, or in any way molesting by threats or intimidation any fisherman lawfully pursuing his business, as such on the Columbia river. Also, $50 will be paid for the arrest and conviction of any person or persons found purchasing from any cannery's boat on the Columbia river, without authority from the owner of said boat."

The plaintiff alleged a performance of the conditions entitling him to recover said sum of five hundred dollars. and

the defendants having refused payment, he brought his action to recover. The appellants denied the publication.

At the trial, the court charged the jury that if knowledge of the published offer of reward, although its publication was in no way authorized by defendants, came to them and they did not object to, countermand, or deny it, they were liable. The instruction goes on the ground that the appellants were estopped by their silence, to deny that the published offer of reward was their act.

The facts to which the instruction was applied—the mere knowledge of the existence of the unauthorized advertisement—bring the case within the rule laid down in *Meley* v. *Collins*, 41 Cal., 663. In that case there was a forged deed, in all respects regular on its face, put upon record, purporting to have been executed by the plaintiff to the grantor of the defendant's grantor. The evidence tended to prove that the defendants had no knowledge that the said nominal deed of the plaintiff was a forgery. It was shown that the plaintiff had knowledge of the existence of the deed several years before she brought her action, and before the defendant made his purchase, and took no steps to correct the false impression carried by the record. The case presented was, whether the mere silence of the plaintiff under such circumstances, and the possible and even probable fact that some one might act to his injury on what appeared to be the true state of the title would estop plaintiff to assert title to the land against an innocent purchaser. The court held that it would not. It is only where silence becomes a fraud that it works an estoppel. (*Hill* v. *Eply*, 31 Penn. St., 334.)

Now in this case there is nothing to found an estoppel upon, but the mere knowledge of the defendants that an advertisement over their names had appeared in the public press. This advertisement was not the act of the defendants; hence to make them liable the act of the plaintiff must have been done under such circumstances that the silence of the defendants

amounted to a fraud upon him. This requires some intent—an implied admission on the part of the defendants.

The principle is the same "that is applied in the case of deeds of real estate, that he who stands by at the sale of his property by another person, without objecting, will be precluded contesting purchaser's title." (*Corser* v. *Paul*, 41 N. H., 31; 1 Greenleaf on Evidence, section 197.)

The plaintiff's belief in the genuineness of the advertisement, like the belief in the genuineness of the deed in the case of *Meley* v. *Collins*, above, cannot of itself affect the appellants. They must have been placed in such a situation that their conduct was equivalent to standing by and seeing the plaintiff act, knowing that he believed the advertisement to be genuine. The instruction was not applied to such a case, but made it the duty of appellants generally, when the knowledge of the advertisement came to them, to contradict it in a public manner, or affirmatively undeceive the plaintiff. The mere failure to do this cannot, under the authorities cited, be construed into an admission of the genuineness of the advertisement. The judgment of the circuit court must be reversed and a new trial ordered.

Judgment reversed.

RANKIN v. BUCKMAN, et al.

MUNICIPAL CORPORATIONS.

Where the charter of a municipal corporation provided that "the board of trustees has power and authority," within the limits of the corporation, "to construct, repair and clear streets," and to "levy and collect taxes," etc., the duty imposed by the charter upon these officers to keep the streets in repair and safe for the passage of persons and property, is imperative, and not discretionary. "The words power and authority in such case may be construed, duty and obligation."

OFFICERS—DUTIES OF.

What officers are employed to do for others, and which is beneficial to them to have done, the law holds they ought to do, especially if the law supplies them with the means of executing the power.

TRUSTEES—DUTIES AND LIABILITIES.

Where the charter of a municipal corporation provided that "the city is not liable to any one, for any loss or injury to person or property, growing out of any casualty or accident happening to such person or property, on account of the condition of any street or public ground therein, but that this section does not exonerate any officer of the city, or any other person, from such liability, when such casualty or accident is caused by the willful neglect of a duty enjoined upon any such officer": *Held*, That the repair of the streets, and the maintaining them in a safe condition for travel, was a duty enjoined upon the defendants, and if this plain duty is willfully neglected, and any one is injured, they are liable for the damages sustained.

PLEADING AND PRACTICE.

It is not necessary that the complaint should contain a distinct averment of the possession of the requisite funds to make repairs; *prima facie* such means exist, and the absence of them must be shown by way of defense.

APPEAL from Multnomah. The facts are stated in the opinion.

H. T. Bingham and Durham & Thompson, for appellant.

Submit that when the statute refers to the duties of public officers exercising statutory authority delegated to them, concerning the public interests and the rights of third persons, the execution of the power may be insisted on as a duty, even though the phraseology of the statute be permissive only. And if the duty is not performed, an action will lie. (Sedg-

wick on Statutes and Const. Law, 386, 387; *Mayor of New York* v. *Furz*, 3 Hill, 612; Thompson on Negligence, vol. 2, 627.)

The repair of streets is a duty which devolved upon the defendants by necessary implication, from the acceptance of the privileges and immunities granted the city and its inhabitants by the charter. Want of funds, and the legal means of procuring them, must be shown by way of defense. (*Hoover* v. *Backhoof*, 44 N. Y., 113; *Shartell* v. *Minneapolis*, 17 Minn., 308.)

The respondents willfuly neglected a duty enjoined by law, and are liable for special injury sustained. (*Robinson* v. *Chamberlain*, 34 N. Y., 389; *Detroit* v. *Cory*, 9 Mich., 165; *Bryan* v. *Landon*, 3 Hun, 500; Cooley on Torts, 625, and cases cited.)

J. H. Woodward, City Attorney, and E. D. Shattuck, for respondents.

The complaint is fatally defective, because it does not allege any fact showing that the defendants, as a board or otherwise, had funds, or the power to raise funds, to repair the bridge in question. They are not liable for omitting or refusing to perform an act that is discretionary—*quasi judicial*. (Dillon on Municipal Corporations, sec. 764.)

In any event, there can be no duty to repair, unless there are funds, or the coercive power to raise funds sufficient for the purpose, which must be alleged and shown. (*Garlinghouse* v. *Jacobs*, 29 N. Y., 303, 312; *Commissioners* v. *Duckett*, 20 Md., 439.)

It is too well settled law to require citation of authorities that where public corporations maintain streets, bridges, wharves, docks, canals, or other like works for the benefit of the members of the public distributively, and for the profit of the corporation, by taking toll or other means of compensation—the corporation—and if the trustees are provided with corporate funds for the purpose, out of which they may

respond, they—the trustees—may be held liable to an individual for injury on account of failure to repair. But not so where the service is voluntary and maintained for the public collectively and the trustees are provided with no public funds out of which they may respond.

By the Court, LORD, C. J.:

This is an action to recover damages for an injury, resulting in the death of the daughter of the plaintiff, for negligence in not repairing a bridge.

The complaint alleges substantially, that the defendants were officers of the municipal corporation of the city of East Portland, duly elected and qualified as such, and constituting what is called the Board of Trustees of said city, and that each of them had accepted the said office and had entered upon the duties thereof; that by the charter of said city, it was the duty of said defendants, as such officers, to keep the streets of said city in good order and repair, and safe for travel; that among other streets is Fourth street, which extends over a deep ravine, and is projected over the same by means of a bridge and trestles; that the same was much traveled over and used by the citizens, etc., so much so that the duty of the defendants in the premises was a matter of public and general concern. That on a certain day the said bridge became and was insecure and unsafe for the passage and travel of passengers over and upon it, etc. That the said defendants, at and long prior to the accident hereinafter mentioned, were notified and were aware of the unsafe and insecure condition of said bridge, but the said defendants, willfully disregarding the duties of their said office of Board of Trustees, willfully, negligently and carelessly suffered and permitted the said bridge to remain unsafe and insecure, and without proper protection, or notice to citizens or travelers against accident.

That on the 4th day of August, 1880, the daughter of the plaintiff was lawfully passing along said bridge and over the same, and wholly unaware of danger, was accidentally, and

without fault or negligence upon her part, precipitated through the planking or roadway of said bridge, down among the trestles thereof, and into the water at the bottom of said ravine, whereby the said Eva Rose Rankin received great bodily injury and was killed. Then follow other allegations immaterial to the controversy.

The complaint was demurred to and the demurrer was sustained, on the ground that it did not state facts sufficient to constitute a cause of action.

Two objections are urged to the sufficiency of the complaint. First, that the power and authority to repair, imposed upon the Board of Trustees by the charter, is not absolute and imperative, but discretionary; and, second, that it ought to be alleged affirmatively in the complaint that the defendants had funds sufficient, or the coercive power to raise funds sufficient, to make the necessary repairs.

At the common law, political divisions of the state, which have duties imposed upon them by the general law, without their consent, are not liable to respond to individuals in damages for their neglect, unless expressly made so by statute. Accordingly, such organizations as counties, towns, road districts, etc., the courts have held quite uniformly not to be liable in a civil action for damages for neglect of duty, unless such liability be expressly made so by statute.

Although such corporations may have the duty imposed upon them by general law to make and repair roads, streets and bridges, and also the power conferred to levy taxes therefor, the reasoning of the courts has been that this is a public duty, and not a corporate duty; and in this respect such corporations are to be regarded as public or state agencies, and not liable to be sued civilly, unless, as before stated, the action be expressly given by statute. (Dillon on Municipal Corporations, secs. 762, 785, and notes.)

The authorities, however, make a distinction between such organizations and a municipal corporation which exists under a special charter conferring peculiar powers and privileges,

and imposing special duties different from those which prevail in the case of the former.

But as was said in *Hill* v. *Boston*, 122 Mass., 344, where counties and towns are held liable to such actions, there is, of course, no reason why municipal corporations should be exempt from liability, unless directly made so by statute. But under the provisions of our statute all such corporations, whether incorporated towns, school districts or counties, are liable to respond in damages for an injury arising from some act or omission of such corporation.

Section 347 of the code provides that "an action may be maintained against a county, incorporated town, etc., for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation." This section of the code was adopted in 1862, and is still the law of this state. Subsequently, by an act of the legislature the city of East Portland was incorporated, and the charter granted to the inhabitants thereof, which expressly exempts the city from any liability growing out of any casualty or accident, occasioned by the defective condition of any streets or public grounds within the territorial limits of the city, and transfers or attaches this liability to any officer or person out of whose willful neglect of a duty imposed by the charter, or gross negligence, such casualty or accident is caused. This section is as follows:

"Sec. 33. The city of East Portland is not liable to any one for any loss or injury to person or property growing out of any casualty or accident to such person or property, on account of the condition of any street or public ground therein, but this section does not exonerate any officer of the city of East Portland, or any other person, from such liability, when such casualty or accident is caused by the willful neglect of a duty enjoined upon such officer or person by the law, or by the gross negligence or willful conduct of such officer or person in any other respect."

It will be observed that the first clause of this section ex-

pressly exempts the city from any liability to persons for injuries received on account of the streets being defective or out of repair. In *O'Hara* v. *City of Portland*, 3 Or., 526, a provision similar to this clause was held to be constitutional, and the city not liable for injuries sustained by reason of a defective sidewalk. (Abb. Pr. R. [U. S.] Vol. 10, 186; Sherman & R. on Negligence, section 124.)

But the latter clause of the section (33) imposes the liability from which the city is exempted in such case, upon any officer of the city, or any other person, when such accident is caused by the willful neglect of a duty enjoined upon any such officer. The liability which the statute above referred to imposes upon the corporation for any act or omission resulting in an injury, is shifted, by this section of the charter, from the corporation to the officer or person out of whose negligence a duty enjoined, but unperformed, has resulted in an injury.

The "act or omission" mentioned in the statute, and by reason of which an injury has been sustained, must have grown out of some duty or obligation imposed by the charter or the law upon the corporation, before the liability to a civil action in damages could have been sustained. But in respect to municipal corporations this is nothing more than the courts have held, as before stated, in the absence of an express statute, that municipal corporations are liable to an action for damages for injuries resulting from their negligence by reason of the peculiar power and privileges conferred, and the special duties imposed upon them by their charter.

As the result of an examination of numerous judicial decisions, Judge Dillon, in his excellent work on Municipal Corporations, section 789, says: "It may be fairly deduced from the many cases on this subject, referred to in the notes, that in the absence of an express statute, imposing the duty, and declaring the liability, municipal corporations proper, having the powers ordinarily conferred upon them, respecting bridges, streets and sidewalks, within their limits, owe to the

public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in civil actions for special injuries resulting from neglect to perform this duty. Such a duty and liability are considered to exist, without a positive statute, when the following conditions concur: 1. The place in question, whether bridge, sidewalk or street, must be one which it is the duty of the corporation to repair or keep in a safe condition, and this duty (to keep in repair) if not specifically enjoined, must arise upon a just construction of the charter, or statutes applicable to the corporation. 2. This duty or burden must appear upon a fair view of the charter, or statutes, to be imposed, or rest upon the municipal corporation as such, and not upon it as an agency of the state, or upon its officers as independent public officers. (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter, or general act, which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways.) 3. The power to perform the duty of maintaining the streets in a safe condition, by authority to levy taxes, or to impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation."

Bearing in mind that the city is exempted by section 33 of the charter, from liability for an injury to any person, growing out of any accident on account of the condition of any street, but that this section does not exonerate any officer of the city from such liability when the accident is caused by the wilful neglect of a duty enjoined upon such officer, we come now to inquire whether the duty and responsibility of keeping the streets in repair is not devolved upon the defendants, by any such certain and precise provisions of the charter, as to make them responsible to individuals for injuries resulting from the bad state or condition of the streets; or, in other words, to ascertain whether the duty imposed

upon the defendants by the charter, in respect to the matter in hand, is imperative, or discretionary. The question is one of legislative intention.

It will be admitted, of course, that a municipal corporation, or its officers to whom is confided legislative functions, is not liable to an individual damnified by the exercise, or failure to exercise, a legislative authority. But it may be affirmed with confidence that the general tenor of judicial authority sustains the doctrine that where the power conferred upon the officers is to be exercised for the benefit of others, and also includes the means of executing the power, the intent of the legislature is to impose a positive and absolute duty.

It is provided, among other things in the charter, that "the Board of Trustees has power and authority, within the limits of the corporation, to remove all obstructions from the public highways, streets, side and cross walks, gutters and sewers, and to provide for the construction, repair and cleaning of the same. To assess, levy and collect taxes, etc., and the board is authorized and empowered to enforce the collection of any general or special tax, levied in pursuance of this act, and may authorize the issue of warrants, and levy on the real and personal property, and cause the same to be sold," etc. Here, then, is the power and authority of the defendants to repair the streets and keep them in a safe condition, and to enable them to perform this duty, the power and authority to levy and collect taxes to pay for it. Besides, the duty in respect to highways and streets, imposed upon these officers, is not as independent public officers, acting in behalf of the state, for the territorial limits of the corporation is excepted out of the jurisdiction of the county court, and the jurisdiction of the supervisory officers of the county for road purposes. Manifestly the power and authority conferred upon the defendants is to be exercised for the benefit of others, the public good, and the means of executing the power, or to perform the duty of maintaining the streets in a safe condition, is supplied by

the most efficient instrumentalities of the law. This of itself is sufficient to indicate, by the special powers and privileges conferred, and the special duties imposed by the charter upon the defendants, that the legislative intent was not to impose discretionary but positive and absolute duties in respect to maintaining the streets in a safe condition for the passage of persons and property.

"But where the duty to repair," says Judge Dillon, "is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and the liability, if there be nothing in the charter, or legislation of the state, to negative the inference, has often and, in our judgment properly, been deduced from special powers conferred upon the corporation to open, grade, improve and exclusively control public streets within their limits, and the means from which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge the duty."

The various sections under articles four and six of the charter, confer all the power upon the defendants enumerated in the above quotation. They can improve, widen, alter the grade of any street, etc., or repair any street or part thereof, when deemed expedient, and provide for the payment by local assessments, or cause the same to be paid out of the general fund. Whether the cost of the improvement or repair of the street, under section 28, shall be assessed upon the adjacent property, or be paid out of the general fund, is a matter, of course, resting in their discretion. This they are required to do by ordinance, and it in no wise conflicts with the "power and authority" conferred under article IV., to "construct, repair and clean the streets."

In *Springfield Milling Co.* v. *Lane County*, 5 Or., 271, Mr. Justice Shattuck said: "When a public officer or body has been clothed by statute with power to do an act which concerns the public interest, the execution of the power is a duty, and though the phraseology of the statute may be per-

missive, it is nevertheless to be held peremptory." (Smith's Com., 727, 729; Sedgwick Stat. and Const. Law, 438.)

But the "power and authority" conferred upon the defendants to "construct or repair streets," is not permissive in its phraseology. These words, "power and authority" to "repair streets," etc., and "to levy taxes," etc., have received a judicial construction upon a subject almost identical in character with that under consideration. "It is a well-settled principle that when a statute confers a power upon a corporation, to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power and authority' in such case may be construed 'duty and obligation.'" (Dwarris on Statutes, 712; *Mayor and Common Council of Baltimore* v. ———, 9 Md. R., 174; *Com'rs Public Schools* v. *County Com'rs of Alleghany County*, 20 Md., 458; *County Com'rs* v. *Duckett*, 20 Md., 477.)

In Thompson on Negligence, vol. 2, page 753, it is said that, "it is now settled in most of the states, independent of statutes expressly so providing, that cities and towns which voluntarily accept charters from the state, clothing them with special privileges to be exercised for the benefit of their citizens, and committing to them exclusive control over streets, alleys and highways, within their limits, are liable in an action for damages to any person specially injured by their failure to keep such streets, alleys, and other highways in suitable repair. And this is so, although the statute committing to such corporation the care of the streets and highways within its limits is only permissive in its language. The case becomes clearer, when the duty of keeping the streets in repair is clearly implied by the charter, and adequate means provided for its performance. The exercise of such power is not merely a duty, but imperative, and the words 'power and authority' in such a charter mean 'duty and obligation.'"

From this review, it must be manifest that the "power and authority" conferred upon the defendants by the charter, is

not merely a duty to be exercised at their pleasure, but an obligation they owe the public to keep the streets in repair and in a safe condition for travel. The charter expressly provides that any officer by whose wilful neglect of a duty enjoined any accident has happened, shall not be exonerated from liability; or, in other words, shall be liable in an action for damages for the injury sustained.

Having, then, the exclusive care and control of the streets, and the means provided to repair them when defective, the duty which the law imposes upon the defendants is imperative to see that the streets are kept in a safe condition for the passage of persons and property, and if this plain duty is neglected and any one is injured, they are liable for the damages sustained.

The second objection is, that it ought to be alleged in the complaint that the defendants had the requisite funds, or the coercive power to raise funds, sufficient to make the repair. That the defendants are invested with ample and coercive power under the charter to raise funds, has been sufficiently shown already, and this part of the objection is dismissed.

The question then is, is the complaint fatally defective for want of an allegation of the possession of the requisite funds by the defendants to make the repair? "Want of funds, and of the legal means of procuring them, will, of course, be an excuse; but *prima facie* such means exist, and the absence of them must, it seems, be shown by way of defense, and evidence of a want of means, is, therefore, generally irrelevant." (Thompson on Negligence, vol. 2, 758, and authorities cited in notes.)

In *Adsit* v. *Brady*, 4 Hill, 634, Mr. Justice Bronson said: "It has not yet been decided that an individual possessing a civil remedy, must make such an averment, and as an original question, I should think it enough to show that the law imposed the duty of repairing, and then leave it to the officer to excuse himself, if he can, by showing a want of funds."

But in *Smith* v. *Wright*, 27 Barb., 622, it was held that

an averment in the complaint of the possession of the requisite funds by the commissioners is necessary.

In a still later case, *Hyatt* v. *Trustees of Rondout*, 44 Barb., 385, it was said, as a question of pleading, the cases are not decisive whether an averment of the possession of funds should be made in the complaint, leaving the defendant to set up the want of them in the answer, or not, and referred to the cases of *Adsit* v. *Brady* and *Smith* v. *Wright*, supra; but the court say: "Whatever may be the case in regard to commissioners of highways and towns, a different and more stringent rule appears to have been applied to corporations and the trustees of a village." The reason of this difference has already been sufficiently discussed not to require further notice. It is sufficient to say that *Hyatt* v. *Trustees of Rondout* was affirmed in ——— v. ———, 41 N. Y., 619. But in *Hover* v. *Barkhoof*, 44 N. Y., 118, the principle as decided in *Adsit* v. *Brady*, supra, was approved. Mr. Justice Earl says: "If the defendants had shown that they did not have the funds to repair the bridge, and that they could not have caused it to be repaired upon credit, under the statute, then they would have had a clear ground of defense. But in the absence of proof to that effect, they cannot avail themselves of that ground of defense. Under the facts of this case, and the principle decided in *Adsit* v. *Brady*, 4 Hill, 630, they must be treated as if they had the requisite funds in hand, or under their control."

In *Shartle* v. *City of Minneapolis*, 17 Minn., 314, it was held that in an action against a municipal corporation for damages for an injury caused by a defective bridge, it is not necessary for the plaintiff to plead, in the first instance, that the means for repairing the bridge were provided for, or placed at the disposal of the defendant, unless, by the terms of the act of incorporation, the possession of the means is made a condition precedent of the defendants' liability.

From this review it is our opinion that it is not necessary to allege in the complaint the possession of the requisite funds

by the defendants to make the repair, but that *prima facie* such means exist, and the absence of them must be shown by way of defense.

In respect to *Garlinghouse* v. *Jacobs*, 29 N. Y., 297, relied upon by the defendants, it is sufficient to say that in that case the defendants had no funds, and no authority to obtain them, for the purpose of repairing bridges. In *Hoover* v. *Barkhoof*, supra, Mr. Justice Leonard said: "The court of appeals reversed that case (*Garlinghouse* v. *Jacobs*) in *Robinson* v. *Chamberlain*, 34 N. Y., 389, and placed the prior decision on the true ground, that the defendants were without funds, or the power to obtain them, and denied the doctrine there attempted to be established, that commissioners of highways were not liable to a private action for injuries caused by their neglect or omission to keep the bridges of their town in repair. The leading cases of this state and of England are all reviewed, and it was held, on careful consideration, that one who assumes the duties and is invested with the powers of a public officer, is liable to an individual who sustains a special damage by a neglect properly to perform such duties."

The case of *Bartlett* v. *Crozier*, 17 John., 440, also relied upon by the defendants, is not in point. The defendant was an overseer of highways, and had no authority to repair bridges, or any funds, or the power to raise funds; he was the mere subordinate agent of the commissioners, and the court held that the latter were responsible to the public for the repair of bridges, and thus reached a conclusion necessarily fatal to the plaintiff's right of recovery. It follows that the judgment of the court below must be reversed.

Judgment reversed.

BREMER & CO. v. FLECKENSTEIN & MAYER.

CHATTEL MORTGAGE—SALE—CONFIRMATION—CREDITOR'S RIGHTS.

Fraudulent mortgages, judgments and decrees, although void at law, may be impeached and set aside in equity, where they tend to obstruct the collection of debts; and having acquired jurisdiction for this purpose, equity will proceed to afford final relief.

Where a fraudulent mortgagee, for the purpose of defeating a subsequent valid attachment, procures a decree of foreclosure, and receives the proceeds of the mortgaged property through a judicial sale under such decree, equity will make him a trustee of such proceeds for the attaching creditor.

A chattel mortgage fraudulent as to creditors, by reason of an agreement between the parties thereto, allowing the mortgagor to continue in possession of the mortgaged chattels, with power to sell and dispose of portions of the same for his own benefit, in the usual course of trade, is void as to all the property covered by the power of sale.

No order of sale is necessary to preserve an attaching creditor's lien on the proceeds of attached property in the hands of a fraudulent mortgagee, who has procured a foreclosure of his mortgage and a sale of the property, with notice of the attachment, but without making the creditor a party prior to the rendition of judgment in the attachment suit.

An appellee, whose objections to the confirmation of a referee's report in the court below were overruled, is entitled to have such action of the lower court reviewed, on an appeal by the appellant from the whole decree, and to obtain a more favorable decree, if warranted by the facts in the case.

It is error to allow interest in excess of the legal rate as damages.

APPEAL from Multnomah.

This is an appeal from a decree of the circuit court, declaring a chattel mortgage fraudulent and void as to the respondents, J. Bremer & Co., setting aside a decree of foreclosure thereof in the same court, and giving respondents judgment against the appellants for $200, with interest at one per cent. per month from July 7, 1879, and costs.

The mortgage was executed by one J. Haas, to appellants Fleckenstein & Mayer, on June 2, 1879, upon a stock of wines, liquors and cigars, some bar-room furniture, and other personal property, to secure a debt of $4,000, which he then owed

appellants. The mortgage was duly filed and recorded on the 6th day of the same month. Haas was a wholesale and retail liquor merchant, doing business in the city of Portland, and the wines, liquors and cigars constituted his stock in trade. He remained in possession, and continued to sell at retail, both for cash and on credit, until the 7th day of July following, when all the mortgaged property was attached, in an action brought against him by the respondents, in said circuit court, to recover a debt of $289, then due from him to the respondents. On the day following, appellants instituted a suit in the same court to foreclose their mortgage, without making respondents parties, and, by the appearance and consent of Haas, obtained a decree of foreclosure and sale on that day. The property was sold under this decree, on the 21st day of the same month, for $1,240, and the proceeds were afterwards paid over to the appellants. Three days later respondents recovered judgment in their action against Haas, for the sum of $289, with interest at one per cent. per month from June 26, 1879, and costs and disbursements, taxed at $24.20. On the 7th day of August following, and while the proceeds of sale were still in the hands of the clerk of the court, they filed an affidavit with said clerk, claiming a sufficient amount of such proceeds to satisfy their judgment against Haas.

The clerk thereupon applied to the court for an order requiring respondents and appellants to interplead in said foreclosure suit as to the disposition of such proceeds. Upon this application the court made an order allowing respondents ten days from that date in which to file a bill in equity, for the purpose of impeaching the decree in said foreclosure suit, and restraining the clerk from paying over such proceeds. On the 21st day of the same month, the respondents having neglected to file a bill, the court vacated its order, and the clerk paid over the proceeds of sale to the appellants. Haas was all the while insolvent.

The respondents then brought this suit to impeach and set

aside the mortgage and for a decree of foreclosure thereon, on the ground of fraud, and prayed for a personal judgment against the appellants for the amount of their judgment against Haas. Appellants demurred to the complaint, but the demurrer was overruled.

They then answered, denying all allegations of fraud, and averring as separate defenses, that respondents' judgment against Haas was a general judgment only, and contained no order for the sale of the property attached, and that in consequence thereof their attachment became vacated and discharged, and their lien was lost, also setting up, as a bar to the suit, the filing of the affidavit with the clerk, and the proceedings thereon, above stated. The respondents demurred to these defenses and the demurrer was sustained by the court.

A replication was filed to the remaining new matter set forth in the answer. The cause was then submitted to a referee to take the testimony and report his findings of fact, and conclusions of law therefrom. He found: "That it was understood between defendants Fleckenstein and Mayer at the time of the execution of said mortgage that Haas should continue in his business of retail liquor dealer, in Portland, Oregon, and sell, in the course of business, wines, liquors and cigars, and stock, that was included in the mortgage, and replace the same. The proceeds of such sales to be used in the business by Haas, and the remainder paid to the defendants Fleckenstein and Mayer on the mortgage. That Haas so continued and sold, from the execution of the mortgage until plaintiffs' levy, both for cash and upon credit. Fleckenstein and Mayer at the time knew that such sales were being made by Haas."

He also found that the value of the stock of wines, liquors and cigars, at the time of respondents' attachment, was $200, and the balance of the property, $1,040. As a conclusion of law, he reported the respondents entitled to a decree setting

aside said proceedings of foreclosure, and for the recovery of $200 and costs.

Objections were filed by both parties, but they were overruled, the report confirmed and a decree entered accordingly.

Joseph Simon, for appellants.

The mortgage gave no authority to the mortgagor to sell any portion of the property, except for the purpose of applying the proceeds to diminish his debt to the mortgagee. That such a chattel mortgage is valid, and will be sustained by the courts, there can be no doubt. (*Robinson* v. *Elliott*, 22 Wallace, 513; *Brett* v. *Carter*, 2 Lowell, 458; *Hughes* v. *Corey*, 20 Iowa, 397; *Re Kirkbride*, 5 Dillon, 116; *Davenport* v. *Foulke*, 68 Ind., 382; 22 Kan., 127; 31 Am. R., 171; 32 Am. R., 621.)

Henry Ach, for respondents.

Deeming that it is proven that an agreement was had and understood between the appellants and Haas, as charged in the complaint, we submit that the mortgage is void as to the respondent. (Herman on Chattel Mortgages, pages 225, 228, 230, 232, 238, 240, 257, 352, 389; *Collins* v. *Meyers*, 16 Ohio, 547; *Edgell* v. *Hart*, 9 N. Y., 213; *Russell* v. *Winne*, 37 N. Y., 591; *Orton* v. *Orton*, 7 Or., 478; *Jacobs* v. *McCalley*, 9 Or., 52.)

By the Court, WATSON, J.:

The first question to be considered arises upon the decision of the court below overruling appellants' demurrer to the complaint. In addition to the facts contained in the foregoing statement, the complaint alleged an agreement and understanding between Haas and the appellants, at the time the chattel mortgage was executed, substantially as found by the referee. But appellants insist that in the case made by the complaint itself, the respondents had a plain, speedy and adequate remedy at law, and were therefore not entitled to bring a suit in equity. We think it unnecessary to determine

whether they had an adequate legal remedy at law or not, as they had a clear right to resort to a suit in equity under the allegations of fraud in their complaint, and on account of the nature of the relief sought. If the allegations in the complaint were true, and their truth was admitted by the demurrer, the chattel mortgage given by Haas to the appellants was fraudulent and void as to their judgment against Haas, as also were the proceedings upon the foreclosure of the same, and they had a right, for that reason, to impeach and set aside both the mortgage and the decree thereon.

They acquired a specific lien on the property by the levy under their attachment, and could have maintained a suit in equity to have the fraudulent mortgage declared void as to their judgment, even though there had been no foreclosure or sale under it. And they would not have been under any necessity of first exhausting their legal remedy by an execution sale of the attached property, before proceeding in equity to impeach and remove the fraudulent incumbrance.

Equity will always lend its aid to remove fraudulent obstructions out of the way of legal process, and when it acquires jurisdiction for this purpose, will retain it until final and complete satisfaction has been obtained. And it is in equity only, that fraudulent liens on titles, which obstruct legal process, and render any proceeding under it hazardous and uncertain, can be removed, and the full benefit of the debtor's effects realized in satisfaction of valid demands against him.

The fact of there having been a decree of foreclosure and sale under the fraudulent mortgage, will not alter the relations of the parties as to each other. Circuitous methods may, under some circumstances, prove effectual to conceal fraud from detection, but cannot protect it after discovery.

The appellants having obtained the proceeds of the attached property, with notice of the rights of the respondents, by selling it out from under the attachment, through the instrumentality of a mortgage lien and decree of foreclosure, fraudulent, and therefore invalid as to the respondents, as

averred in the complaint, are not shielded by the form of legal proceedings adopted by them to accomplish their purpose. In equity the lien of the respondents is just as available against the proceeds in their hands as it was at law under the attachment against the property itself.

It was suggested at the hearing that the respondents had an adequate remedy against the sheriff. But without conceding the correctness of this proposition—and it is distinctly opposed to our judgment—we think it immaterial in the determination of this case. We are fully satisfied that upon the facts stated in their complaint, they were entitled to bring this suit against the appellants, whether they did or did not have a remedy against the sheriff who held the attachment and made the sale.

We will next examine the objections urged by appellants to the decision of the lower court upon the demurrer of the respondents to the separate defenses set up in the answer. Under the law, as it stood, before the amendment of October 25, 1878, no order of sale of attached property was required. The Statute itself directed the application of such property upon the execution when it should be issued.

The amendment above referred to, however, provides that if property has been attached in the action, and has not been sold as perishable, or otherwise discharged from the attachment as provided by law, the court shall, when it renders judgment, order and adjudge that the property be sold to satisfy the plaintiffs' demands, and that if execution issues thereon, the sheriff shall apply the property attached by him, or the proceeds thereof, upon such execution.

We recognize the fact that this amendment has effected a change here as to the property under attachment, when judgment in the action is rendered. The order of sale must be made as to such property when judgment is given, or it will be discharged from the attachment, and liberated from the attachment lien. The authorities cited by appellants' counsel fully sustain this principle. (*Wassen* v. *Cone*, 86 Ill., 46;

Staunton v. *Harris*, 9 Heisk. (Tenn.,) 579; *Hillman* v. *Werner*, Id., 586.)

But no order of sale is required where the attached property has been sold as perishable, or discharged from the attachment as provided by law, prior to the rendition of judgment; and it seems to us that under such conditions, such an order would be unnecessary and unmeaning. If the property has been sold or discharged from the attachment previous to the rendition of the judgment, there is nothing for the order of sale to operate on, and if there happen to be any proceeds in the sheriff's hands when the execution issues, the statute directs their application without any order of the court for that purpose. In the case at bar, the attached property had all been sold and effectually discharged from the attachment, as provided by law, through the agency of the appellants, before respondents recovered their judgment against Haas, and we do not think the equitable rights of the latter against the former were in any manner affected by the form of the judgment against Haas. As to the defense based upon the proceedings had on the affidavit filed by respondents with the clerk, little need be said. It was not in any sense a judicial proceeding, in which the rights of the parties to this suit could have been determined as against each other, and, in fact, the court did not undertake to determine any such rights. And it seems very clear that those proceedings can not by any possibility affect the determination in this suit. In our judgment neither of these defenses was sufficient, and the demurrer was properly sustained.

This brings us to the questions of fact. The mortgage does not, on its face, express any agreement with Haas that would render it fraudulent and invalid as to the respondents. But it has long been settled beyond the possibility of successful contradiction, that courts are not confined to a bare inspection of written instruments, when it is sought to impeach their execution on account of fraud. And in the class to which the case under consideration belongs, proof of a contempo-

raneous parol agreement as effectually invalidates the mortgage as an agreement incorporated into the mortgage itself. It is too late now to discuss the effect of such an agreement as was alleged in the complaint, and found by the referee, in this state.

We regard it as settled doctrine here, that an agreement of that character between the mortgagor and mortgagee, at the time the mortgage is given, renders the mortgage fraudulent and void as to other creditors of the mortgagor. (*Orton* v. *Orton*, 7 Or., 478; *Jacobs* v. *McCalley*, 9 Or., 52.)

As to the existence of such an agreement between the appellants and Haas, we think there is not much room to doubt that Haas was allowed to continue in possession of the mortgaged property, and keep his place of business open as usual, from the date of the execution of the chattel mortgage on June 2, 1879, until it was attached by respondents on July 7, 1879, with the full knowledge and consent of the appellants, is not denied. That the mortgage covered all his stock in trade, and that he continued to sell it off at retail during said period, with the knowledge and consent of the appellants, is not disputed. That he sold on credit as well as for cash, during this period, fully appears from the testimony. That he replenished his stock from time to time during this period, with the proceeds of such sales, and even patronized the appellants while so doing, is clearly proven.

Haas testifies that Mayer, one of the appellants, told him not to sell at wholesale, but at retail only, at the time the mortgage was executed. Mayer himself was a witness, and did not dispute this. On the contrary, he seems to concede that Haas was to sell at retail, but claims he was only to sell for cash, and not to sell at wholesale. His testimony also fairly justifies the inference that Haas was to use such portion of the proceeds of sales made after the execution of the mortgage as might be necessary to meet his own personal expenses incurred in conducting the business, and keep his stock replenished. And this was just what he evidently did with the

amounts received by him on account of sales of the mortgaged stock.

Here, then, we find Haas, after the execution of the mortgage to appellants, carrying on his business in the same manner as before; selling off the mortgaged stock in trade, and paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its obvious effect was to ward off his other creditors, and hinder and delay the collection of their demands against him, and the appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld.

We shall not discuss the testimony so far as it relates to the separate value of the stock of wines, liquors and cigars, as we are satisfied of the correctness of the findings of the court below on this point.

The decree of the lower court is erroneous in respect to the rate of interest allowed. Legal interest, not exceeding ten per cent. per annum, was all that could properly have been allowed.

The decree must be modified in accordance with these views.

BURSTON v. JACKSON.

DEED—ESTOPPEL.

The following clause in a deed purporting to be the sole deed of the husband: "And for the consideration aforesaid, and for divers other good and valuable considerations, I, Jannett Burston, wife of the said Alexander Burston, do hereby release and quit-claim unto the said John Spence, his heirs and assigns, all my right, claim or possibility of dower in or out of the afore-described premises," does not operate as a conveyance of an existing or after-acquired estate in fee simple in the land, by estoppel or otherwise.

APPEAL from Washington. The facts are stated in the opinion.

B. Killin and Thomas H. Tongue, for appellant.

The deed of the respondent is good as a conveyance. It can be gathered from it that she, in consideration of twelve hundred dollars, intended to part with and convey all her interest in the land. The recitals in the deed are evidence of title as against her. (Civil code, section 765; Statutes of 1878, page 82; *Graham* v. *Meek*, 1 Or., 235.) The instrument should be construed according to the intent of the parties. (*Mathew* v. *Eddy*, 4 Or., 230; *Baldman* v. *Coffin*, 4 Or., 315.)

When it can be collected from a deed that the parties have agreed to a certain admitted state of facts as the basis upon which they contract, the statement of these facts, though only by way of recitals, estops the party from proving the contrary. (Herman on Estoppel, 214; Biglow on Estoppel, 294, 295, 340.)

Sidney Dell and N. H. Gates, for respondent.

The deed set out in the answer is but the deed of Alexander Burston, and only conveys his estate, and the dower and possibility of dower of his wife, the respondent, therein; and is not a conveyance by her of her half of the donation land claim, she not being a party thereto in the granting part of

the conveyance. (2 Story Eq., 617; Civil Code, sec. 771; Biglow on Estoppel, 340, 437, 448; *Davis* v. *Davis,* 46 Penn. St., 455; *Glidden* v. *Strupler,* 52 Penn. St., 400.)

By the Court, WALDO, J.:

This is an action of ejectment for the possession of the north half of the donation land claim of Alexander Burston, and Jannett Burston, his wife, situated in Washington county, and containing 137 and 44-100 acres of land. The plaintiff is admitted to be the owner of the land by patent from the United States, unless estopped to assert title thereto under the following circumstances:

On the 4th day of April, 1860, Alexander Burston, in consideration, as recited in the deed, of twelve hundred dollars, conveyed said land to John Spence, in fee simple, with full covenants of warranty. After the warranty clause in the deed, there is the following: "And for the consideration aforesaid, and for divers other good and valuable considerations, I, Jannett Burston, wife of said Alexander Burston, do hereby release and quit-claim unto the said John Spence, his heirs and assigns, all my right, claim, or possibility of dower in or out of the aforesaid-described premises;" and said Jannett joins in the execution of the deed.

The appellant's counsel found it somewhat difficult to state distinctly where the estoppel upon the wife came in. She releases her dower in the premises for a consideration. She had an inchoate right of dower in one-half of the premises to release, and the deed has the effect to release it. She asserts no estate in the land either directly or indirectly. There is no recital of any fact of ownership. There is nothing that even by implication affirms or signifies that she had any estate or title in or to the land, or any right whatever, except an inchoate right or possibility of dower.

She receives a consideration and states what she receives it for—namely, her right, claim or possibility of dower. Dower

is a freehold interest, and the words, heirs or assigns, used in the release, are appropriate.

Section 13, page 407, General Laws of Oregon, 1855, in force at the time the deed was made, provided that a married woman might bar her right of dower by joining in the deed of conveyance with her husband and acknowledging the same. Signing the deed merely would not have been sufficient. There should be apt words of release. (*Powell* v. *Monson*, 3 Mason, 347.)

But the appellant's counsel contend that the deed purported on its face to convey land that in fact belonged to the respondent. That by releasing her dower in the premises, she impliedly assented to the conveyance of her title.

In *Bruce* v. *Wood*, 1 Md., 542, the deed of the wife's land was wholly in the name of the husband until the closing part, which was expressed as follows: "And I, Mary Bruce, in token that I relinquish all my right in said bargained premises," execute the deed. The court held that the wife's title did not pass. She should have joined in the operative words of the conveyance. (*Wales* v. *Coffin*, 13 Allen, 213, is exactly in point.)

Again, counsel for appellant claim an estoppel *in pais*. To establish this they rely wholly upon the deed. An estoppel *in pais*, established by deed, is a contradiction in terms. If there is anything in the deed that operates as an estoppel, it must operate as an estoppel by deed, and we have already seen that the deed cannot have this effect.

The allowance of the challenge to Geo. E. Casey, who was called as a juror, and challenged by respondent, because his wife was a sister of the defendant's wife, was correct. He was related by affinity to the defendant within the second degree. (*Paddock* v. *Wells*, 2 Barb. Ch., 331; *Foot* v. *Morgan*, 1 Hill, 654.)

The judgment of the circuit court must be affirmed.

SMITH v. CARO and BAUM.

PROMISSORY NOTE—INDORSEMENT—DEMAND—NOTICE.

The indorsement of a promissory note after maturity is, in effect, the drawing of a new bill payable on demand, and to hold the indorser, demand and notice of non-payment are essential.

CONTRACTS—PAROL EVIDENCE.

The rule that parol evidence is not admissible to contradict or vary a written contract, is founded in the highest principles of public policy, and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes.

INDORSEMENT IN BLANK.

In an action by an indorsee against his immediate indorser, upon a promissory note indorsed in blank, after maturity, parol evidence of an agreement between them at the time of the indorsement, which would vary the legal liability of the indorser under his indorsement, is inadmissible.

APPEAL from Jackson. The facts are stated in the opinion.

William R. Willis, for appellants.

The complaint does not state facts sufficient to constitute a cause of action, for that it does not allege any demand or notice to the defendants, and the court erred in overruling the demurrer. The court also erred in admitting parol evidence to vary the terms of the written agreement of indorsement on the note. (Code, 246, sec. 775, sub. 2; *Drake* v. *Markle*, 21 Ind., 433; *Barnard* v. *Gasline*, 23 Minn., 192; *Goldmas* v. *Davis*, 23 Cal., 256; *Prescott Bank* v. *Caverly*, 7 Gray, 217; *Allen* v. *Brown*, 124 Mass., 77; *Rodney* v. *Wilson*, 67 Mo., 123.)

The court erred in refusing to instruct the jury that the legal effect of an indorsement of a promissory note in blank cannot be changed by an oral agreement made at the time of the endorsement. (Code, 248, sec. 682; *Moffat* v. *Griswold*, 1 Neb., 415.)

B. F. Dowell and Kelsay & Burnett, for respondent.

A verbal contract made at the time of making a blank in-

dorsement is admissible. In Massachusetts, Pennsylvania and New York it has been frequently decided they are irrevocable. (*Ross* v. *Espy*, 481; *Brisco* v. *Power*, 85 Ill., 420; *Patterson* v. *Todd*, 18 Penn., 426; *Boyd* v. *Cleveland*, 4 Pick., 525; *Backus* v. *Shiperd*, 11 Wend., 129.)

In *Fuller* v. *McDonald*, 8 Greenleaf, 213, where the endorser, at the time the note was transferred, agreed to pay the note if the maker did not, held a waiver of demand and notice.

Whether a particular conversation amounts to a waiver or not is a question of fact for the jury, and not one of law for the court. (*Union Bank* v. *Magruder*, 7 Pet., 281; 1 Parsons on Bills and Notes, 291, note A.)

By the Court, LORD, C. J.:

This is an action brought by the respondent, Smith, against the appellants as indorsees of a promissory note executed by J. H. Skidmore and H. H. Hill; and payable to the order of appellants, one day after date, for the sum of eight hundred and ninety-four dollars, and interest. The note was dated on the 15th day of July, 1873, and indorsed in blank by the appellants to the respondent, on the 19th day of July, 1873. Skidmore paid to the respondent, on the note, the sum of three hundred and fifty dollars, Nov. 1, 1876, and three hundred dollars, May 27, 1878, leaving due on said note the sum of seven hundred and seventy-two dollars and thirty cents, for the recovery of which this action was commenced by the respondent against the appellants, as indorsers.

The complaint avers in effect, that the appellants waived demand and notice—that it was understood and agreed between the parties at the time of the indorsement, that the appellants would pay the note; that respondent need not sue Skidmore and Hill, and if Skidmore and Hill did not pay the note at the end of the year from its date, that respondent might look solely to the appellants for such payment.

The complaint was demurred to, on the ground that it did

not state facts sufficient to constitute a cause of action, and the demurrer was overruled by the court. The appellants answered, admitting the indorsement, but denied the verbal contract alleged to have been made at the time of the indorsement and delivery of the note. Upon the trial the respondent introduced evidence tending to show a contemporaneous parol agreement at the time of the indorsement, which the court admitted against the objection of appellants.

The counsel for appellants asked the court to instruct the jury to disregard all parol evidence tending to prove an agreement, before or at the time of the indorsement, inconsistent with the contract created by the indorsement; that the legal effect of an indorsement in blank cannot be waived or changed by any oral agreement made at the time of the indorsement; that in an action against the indorsers, on a blank indorsement, the plaintiff will not be allowed to prove that at the time the defendants sold and indorsed the note, it was agreed by parol that the plaintiff need not make any demand of the maker, but that the defendants will pay without such demand. The court refused to give the instructions, and the defendants excepted.

The correctness of this ruling is the main question we deem it necessary to consider in this case. From some intimation which was made at the argument, in respect to the necessity of demand and notice upon the indorsement in blank of a note after maturity, it becomes necessary to briefly dispose of this question before proceeding to pass upon the principal inquiry. In our judgment the principle is well settled by numerous decisions, that the indorsement of a note after maturity is, in effect, the drawing of a new bill payable on demand, and to hold the indorser, the demand of payment and notice of non-payment, are essential to charge the indorser.

Mr. Daniel, in his valuable work on Negotiable Instruments, section 611, says: "When a negotiable instrument is indorsed after maturity, payment must be demanded of the

payer within a reasonable time, and notice in the event of a refusal given to the indorser, in order to charge him, it being regarded as equivalent to one payable on demand." The adjudications to this effect are numerous and uncontradicted.

In the case of *Berry* v. *Robinson*, 9 John., 121, which was decided in the early part of this century, and has been repeatedly cited and followed by other judicial tribunals of this country, it was held that the indorsee of a promissory note overdue is still bound to prove demand and notice in the same manner as he would if he received the note before maturity; that the books make no distinction on this point, whether the note be indorsed before or after maturity. And in *Nash* v. *Harrington*, 2 Aikin, 9, it is said that a note indorsed long after it was due will be treated as if indorsed on the day of payment, for the purpose of demand and notice. (*Ecfort* v. *DesComdes*, 1 Mill, 69; *Pool* v. *Talleson*, 1 McCord, 199; *Kinnon* v. *Rae*, 7 Porter, 175; *Beebe* v. *Brooks*, 12 Cal., 308; *Light* v. *Kingsbury*, 50 Mo., 331; *Chandler* v. *Westfield*, 30 Texas, 475; Chitty on Bills, 433, and authorities cited in the note.)

But the main question raised by the argument, and which we are required to decide, is, whether it was admissible for the plaintiff to introduce evidence of a parol agreement between himself and the defendants, at the time of the indorsement and delivery of the note, the effect of which was to vary or contradict the legal import of the indorsement. The contract which the law implies upon the written indorsement of the defendants was, that they transferred the note to the plaintiff, and assumed the ordinary liabilities of indorsers. Among the liabilities assumed by the defendants, as the legal effect of their indorsement, was an agreement to pay the note to the plaintiff on receiving due notice that the maker, on demand at the proper time, has neglected or refused to pay it; or, in other words, the liability of the defendants to pay the note was not absolute, but conditional, and dependent upon proper demand and notice.

There can be no doubt if the legal import of the contract of indorsement of the defendants had been written over their signature, the evidence of the parol agreement would have been inadmissible upon the familiar principle that evidence of a contemporaneous parol agreement is not admissible to contradict or vary that which is contained in a written agreement. (1 Greenleaf, sections 277, 281, 282.)

Upon this point Prof. Parsons says: "Suppose over an indorsement an agreement is written out in full, setting forth exactly the same promises which the law implies from a blank indorsement; suppose further, that in an action by an indorsee upon this indorsement, evidence was offered by either party which was inadmissible on the ground that it varied a written agreement, would the same evidence be admissible in the same action if the indorsement were in blank? We are strongly disposed to say that it would be so, as a general rule, and to consider those cases in which such evidence would seem to be admissible as exceptions." (2 Parsons on Notes and Bills, 23, 24.)

This rule of evidence which inhibits proof of a contemporaneous parol agreement to vary or contradict a written instrument, is conceded to be of the utmost importance in the administration of justice. It is founded upon the principle that all previous and contemporaneous negotiation and discussion on the subject are merged in and extinguished by the writing, and cannot be shown to vary or contradict it. The mischiefs which would result from a lax application of the rule are too many and manifest to require illustration.

That conditions in written agreements may be waived by subsequent verbal agreements, without violating this principle of evidence, is not questioned, but not by prior or contemporaneous verbal agreements. But it is claimed that these general principles of law governing the inadmissibility of parol evidence, have no application to contracts of indorsement, the terms of which are not written out but are implied by law; that where a note is indorsed in blank, as between in

dorser and indorsee, it is competent to prove a parol agreement at the time of the indorsement, although its effect is to vary or contradict the legal import of the indorsement. The principal authorities relied upon to sustain this view are *Perkins* v. *Catlin*, 11 Conn., 212; 4 Wash. C. C. R., 480; *Ross* v. *Espy*, 66 Penn. St. R., 481; *Smith* v. *Morrill*, 54 Maine, 48.

In the case of *Smith* v. *Morrill*, supra, which is conceded to be an able and learned exposition of the law in support of the view claimed by the respondent, the reasoning of the court in the case of *Perkins* v. *Catlin*, supra, was approved and adopted. The court say: "That a blank indorsement is not a contract in writing, that the law implies a contract as in a great variety of other cases, simply because the parties have failed to make one, and because otherwise the indorsement would be meaningless; that a blank indorsement is only *prima facie* evidence of the contract implied by law, and that it is competent, as between the parties to the indorsement, to prove by parol evidence the agreement which in fact was made, at the time of the indorsement." But in *Dale* v. *Gear*, 38 Conn., 16, the court say, that "the contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irrespective of any contingency of negotiation, as if written out in full when indorsed. And if, as between the original parties, there is any equity existing *dehors* the instrument, which should prevent the indorsee from enforcing the contract, it must be set up as an *equity*, provable in equity, to bar an apparent legal liability." And, again: "It presents a naked case of an attempt to prove by parol that a clear and unambiguous contract of warranty is not such, and to contradict it in terms, to turn an indorsement without restriction, before maturity, into a restricted indorsement. Such a plea cannot be sustained without a violation of essential principles."

It is evident from this case that the doctrine as laid down in *Perkins* v. *Catlin*, supra, in respect to indorsements in blank of negotiable paper, has undergone some change, and

the rule adopted is certainly more in harmony with the
of authority.

We confess we do not see any just ground in princip
the distinction for which counsel contend. Nor can we
express our own view than by adopting the language of
Joynes: "When the legal import of a contract is clea
definite, the intention of the parties is, for all subst
purposes, as distinctly and as fully expressed as if the
written out in words what the law implies. It is imm
how much or how little is expresed in words, if the l
taches to what is expressed a clear and definite i
Though the writing consists only of a signature, as i
case of an indorsement in blank, yet where the law at
to it a clear, unequivocal and definite import, the co
imported by it can no more be varied or contradict
evidence of a contemporaneous parol agreement, than
whole contract had been written out in words. The mi
of admitting parol evidence would be the same in such
as if the terms implied by law had been expressed."

In conformity with these principles, the rule of law
excludes evidence of a contemporaneous parol agreem
contradict or vary a contract in writing, has been appl
England and the United States to the cases of indorse
in blank. (Chitty on Bills, 144; *House* v. *Graham*, 3 C
57.)

In *Rodney* v. *Wilson*, 67 Mo., 124, which was a case
tical with the one under consideration, where the not
indorsed in blank after maturity, and testimony was o
and admitted for the purpose of showing a contempora
parol agreement that the plaintiff should look alone
indorser, Rodney, for payment, thereby waiving the ne
for demand and notice, and thus varying the legal eff
the blank indorsement, the court say: "It is the gen
received opinion that the legal import of every writte
dertaking is a part of the contract. Now, being the pa
the note, Rodney could not, by simply writing his na

the back thereof, contract in any other capacity than that of indorser. As indorser the law fixed his liability. That liability was to pay after demand and notice. It is evident that the verbal contract on which the plaintiff relied, and the contract implied by the indorsement, are inconsistent with each other, and cannot stand together. One is an undertaking to be bound absolutely, the other an undertaking to be bound conditionally. The proof of the former has the effect of varying the latter."

The rule is universal that all prior and contemporaneous agreements, are merged in the written undertaking. The contemporaneous parol agreement to be bound absolutely, that is, without demand and notice, must, therefore, yield to the agreement which the law declares arises out of the written indorsement, which is, to be bound only after demand and notice. If the indorsee may thus qualify the legal effect of a regular blank indorsement, why may not the indorser be permitted on the other hand, to escape all liability by showing that his indorsement was without recourse.

In *Goldman* v. *Davis*, 23 Cal., 256, the court held that the contract of an indorser of a promissory note is a written one, and his liability a conditional one to pay upon a proper demand and notice, and that this written contract cannot be changed from a conditional to an absolute one, by parol evidence of a verbal promise made by the indorser at the time of the indorsement, to pay the note without demand and notice.

In *Charles* v. *Dennis*, 42 Wis., 56, the court say: "It is in principle the same as though the plaintiff had offered to show by parol that the defendant had waived demand and notice, or the same as an offer on the part of the defendant to contradict the instrument in any important particular. The legal effect of a regular indorsement cannot be controlled by parol evidence of an agreement that the indorsement was without recourse."

In the *Bank of Albion* v. *Smith*, 27 Barb., 491, it was held

that in an action against an indorser, on a blank i
ment, the plaintiff will not be allowed to prove that
time the defendant sold and indorsed the note to him
agreed by parol that the plaintiff need not make any
of the maker, when the note should mature, but that
fendant would be bound to pay without such demand
court say: "The undertaking of an indorser may be
limited or enlarged at the time it is entered into, by
terms, at the pleasure of the indorser. But if no such
are expressed in the indorsement, the law fixes the ch
of the undertaking, and it cannot be varied by parol."
again: "If an indorsement can be varied by a contem
ous parol agreement, to this extent, its entire charact
be changed, and no one ever know how, or to what ext
indorser in blank is bound."

These illustrations are sufficient to show the applica
the doctrine to the particular facts under consideration
not to be denied but what there is a considerable diver
judicial opinion upon the question of indorsements in
and that there is a strong current of authority to the
that an indorsement in blank is not a written instrume
consequently not entitled to its immunities, nor subje
its restraints, but that it may be explained and expand
tween the parties, by parol.

But in our opinion the weight of authority greatl
ponderates against the admission of parol evidence
agreement between the parties to qualify or vary the co
of indorsement, whether it be made in blank or full. (
on Bills, 144; *House* v. *Graham*, 3 Camp., 57; *Go*
Hardee, 7 Taunton, 159; *Mason* v. *Burton*, 54 Ill., 354;
v. *Albee*, 70 Ill., 37; *Wilson* v. *Black*, 6 Blackf., 509;
Pile, 37 Ind., 107; *Barnard* v. *Gasline*, 23 Minn., 196;
v. *Cole*, 3 Colorado, 114; *Cottrell* v. *Conklin*, 4 Due
Dale v. *Gear*, 38 Conn., 16; *Fassin* v. *Hubbard*, 55 N. Y
Howe v. *Merrill*, 5 Cush., 80; *Prescott Bank* v. *Ca*
Gray, 217; *Barry* v. *Morse*, 3 N. H., 132; *Stubbs* v. *G*

4 Ga. 106; *Chaddock* v. *Vanness*, 35 N. J., 519; *Bank of U. S.* v. *Dunn*, 6 Peters, 51; *Woodward, Baldwin & Co.*, v. *Foster*, 18 Gratt., 208; Parsons on Bills and Notes, vol. 2, 521.)

Some of the authorities cited show that there are a few classes of cases that form an exception to the rule stated, (*Jones* v. *Albee*, 70 Ill., 37; *Dale* v. *Gear*, 38 Conn., 16;) but the question in this case does not fall within the principle of any of these excepted cases, and upon which it is unnecessary for us to express any opinion.

The rule that parol evidence is not admissible to contradict or vary a written contract, is founded in the highest principles of public policy, and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes.

The contract by a blank indorsement is fixed by law, and should not be rendered uncertain by parol any more than when written out in full. "And since the same injurious results would flow from permitting the legal effect of an indorsement in blank to be destroyed, as if it were an indorsement in full, no indulgence should be granted to the former contract over the latter. Otherwise, indeed, no one can ever know how, or to what extent, an indorser in blank is bound." (2 Parsons on Notes and Bills, 521.) It follows that the judgment must be reversed.

Judgment reversed.

HOWE v. TAYLOR, et al.

PAROL EVIDENCE ADMISSIBLE TO PROVE CONTENTS OF LOST INSTRUMENT

Where the undertaking of a county clerk has been copied into a book no required by law to be kept, and both the original and such copy hav been lost or stolen, and no better evidence can be produced, upon sat isfactory proof of the correctness of such copy, parol evidence of it contents is admissible upon an issue as to the contents of the origina undertaking.

EVIDENCE—OFFICIAL UNDERTAKING.

The testimony of a defendant, in a suit brought for the purpose of charg ing him, with others, as surety on such undertaking, that he has n recollection of having either seen or signed the same, is very unsatis factory and entitled to but little weight, when the circumstance strongly indicate that positive information on the subject is in hi possession, or within his reach.

DAMAGES—MEASURE OF.

The amount which a party injured by the mistake of a county clerk, i recording a mortgage on real property, subsequently conveyed by th mortgagor to a *bona fide* purchaser for value, is entitled to recove from the sureties in such undertaking, is the value of the mortgage property at the time of such conveyance.

APPEAL from Columbia. The facts are stated in the opinion

J. Catlin and B. Killin, for appellants.

There is nothing in the record from which it can be reason ably inferred that an official undertaking was ever executed by Williams; that the sureties signed or justified to it, or tha it was delivered, approved or filed. The record of the county court, offered by the respondent to sustain his allegation tha such an undertaking was executed, reads as follows: "C. H Williams came into court and filed his *bond*, which was duly examined and approved by the court." The record does not show that there were any sureties on the *bond*. There is no analogy between bonds and undertakings. (*City of Sacramento* v. *Dunlap*, 14 Cal., 424; *Curtis* v. *Richards*, 9 Cal. 33.)

The loss of the undertaking must be proved by the best

attainable evidence. Before a party can prove the contents of a paper, whether it is produced or lost, he must prove the existence of an original and its execution. (17 Mo., 40; 3 N. Y., 424; 39 Mo., 519; 65 N. Y., 127.)

Secondary evidence of the contents of a written instrument, when allowed, does not obviate the necessity of proving the genuineness of the instrument, but renders it more imperative. (56 N. Y., 618.)

An effort is made to show that the appellants' names were to the instrument. But there is no evidence showing that they signed and executed it, or authorized its execution. The fact in controversy as to the execution of the instrument is, whether or not appellants did sign, or did authorize their names to be signed to, the paper. (13 Iowa, 228.)

William Strong & Sons, for respondent.

This is a peculiar case, and it is to the credit of the state that this is the first time the supreme court has been called upon to try a case of this kind.

The writing and its record would certainly be the best evidence, but they are gone and it is not within the power of the party to produce them. The rule requires that the best evidence be produced, yet this rule is construed to mean by best evidence, the best that is within the power of the party to produce. This must depend upon the circumstances of the particular case. If original evidence, without the fault of the party, is wanting, then secondary is admitted; if direct cannot be had, then indirect. Any and every circumstance out of which a presumption can arise or an inference be drawn in support of the ultimate facts to be proved, or any part of them, is admissible, from the necessity of the case.

It is impossible to lay down a definite rule which shall be applicable to all cases. The nearest approximation to such a rule may, perhaps, be stated in the following terms:

All evidence which tends, in the slightest degree, to enlighten the mind of the court or trier upon the matter in

issue, which the nature of the case admits, or which, with
fault of the party offering it, is the best that he can produ
is admissible; and such weight is to be given to the en
testimony as under all the circumstances it naturally has u
the mind of the trier. And if, from all the facts and circu
stances proved, the triers can arrive at a satisfactory conc
sion, as to the preponderance of evidence, they must so dec
The proof need not be free from doubt. (Code, secs. 6
835, subd. 5, 7.)

The question whether the entry of a copy of this und
taking of the county clerk in the book called Miscellane
Records, is a technical record, has some bearing upon
weight to be given to some of the testimony in this case.

The question is not whether it is a copy, made by stat
competent primary evidence, to take the place of the origi
without accounting for its non-production, but is, whether
original being lost, and there being no possibility of prod
ing a record copy, or a sworn copy, the court will not rece
this testimony as the best that, under the circumstances,
be produced, and give it such weight as it must natura
have. The probability that a copy written in the Misce
neous Records by an officer who was acting under the be
that he made it in the line of his duty, is correct, is as gr
as that a technical record, made by the same officer in
actual performance of a duty, is a correct copy, and if i
the best evidence that the party can produce, it is admissi
and if lost, its contents can be proved in the same manner
the contents of the original, to prevent a failure of just
We cite 1 Greenleaf Ev., sec. 509: 1 Wharton's Law of E
secs. 13, 135; 15 Wall., 123; 20 Wall., 226, 240, 245.

By the Court, WATSON, J.:

The respondent brought this suit to recover damages, oc
sioned by official dereliction, from the appellants as suret
on the official undertaking of C. H. Williams, formerly cou
clerk of Columbia county. The undertaking itself had b

lost or stolen prior to the commencement of the suit, which this court has already held entitled respondent to seek his relief in equity. (*Howe* v. *Taylor*, 6 Or., 284.)

The only questions we have now to consider, relate to the competency and sufficiency of the evidence to sustain the decree which the respondent recovered in the court below, the facts that respondent lost his security by the failure of the clerk to record his mortgage properly, and that the debtor has been insolvent ever since, cannot be denied. The value of that security will be considered hereafter.

The first question to be disposed of is, whether Williams ever gave an official undertaking. As already stated, the undertaking, if there ever was one, as well as the record of the same, were either lost or stolen before the suit was instituted. Of this fact there can be no doubt, and upon it there need be no decision.

The evidence of George Merrill, who was clerk during the period in which it occurred, fully establishes this fact. If corroboration were needed, the appearance of the volume of Miscellaneous Records, with the leaves torn out, upon which the index to the volume locates the record of Williams' undertaking as county clerk, would amply supply it. We are fully satisfied with the foundation that has been laid for the introduction of secondary evidence.

Williams testifies to his appointment as county clerk of Columbia county, and to his giving an undertaking therefor. Seth Pope, who was county judge at the time, also testifies to the same effect. The undertaking was delivered by Williams to Pope for acceptance and approval. Both testify that it was accepted. The record of the county court shows that Williams was appointed, and that his undertaking was accepted and approved, December 4, 1871.

Williams thereupon entered upon the discharge of his official duties, and continued in the office until he was succeeded by Merrill, July 1, 1872, and no one is shown to have ever questioned his authority to do so. Merrill found an under-

taking in the office after his term commenced, which pu ported to be the official undertaking of C. H. Williams county clerk. He also found a copy of it in one of the volum of Miscellaneous Records of Columbia county, and they r mained there until about September, 1874, when they we missed and could not be found after diligent search.

We hardly need to invoke the presumption of law, th official duty has been regularly performed, to satisfactori establish the fact that Williams did give an official underta ing when he was appointed, which was accepted and approv by the county court. The evidence upon this point seems us conclusive, and there is none to the contrary. But it w necessary for the respondent to prove not only that Willia gave an official undertaking, but that it was *the* undertaki described in the complaint. (*Stickney* v. *Stickney*, 21 H., 61.)

The undertaking declared on is substantially in the fo given in the statute. This statute was in force then, and h been for seven years. Does the evidence in the case sh that such was the form of the undertaking which Willia gave? We have examined the numerous authorities on th point, in connection with the evidence, with considerable ca and have come to the conclusion that the allegations in t complaint, upon this subject, are fairly sustained. We ha heretofore found that an official undertaking was given, a cepted, approved and acted upon. We have noticed the cha acter of the legal presumption applicable to the circumstanc developed by the evidence, and we need only suggest that th presumption is equally favorable to the respondent here. will be presumed, in the absence of any evidence to the co trary, that the undertaking was substantially in complian with the requirements of law. But the decision of this poi does not depend altogether on mere legal presumptio Williams swears that he gave an undertaking which he su posed was the correct and right bond for him to give. does not know if it complied with the general statutes.

testifies that so far as he knows the undertaking was
sual form and properly signed. Merrill testifies that
est of his recollection, it was in proper shape and
That he has no recollection of noticing anything wrong
iar about it. That to the best of his knowledge and
ion it was in the form given in the statute, and to the
Oregon, in the amount of ten thousand dollars, and
justification of the sureties accompanied it.

ave assumed as a legitimate and satisfactory inference
undertaking which Merrill found in the clerk's office
his term, was the same that Williams gave, and we
doubt of the correctness of this view. But we think
imony of F. D. Winton, as to the contents of the
hich was abstracted, as we have seen from the Miscel-
Records, should also receive some consideration.

o not find from the evidence that he ever saw the
undertaking, but his testimony seems to be based
so far as it touches this matter, upon his recollection
he saw in the copy, in the Miscellaneous Records,
ts abstraction. Appellants claim that his testimony
point cannot be received. But from all the facts and
ances disclosed by the evidence, we are fully satisfied
was a correct copy of the original, and both being
think parol evidence of the contents of the copy was
le. (*Winn* v. *Patterson*, 9 Peters, 663; *Hedrick* v.
15 Wall., 123.)

vithout the testimony of Winton, we should still hold
contents of the undertaking declared on were satis-
established. (*Posten* v. *Rassette*, 5 Cal., 267.)

undertakings are comparatively simple and uniform
provisions, and the same degree of particularity, in
of of their contents when lost, does not appear to us
quisite, as in the case of lost instruments of a private
r.

are some other matters proper to be considered in
nection. This record was obviously made by Williams'

deputy, S. G. Caudle, and during his term. As it was n required by statute, it was done with the sanction, if not u der the supervision, of the county court. That such was t custom in Columbia county is evident. It was designed for pu lic inspection and use, to afford greater security for the orig nal, and to subserve the convenience both of the public a of the officer having the legal custody of the original. T opportunities for imposition or mistake were for these reaso quite limited, and hardly worth considering, in the absen of any evidence tending to show any grounds for suspici that this record was not fairly and correctly made.

But the more important and difficult question, whether t appellants, or any of them, were sureties on that undertakin still remains to be determined. Williams, himself, wh asked to state who were sureties on his official undertakin answered that he did not know. In answer to specific que tions as to each of the defendants, he says he is inclined think B. F. Giltner was not a surety, as he was not friend toward him at that time. That he does not think that Jam Dart was a surety, but gives no reason for his belief. Th he does not think Wagner, Yeargain or Caples were suretie because they were politically opposed to his appointmen That he is inclined to think Joel Hamilton was a surety, b is not sure. As to the other defendants he does not know remember. Pope does not recollect who the sureties we but thinks the undertaking was properly signed.

S. G. Caudle, who was Williams' deputy when the mista in recording the Gillahan mortgage occurred, and also, accor ing to Williams' testimony, obtained all the sureties on t undertaking, and conducted the whole business, could n recollect who any of the sureties were.

The appellants, Miles, Caples, Yeargain, Benham, Giltn Dart and Taylor, were examined by the respondent. Benha only, positively denied having either seen or signed the u dertaking. The rest had no recollection of having done

George Merrill testifies that the original undertaking,

pages in the Miscellaneous Record containing the
bstracted from his office about August or Septem-
and that he believes them to have been stolen.
dex showing that the undertaking had been re-
he missing pages is in the handwriting of S. G.
e further says, that to the best of his recollection
he names of the appellants, Taylor, Miles, Dart,
Giltner, and also the name of one T. C. Elrington,
e undertaking. His testimony shows, also, that
es, Giltner, Dart and Caples came to his office to
e on the bond. That some of them came several
hat Samuel Miles looked at the undertaking more
The last time he was in the office was two or
before the undertaking was stolen. All of Mer-
ony is to the best of his recollection and belief
taking it in connection with all the surroundings,
as fully impressed by it with the truth and cor-
what he thus asserts, as we could have been had it
most positive character.

ent to us that he testified to nothing detrimental
llants, except that which he firmly believed to be
which he had the best opportunities of knowledge.
tion and belief as to who were sureties on the
, are not wholly based on seeing the names on
nent, but upon the additional fact that his exam-
e made at the instance of these very parties whose
id find there. He does not recollect having seen
f Benham, Hamilton, Wagner or Yeargain on the
, nor of any one of these coming to his office to
t the matter. We are satisfied that his testimony
hful and accurate, and that it is not counterbal-
e negative and unsatisfactory evidence of Miles,
t, Giltner and Caples, to which we have already

estified that to the best of his recollection the
was accompanied by the justification of the sure-

ties, and that the names of the appellants, Taylor, M
Wagner, Benham, Yeargain and Giltner, and also the
of T. C. Elrington, were on the undertaking as sureties.
opportunities for knowing and recollecting the names o
undertaking were not equal to Merrill's, and we thin
liability to mistake much greater. We have concluded
so far as it corroborates Merrill's it should be considered
that it is not sufficient to fasten the liability of Ben
Wagner and Yeargain.

Hamilton has not appealed, and it is therefore unnece
to discuss the effect of the evidence as to him. There is
testimony as to the admissions of the appellants Miles,
lor and Dart. Judge Strong testifies that Miles told him
he was a surety on this undertaking. Miles denies any
lection of making any such admission, but says if he did
it, it was in the way of a joke. Such a denial, it seems
is not entitled to much weight, in opposition to the po
testimony of Judge Strong.

The testimony of Nelson and Mary Hoyt shows a sub
tial admission by Taylor that he was one of the suret
the undertaking, and has every appearance of accuracy
candor. Taking Taylor's testimony on this subject altoge
it cannot be construed into a positive denial of the admis
Winton testifies to a similar admission by Dart. It
hardly be claimed that Dart has denied it. He gives wh
terms the substance of the conversation, in which W
says the admission was made. In his version of that co
sation no admission appears. But it seems to us it must
been in the power of the appellants to have furnished
direct, positive and satisfactory evidence that they were
sureties on the undertaking, if that had been the fact,
they did furnish, and they cannot complain, after respo
had made out a *prima facie* case, if their failure to do
held to afford ground for an inference unfavorable to
defense.

We are convinced, after a thorough examination of al

at the appellants, T. H. Taylor, Samuel A. Miles, r, James Dart and Hezekiah Caples were sureties al undertaking of C. H. Williams, and must be for the loss occasioned by the mistake of their But we are not satisfied that the evidence is suffi- ify the same conclusion as to the appellants, John . L. Wagner and D. J. Yeargain, and hence we spondent's case not made out as to them.

to the amount of damages respondent is entitled ve are compelled to differ with the decision of the Gillihan and wife conveyed the land covered by s mortgage to Semple, August 23, 1872. The testifies that he became aware of the mistake in rovements were put upon the land in 1874, by rantees, which increased the value of the premises ed or one thousand dollars.

t think the evidence warrants the conclusion that after the mortgage was given, up to the date of ments in 1874, the value of the premises exceeded lred dollars; and this amount, with ten per cent. annum from the date of the conveyance to Sem- concluded the respondent ought to recover from the whom we have found were sureties on Williams' , and Joel Hamilton, with his costs of suit against parties in the court below, and against said appel- s court; and that the appellants, John Benham, ner and D. J. Yeargain are entitled to their costs respondent, both in the court below and on this

e is modified accordingly.

ODELL v. CAMPBELL.

JUDGMENTS OF COURTS OF GENERAL JURISDICTION.

There is no presumption in favor of courts of general jurisdiction, e as to matters and persons falling within the scope of that jur tion. Where the proceeding is special, and outside of that ge scope, either as to subjects or persons, the presumption ceases, the record must show a compliance with the special authorit which the extraordinary jurisdiction is exercised.

SUMMONS—SERVICE BY PUBLICATION.

Where the order for publication omits to direct that a copy of the mons and complaint be mailed to the defendant, addressed t place of residence, and there is nothing in the record, or in the recited in the order to excuse such omission, the requirements o statute are not complied with by mere publication, and the c and the service, and the judgment following it, are void.

STATUTE MUST BE STRICTLY COMPLIED WITH.

Where the statute prescribes certain things which the summons publ shall contain, they must be deemed essential and necessary, an absence of any of them is not a compliance with its requirem and is fatal to the jurisdiction.

PROOF OF SERVICE BY PUBLICATION.

Where the service of summons is had by publication, proof thereof only be made by the affidavit of the printer, or his foreman, o principal clerk, and the affidavit should state that the person ts the same holds one of these positions. An affidavit commencin this way: "A. B., editor of the *Oregon Statesman* newspaper, " being sworn say," etc., is insufficient, and would not give the jurisdiction of the defendant.

JUDGMENT—EFFECT OF UNTRUE RECITALS.

An averment of due publication of a summons, in a judgment e which appears from the record to be untrue, or is not affirmat supported by the facts contained in such record, is a nullity, and be disregarded.

APPEAL from Yamhill. The facts are stated in the opin

John Burnett and W. R. Willis, for appellant.

William Strong & Sons, and H. & A. M. Hurley, respondent.

By the Court, LORD, C. J..

This is an action to recover real property. The compl is in the usual form. The answer denies the material a

ie complaint, and alleges title and rightful posses-
defendant, and also improvements of the value of
d dollars. The reply denies the new matter set up
wer. The cause being at issue, a trial was had
lted in a judgment in favor of the defendant for
ion of the land, from which an appeal has been
is court.

roceeding to examine the principal matter in con-
is necessary to dispose of an objection which the
insists is fatal to the appeal. This objection is,
signment of errors is not in compliance with the
ause it does not specify the grounds of error upon
appellant intends to rely. Technically the assign-
rors is not as formally stated as it might be—in
it is susceptible of improvement—but at the same
cifies the grounds of error with sufficient distinct-
ify the respondent of the objections upon which
nt intends to rely. This, we think, is a sufficient
with the statute.

ed: Both parties in this action claim title through
Odell, the donor of the United States; the appel-
conveyance made directly to himself, on the 17th
ober, 1879, and the respondent by a sheriff's deed,
m through a sale by the sheriff upon a judgment
gainst the said Russell B. Odell, on the 10th day
er, 1863, in favor of Abram Coovert. It appears
ecord, that on the 4th day of March, 1863, one
vert commenced an action in the circuit court for
unty, against the said Russell B. Odell, and on the
sued out an attachment, and on the 6th day of
3, the sheriff, under the writ, attached the real
ught to be recovered in this action.

ch of the action was commenced before the adop-
code, but all subsequent proceedings were taken,
affidavit for order of publication of summons, pub-
same, proof of publication, rendition of judgment,

sale of property, etc., after the code went into effect, on t
first day of June, 1863.

The point in controversy is the validity of the title obtain
under this judgment, which is assailed collaterally for want
jurisdiction. The judgment was rendered by a court of ge
eral jurisdiction, upon default, against an absent defenda
without the territorial limits of the state, upon constructi
service by publication.

When such a judgment is produced in evidence, the autho
ity for its rendition must appear upon the face of its recor
In such case the jurisdiction depends upon a strict complian
with the statutory regulations, or the judgment rendered w
be a nullity. The presumptions of jurisdiction which ex
in favor of the judgments of a court of general jurisdictio
when proceeding according to the course of the common la
ceases when the authority to render the judgment is made
depend upon a prescribed mode, according to special statuto
provisions. This distinction is deep rooted in the law, a
has been stated with great clearness by Mr. Justice Field,
Galpin v. *Page*, 3 Sawyer, 109: "When a judgment of su
a court is produced, relating to a matter falling within t
general scope of its powers, the jurisdiction of the court w
be presumed, even in the absence of the former proceedin
or steps by which the jurisdiction was obtained, and su
jurisdiction cannot ordinarily be assailed, except on a writ
error or appeal, or some other direct proceeding. But wh
the judgment of such a court relates to a matter not falli
within the general scope of its powers, and the authority
the court over the subject can only be exercised in a prescrib
manner, not according to the course of the common law,
the judgment is against a party without the territorial limi
of the court, who was not served within those limits, and d
not appear to the action, no such presumption of jurisdicti
can arise. The judgment being as to its subject matter
persons out of its ordinary jurisdiction, authority for its re
dition must appear upon the face of its record. In oth

ere is no presumption in favor of the judgments of general jurisdiction, except as to matters and per-ing within the scope of that general jurisdiction. e proceeding is special, and outside of that general her as to subjects or persons, the presumption ceases, record must show a compliance with the special by which the extraordinary jurisdiction is exercised. trine is an obvious deduction from principle, and is by adjudged cases almost without number, in the ourts of the several states, and in the supreme court United States. There is running all through the he emphatic declaration of the common law courts, pecial authority conferred upon a court of general on, which is exercised in a mode different from the the common law, must be strictly pursued, and the ust disclose the jurisdiction of the court. On this he cases speak a uniform language, with scarcely a nt voice."

inciple to be deduced from this is, that when a party the protection of a judgment rendered against an efendant, who never appeared in the action, and who he time of the alleged service, without the territorial the state, the burden of establishing the jurisdiction ourt to render the judgment is imposed upon such hat no presumption of jurisdiction will be indulged n the judgment, but that the statutory requirements, jurisdiction is acquired, must be strictly complied d thus the authority of the court to render the judg-de affirmatively to appear upon the face of the record. e now to inspect the record of the proceedings in the *Coovert* v. *Odell*, for the purpose of ascertaining, in ty with these principles, whether the court acquired ion to render the judgment under which the respond-s title to the property sought to be recovered. The for an order of publication does not undertake to probative facts, nor even so much as to repeat, in

certain particulars, the language of the statute, or its equi
lent in substance. It states, for instance, "that defendar
residence is not known to affiant," but it does not st
that his residence cannot be ascertained by him with reas
able diligence, much less the acts constituting due diligen
Tested by *Forbes* v. *Hyde*, 31 Cal., 350, which was cited a
approved by Mr. Justice Deady, in *Neff* v. *Pennoyer*, 3 S
yer, 289, with great force and reasoning, the affidavit is fat
defective in more than one particular. But inasmuch as
supreme court of the United States, in the last named ca
5 Otto, 721, held that defects in the affidavit could only
taken advantage of on appeal, or some other direct proce
ing, and could not be urged to impeach the judgment col
erally, and as the defects in the affidavit will not change
conclusion we have reached, the further consideration of
affidavit is dismissed without expressing any opinion on t
point.

The order of publication recites that "it appearing to
undersigned judge that the defendant, Russell B. Odell,
the within entitled action, cannot be found in this sta
that a cause of action exists against him, it is theref
ordered that service be made on the said defendant, Rus
B. Odell, by publication of notice in the *Oregon Statesm*
newspaper, of the pendency of this action, once a week
the space of six weeks." The order directs the publication
the notice, but it does not also direct, as the statute requi
that a copy of the summons and complaint be deposited
the post-office, directed to the defendant at his place of r
dence, nor does any reason appear in the order, or in f
in the record, for this omission. The language of the s
ute is explicit—it requires that a copy of the summons a
complaint must not only be deposited in the post-office,
that it must be done forthwith, or the facts excusing
omission must appear to meet the requirements of the s
ute. If, for instance, the order, in addition to the facts sta
as "appearing to the judge," had recited that "the r

e defendant is unknown to the affiant and cannot, able diligence, be ascertained by him," then the he omission, or the fact excusing the direction of ne post-office, would be disclosed upon the face of the ch an order—reciting the facts which did appear faction of the judge—discloses affirmatively the f the court to exercise its extraordinary jurisdic- when the order of the court omits to direct a ne post-office, and there is nothing in the record, or s recited in the order, to excuse such omission, nents of the statute are not complied with by mere The statute contemplates, if possible, that ac- shall be had of the pendency of the action. De- post-office, directed to the residence of the defend- be much more likely to notify him of the pen- ne action, than publication of the summons in a however general its circulation.

on of this direction of the statute is founded in a for the rights of absent defendants, and as an addi- ution to prevent the injustice of condemning any d, or without his day in court. It is not sufficient idence of the defendant is unknown, but it must also it cannot, with reasonable diligence, be ascertained, the omission to direct the deposit in the post- order is an essential part of proceedings of this nd necessary to show jurisdictional facts, without udgment will be a nullity. The importance, then, essity of the order bearing upon its face the nec- tory requirements, becomes evident. It must not the publication in a paper designated, and for the cribed, but it must do more. The statute requires t direct a copy of the summons and complaint to th deposited in the post-office, directed to the t his place of residence, or the facts excusing the make such direction of deposit must appear, or

the order allowing service by publication, and the service judgment following it, will be void.

Resort to the affidavit would be of no avail. It does state any facts which would justify the omission. It m states that the residence of the defendant is unknown t affiant, but it does not even so much as add in the langua the statute, "nor can with reasonable diligence be ascert by him," much less what ought to be stated, the facts co tuting such diligence.

The result is that the record nowhere discloses any showing why a mode of service prescribed by the sta and designed to give actual notice to absent defendants not been complied with. "When constructive service of cess by publication is substituted in place of personal tion, and the court upon such service is authorized to pr against the person of an absent defendant, not a citize the state, nor found within it, every principle of justice e a strict and literal compliance with the statutory provisi (*Galpin* v. *Page*, 18 Wallace, 350.)

In *Neff* v. *Pennoyer*, supra, the order recited every e tial fact necessary to confer jurisdiction, among which that "the residence of the defendant is unknown to affiant, and cannot with reasonable diligence be ascertaine him," and the reason for the omission to direct a copy o summons and complaint to be forthwith deposited in the office, appeared in the order and upon the face of the re A glance at the record in this case will show an absen any reason to excuse the omission.

The next objection is, that the summons published doe contain the date of the order for service by publication. tion 55 of the code of procedure provides, among things, that "summons published shall contain the name o court and the title of the cause, a succinct statement of th lief demanded, the *date of the order for service by publica* and the time within which the defendant is required to an the complaint." The summons published in this case

ll these several matters except the date of the order for by publication. Where the statute prescribes certain which the summons published shall contain, they must med essential and necessary, and the absence of any of in the summons published is not a compliance with uirements. Nor do we think that this provision of the is merely directory, as claimed, but mandatory. For, summons may omit the date of the order for service lication, and still be held sufficient, why not with equal , "the succinct statement of relief demanded," or the of the court and title of the cause, or any other matter this provision requires the summons shall contain? In e of this law one is as essential as the other, and none omitted without vitiating the summons published. It to us no one would claim that a summons which omit- state these matters required by the statute, could be alid.

summons is the process by which the court acquires isdiction over the person, and certainly, if there is any proceeding in which a strict and literal compliance he statute ought to be exacted, it is in a proceeding of aracter under consideration. The summons published contain the date of the order, not some other date or after the order was made by the judge, but *the* date order itself. The summons published does not con- e date of the order for service by publication, and is e summons which the law prescribes. We think the ion well taken. It is sufficient that the law rescribed the several matters which the summons contain, and whether deemed needful or not, we have hority to disregard its requirements.

next objection is that there was no legal proof of the of the summons by publication, and consequently he court had no jurisdiction to render the judgment. n 69 of the code of procedure provides, that the service summons shall be proved in case of publication, by

the "affidavit of the printer, or his foreman, or his principal clerk." The affidavit of proof of publication is as follows:

"C. P. Crandall, editor of the *Oregon Statesman* newspaper, published at Salem, weekly, in said county and state, being sworn, say, that the above notice to R. B. Odell has been published in said newspaper for six successive weeks, beginning June 26th, 1863."

Conceding that "editor" is within the spirit of the provision, as held in *Neff* v. *Pennoyer*, supra, it will be observed that the affiant swears to nothing except the matter set forth after the word "say." He describes himself as editor, but he does not swear that he was editor, or that such in fact was his position. In construing this provision of the statute, Mr. Justice Deady, in *Neff* v. *Pennoyer*, 3 Sawyer, 296, said: "The statute is imperative, and admits of no proof of service but the affidavit of the printer, or his foreman, or his principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact by virtue of their relation to the subject."

That C. P. Crandall is one of the three several characters authorized by the section quoted to make the affidavit of proof by publication, is a material fact, not sworn to, but which must be proved before the court would be authorized to render judgment against the absent defendant. In *Steinbach* v. *Luse*, 27 Cal., 298, the identical question here involved was decided, and the court say: "By subdivision third of the thirty-third section of the practice act, the fact that an order of publication has been complied with, is to be proved by 'the affidavit of the printer, or his foreman or principal clerk,' and as we construe the provision, they are the only persons competent to testify on the subject. That the affiant is one of the three, is itself a substantive fact, and must be proved as such before the court in which the action is pending can proceed to render judgment against the parties to whom notice is intended to be given. In the affidavit now in question the affiant swears to nothing except to the matters set forth after

'deposes.' He names himself as principal clerk, loes not swear that that was his position in fact, *te Bank of Monroe,* 7 Hill, 178; *Cunningham* v. Denio, 71; *Staples* v. *Fairchild,* 3 N. Y., 44; *Young,* 8 N. Y., 158.) The result is, that as the made up, in *Steinbach* v. *Luse, et al.,* judgment was against Jones without any proof that the order of on had been complied with."

is insisted that due service of the summons appears recitals in the judgment, which states that "the de- had been duly served with notice of the pendency of by publication of notice in the *Oregon Statesman* uccessive weeks prior to the first day of this term." is particular kind of recital in a judgment, Mr. Deady, in *Neff* v. *Pennoyer,* made the following ap- iticism: "What is meant by the averment 'the de- had notice of the pendency of the action,' is not clear. ment is without the statute, which does not provide defendant shall have notice of the pendency of the publication, but that constructive service of the may be made upon him by that means. Whether y acquires actual notice of the proceedings, the court now, and therefore cannot find. The averment that the defendant was duly served with the sum- publication of the same in the *Advocate,* etc. But that this averment is formally sufficient, it does not be true in point of fact. The record not only fails t it, but actually contradicts it. So far as the record the fact there was no evidence before the court that dant had any notice of the pendency of the action ublication of the summons."

me is true of the case under consideration. The not only fails to support the recitals in the judg- t, in point of fact, actually contradicts it. There vidence disclosed by the record that the defendant e of the pendency of the action by publication of

the same. The summons published omitted an essential —the date of the order for service by publication—whic statute specifically enumerates among other essentials it contain. No legal summons, or such as the law presc according to the record in this case, was ever published was there any valid proof of the publication of *this* sum Admit that an editor is within the meaning of the pe authorized by the statute to make the proof of public and there was no proof by such a person that the sum was published, and the record discloses none other befor court. The result is that the record was made up, and ment rendered against the defendant, without any proof the order of publication had been complied with.

But it is insisted, upon the authority of *Hahn* v. *Kell* Cal., 391, that the court in which this judgment was dered, being one of general jurisdiction, that the same sumptions of law are to be indulged in favor of the regul of its proceedings, and for the purpose of upholding its ments, as when proceeding according to the course o common law. Two propositions were maintained in that First, that when a judgment of a court of general jurisdi was offered in evidence, it could only be collaterally att for matters apparent upon its record, and in the absen such matters, the jurisdiction of the court must be conclus presumed. Second, that the record of the court consists of the papers which compose what is designated by statute as the judgment roll. The first proposition is with certain qualifications and exceptions, to which the under consideration belongs. "These qualifications an ceptions arise," says Mr. Justice Field, "where the pro ings, or the party against whom they are taken, are wi the ordinary jurisdiction of the court, and can only be br within it by pursuing special statutory provisions." Be the matter here complained of is apparent upon the fa the record, and speaks for itself. There is no necessity sorting to presumption. "They," says the same le

e no place for consideration when the evidence or
t is made. When, therefore, the record states the
makes an averment with reference to a jurisdic-
it will be understood to speak the truth on that
t will not be presumed that there was other or
dence respecting the fact, or that the fact was
an as averred."

r," says Mr. Justice Deady, "in this class of
not sufficient that an averment of due service of
s in the judgment entry should not be in conflict
cts contained in the record—it must be affirma-
orted by them. If such an averment could be
substituted for the proof of the fact which the
ires, it is reasonable to suppose that the truth
enerally dispensed with. The averment is a

second point maintained in *Hahn* v. *Kelly, supra,*
ord of the court consists only of the proceedings
hich compose what is called the judgment roll, see
age, 3 Sawyer, 119; *Neff* v. *Pennoyer,* Ib., 287.
observed, however, that *Hahn* v. *Kelly* has been
Belcher v. *Chalmbers,* 53 Cal. 635, for reasons
amination of that case will make apparent, and
addressed to this court.

cessary, however, to consider the subject further.
w of this state is, when a court of general juris-
xercising a special power conferred upon it by
not according to the course of the common law,
in *Northcut* v. *Lemery,* 8 Or., 316, in which the
And in such cases even a court of general juris-
t strictly comply with the requirements of the
s proceedings, and this compliance must affirma-
r from the record itself; and unless it does so
resumption will be indulged to sustain the valid-
dgments or decrees."

reasons, it follows that the judgment in the case

of *Coovert* v. *Odell* was void for want of jurisdiction, and t objection of appellant ought to have been sustained, and t judgment of the court below must therefore be reversed, a it is so ordered.

Judgment reversed.

BESSER v. JOYCE, et al.

FRAUDULENT CONVEYANCES — BANKRUPT PROCEEDINGS — CREDITO RIGHTS.

A creditor who is not made a party to proceedings in bankruptcy, is precluded from subsequently impeaching a fraudulent conveyance real property, made by his debtor prior to such proceedings, but k concealed from his assignee until after the termination of such p ceedings.

MARRIED WOMEN—SEPARATE ESTATE—HUSBAND'S INTEREST—TENANT CURTESY.

A husband, since the adoption of the state constitution, has no such terest or estate in his wife's separate real property, during her li as can be taken on execution by his creditors, and his joining w her in a deed, voluntarily, and without consideration, to enable to alienate the same, cannot be deemed a fraud upon his credito although he thereby bars his right to become a tenant by the curt in such property, after her death.

DECLARATION OF GRANTOR—EFFECT OF.

The declarations of a grantor, impeaching her own title to real prope in her possession, are admissible against her grantee. But declarations in support of such title are not admissible in his fav except as accompanying her possession or acts of ownership over same, and being explanatory thereof.

IDEM—EVIDENCE.

Her declarations, that she had purchased of a particular person, and p a definite sum out of a certain fund, are not competent evidence such facts.

from Multnomah. The facts are stated in the

Strong & Sons, for appellant.

filed a petition in bankruptcy on May 30, 1868, per proceedings had, was duly adjudged a bank- ne of that year. An assignment was made by the the duly elected and qualified assignee. Wallace erest in the property described in the complaint ay 30, 1868, for which a bill in equity could be by a creditor for any cause. (U. S. Statutes at 14, 522; *Bradshaw, assignee,* v. *Klein,* vol. 1, N. p., 542; *Mays* v. *Manufacturers' National Bank phia,* vol. 4, N. B. Reg. Rep., 446; Ib., 660; *al.,* v. *Helms, et al.,* U. S. Supreme Court, vol. 19, Rep., part 3, p. 113.)

nt intent is a question of fact, and must be proved ther fact. The burden of proof rests upon the ng to establish the fraud. (General Laws of Ore- Wharton's Law of Evidence, vol. 1, sec. 366; vol. .)

perty, real and personal, of a married woman, ac- her own labor, cannot be holden for the debts of d. (General Laws of Oregon, 663, sec. 4.)

of fraud, in order to vacate a solemnly executed must be clear and strong. (Wharton's Ev., vol. *Field* v. *Gaston,* 12 Iowa, 218.)

V. Yocum, for respondent.

no issue upon the question of bankruptcy to be the appellant had relied upon showing that the bankruptcy was the owner of the property in the described, he should have pleaded it in abatement. no conveyance of any property to the assignee, and hing. (Bump's Bankruptcy.)

nt junior judgment creditor may gain a priority ligent senior judgment creditor, upon equitable

assets and property fraudulently conveyed by the debtor. (
Story's Eq. Jur., sec. 421; *Bridgman & Co.* v. *McKissick d*
Bone, 15 Iowa, 260; *Pratt* v. *Clemens*, 4 W. Va., 443.)

A creditor acquires a specific lien upon equitable asset
from the filing of his bill. (*Corning* v. *White*, 2 Paige, 567
Farnham v. *Campbell*, 10 Paige, 598; *Weed* v. *Pierce*,
Cowen, 722; Story's Eq. Jur., sec. 421; *Blake* v. *Biglow, e*
al., 5 Georgia, 437.)

By the Court, WATSON, J.:

This suit was instituted by the respondent, Sarah Besser
in the circuit court for Multnomah county, against the appel
lant, W. H. D. Joyce, and J. B. Wallace and others, to se
aside a deed and transfer of property from said J. B. Wallac
and wife to the appellant, on the ground of fraud, and to ob
tain an account of the rents, profits and proceeds of the prop
erty so conveyed and transferred, and to subject the same t
the payment of her judgment against Wallace.

The complaint charges that Wallace bought the property
and paid for it with his own money, but procured the deed
therefor in the name of his wife Margaret E. Wallace, sinc
deceased, to hinder and defraud his creditors, and that h
afterwards, on the 7th day of March, 1878, joined with he
in executing the conveyance and transfer of such property
(sought to be impeached by this suit) to the appellant, with
out any consideration, and for the purpose of hindering an
defrauding his creditors, with the full knowledge and co-oper
ation of the appellant, who was a participant in the fraud.

The answer of the appellant puts these allegations in issue
and avers that the property belonged to Mrs. Wallace as he
separate estate; that it was purchased by her for her own use
and paid for out of her own separate funds; and that sai
conveyance and transfer of March 7, 1878, was made by he
and her said husband in good faith, and for a good and val
uable consideration.

The answer also avers that on the 8th day of June, 1868

llace was duly adjudged a bankrupt, upon his own voluntarily filed in the district court of the United r the district of Oregon, which adjudication was n the 15th day of the same month; and notice was n of the meeting of the creditors of such bankrupt their claims against his estate, and choose an as-

plication puts in issue the averments in the answer, purchase and payment for said property by Mrs. and her ownership thereof. Admits the adjudica- ankruptcy, but denies that Wallace was ever dis- in the proceeding in which such adjudication was

Vallace came into the state of Oregon in 1864, pos- n her own right, about one thousand dollars in ive hundred dollars of which was then loaned to s., of Portland, Maine. On the 2d day of December ne year, she married J. B. Wallace.

l property in dispute is situated in Portland, Oregon, purchased in four distinct lots or parcels, at various m 1866 to 1873. All the deeds were made to Mrs. The debt represented by respondent's judgment from J. B. Wallace to Luzerne Besser, and in part, accrued prior to any of such purchases. Subse- t was assigned to the respondent, who recovered the upon it.

Wallace was a sister of the appellant. She died 1878. The evidence was all taken and submitted ree, to find both the facts and the law. He found our, in block "A," Caruthers' addition to the city of which was the first tract purchased, and the consid- or which was twelve hundred dollars, was bought by llace, and paid for out of his own funds, and that g of the deed therefor, in the name of his wife, was by them to be and was a fraud upon his creditors.

urchase was made July 6, 1866. But the referee

found, also, that the subsequent purchases of the three rema ing tracts or parcels, which were all situated in the sa block, were made by the wife with her own separate funds her own use, and in good faith. The aggregate price of these parcels was six hundred dollars.

After these purchases Wallace and his wife took possess of said property and occupied it as a home until her dea Wallace was all this time insolvent. The referee also fou that Wallace was duly adjudged a bankrupt in 1868; that assignee was duly chosen and appointed, but never exerci any control over, or commenced any proceedings to cause of said property in controversy to be appropriated to the p ment of the bankrupt's debts, or to reduce the same, or part thereof, into his possession; and that Wallace was ne discharged in such proceeding.

That the deed of March 7, 1878, from Wallace and wife Joyce, as to lot four, in block "A," and as to Wallace's estate in the remaining three tracts in said block "A," (wh were found to be the separate property of Mrs. Wallace) intended by the parties thereto to operate as a fraud on W lace's creditors, and was executed without any considerat therefor; but that the conveyance of Mrs. Wallace's inte in said three last mentioned tracts or parcels to Joyce by s deed was made in good faith and for a valuable considerati

That the proceeds of the personal property had all b expended in the settlement of the expenses of the last ill and funeral of Mrs. Wallace by the direction of Wall except certain articles which had been returned to him.

That the balance of rents and profits arising from said four, to be accounted for by appellant, was one hundred ninety-three dollars.

The referee found, as a conclusion of law, that the conv ance of lot four, in block "A," and the life estate of Wall in the remaining tracts, was fraudulent, and that respond was entitled, in equity, to have the same sold, and the p ceeds applied toward the satisfaction of her judgment,

tled to have said sum of one hundred and ninety-
applied in the same manner. The circuit court,
t's motion, confirmed the report, and rendered a
dingly.

lant contends that the findings of fact by the
ot warranted by the evidence, and that the court
in not setting aside the report on that ground.
carefully considered the testimony for both par-
ile the whole transaction is involved in much ob-
some doubt, we are convinced that the findings
ee upon the facts are not against the weight of
roperly admitted in the case, but are even sus-
preponderance of such testimony.

nt that Mrs. Wallace did not have money enough
on July 6, 1866, to pay the sum of seven hundred
lars, which must have been paid at that time on
e of lot four. The greater portion of this, if
must have come from Wallace, and the fact that
ving considerable sums of money at or about that
gh insolvent, shows it was in his power to have
whether he did so wholly or not. The sums he
have received were large enough for the purpose.
s nothing whatever to indicate that her subse-
gs, which appellant claims paid off the balance of
d and fifty dollars, did not, in law, belong to her

wears that he bought and paid for lot four with
ey, and took the deed in his wife's name to secure
e. L. Besser, respondent's husband, and C. D.
Clark Hay, both of whom worked with Wallace
this purchase was made, all corroborate Wallace
t, by testifying to admissions made by Mrs. Wal-
n, at various times, substantially agreeing with
stimony.

ut little competent evidence on the other side to
oof. Mrs. Wallace's declarations, as testified to

by several witnesses for the appellant, that she had purcl this lot and paid for it with her own separate estate, wer admissible as evidence of such facts. But even had they competent, still the preponderance of testimony would remained on the side of the respondent.

In *Fahie* v. *Lindsay*, 8 Oregon, 479, this court held tl could not reverse a decree based on the findings of fact referee, unless such findings were clearly against the w of the testimony. But we do not think it necessar invoke the doctrine of that decision in passing upon the tions we have been considering here.

We do not deem a particular examination of the testin in this place, either necessary or desirable, as we fully that the circuit court decided properly when it confirme report as to the findings of fact. This conclusion dispos the case as to lot four, unless the proceedings in bankru as stated in the answer, and found by the referee, shoul held to bar the respondent's suit.

It seems to us to be a sufficient answer to this defense, L. Besser, to whom the debt sued upon here was then from Wallace, was not a party to or connected with that ceeding, in any manner whatever. His name and der were omitted from the bankrupt's schedule, while at the time the bankrupt's interest in the property in controv was also intentionally omitted from his schedules, and cessfully concealed from his assignee until he had been charged and his authority had terminated. (*Barnes* v. *M* 2 N. B. R. Reps., 573; *Hallinshead* v. *Allen*, 17 Pa. 275.)

A further question arises upon that portion of the d subjecting a life estate in the three remaining tracts, in "A," which have been found to have been the separate erty of the wife, to the payment of respondent's judgn We are of the opinion that this portion of the decree i roneous. A husband has no life estate in the separate property of his wife, in this state, during her life-time. has been the uniform construction placed upon the prov

constitution respecting the separate property of
ıen; and similar provisions in statutes in other
received the same interpretation. He has no
erest therein during the life of his wife, that he
y his separate deed, or that can be taken by his
execution, or that will pass to his assignee in in-
Rugh v. *Ottenheimer*, 6 Or., 231; 2 Bishop's Law
Women, secs. 147, 150, and cases cited; *Staples*
Allen, 64.)

ısband is not guilty of any fraud on his creditors,
onsideration, he joins with her in executing a
ch the property is conveyed to a stranger. His
ot vest until the death of his wife. The whole
rs until then; and while the law has placed her
bility to convey her own property without her
join her in executing the deed, it is obvious that
was not imposed for the benefit of the husband's
l that he is neither legally nor morally bound to
assent, to her alienations of her own separate
order to preserve for them the possible advan-
might arise in the event of his surviving her,
tenant by the curtesy, in her separate real prop-
hop's Law of Married Women, sec. 452; *Silsby*
0 Allen, 94; *Lynde* v. *McGregor*, 13 Allen, 182;
yes, 24 Iowa, 298.)

e evidently took the account of rents and profits
7, 1878, to the date of his report, Feb. 12, 1880,
roper, and the amount found in Joyce's hands,
on respondent's judgment, was correctly deter-

appealed from must be modified so that it shall
y estate or interest in any of the three tracts in
hich were the separate property of Mrs. Wallace,
the deed of March 7, 1878, to Joyce, was exe-
thus modified it will stand as the decree of this
llant recovers costs on the appeal.

dified and affirmed.

PLYMALE v. COMSTOCK.

STATUTE OF FRAUDS—PAROL AGREEMENT.

The principle upon which courts of equity have avoided the statute frauds, upon the ground of part performance of a parol agreeme is well settled. The rule is that such parol agreement must be c tain and definite in its terms, and the acts proved in part perfor ance must be of the identical contract set up, and must have been far executed that refusal to execute would operate as a fraud the party. A failure to prove the contract set up is fatal to pretentions of the complainant.

APPEAL from Douglas.

The plaintiff alleges, substantially, that on or about t 18th of September, 1878, the defendant represented to t plaintiff that he had a lawful right to sell and convey l three and four, in block 56, in the railroad addition to the c of Roseburg, Douglas county, Oregon, and then and the agreed that upon the payment to him, defendant, within reasonable time, of the sum of one hundred dollars, to ma execute and deliver to plaintiff a deed for said premis And that the defendant then and there placed the plaint in possession of said premises, and he still maintains the sar That by reason of said representations, the plaintiff ma valuable improvements thereon to the amount of six hundr dollars.

That on the 28th of November, 1879, plaintiff tender one hundred dollars to defendant, and demanded a deed said premises, and defendant refused to accept the money, deliver the deed. That plaintiff is still ready to pay the o hundred dollars. That by reason of defendant's failure perform said agreement, plaintiff has been damaged in t sum of two hundred dollars. That defendant is now, or p tends to be, the owner of said premises, and can perform sa agreement, but refuses. And prays for a decree for a conve ance, and for two hundred dollars damages.

The defendant denies each allegation of the complai excepting the tender of one hundred dollars, and demand f

nd that defendant is now the owner of the premises. was rendered dismissing the complaint, and for 's costs and disbursements—sixteen dollars. From e plaintiff appeals to this court.

elsay, for appellant.

erse the decree of the circuit court, the following d authorities were relied on: An agent may be ap- y parol. (1 Parsons on Contracts.) Authority is , or raised by implication of law. (1 Greenleaf on secs. 60, 61; 1 Parsons on Contracts, 47, 51; Dun- y on Agency, 161.) Authority to contract for land be in writing. (Code, 644; 1 Chitty on Contracts, n agent employed to contract for land cannot pur- himself. (1 Story's Eq., sec. 316; 4 Kernan, 91.)

Willis, for respondent.

the appellant can recover, he must show by the evi- t the respondent represented that he had a lawful ell the lots, and would execute and deliver to appel- od and sufficient deed therefor, on the payment of red dollars, and that respondent put appellant in . (*Charnley* v. *Hously*, 13 Pa., 16, 21; *Waters* v. 8 Gill, 277; Story's Eq. Jur., secs. 764 and 765.)

Court, LORD, C. J.:

ar from the evidence that the contract alleged in the is not proved. There is not a particle of evidence at the respondent represented to the appellant that e owner, or had any lawful right to sell or convey or that he made any agreement with the appellant he agreed to execute to him a deed upon the pay- he sum alleged, or that the respondent placed appel- ossession of the lots. What the evidence does show e appellant desired to purchase a lot for the purpose g a house, and in a friendly way, and merely to aid e selection, the respondent accompanied him to view

several lots which were for sale, and being unable to find o suitable that day, they went on the following day to the ra road office to look at the map of the railroad addition to t town of Roseburg, and found a number of lots vacant, out which he selected the lots in question.

The lots were owned by the Willamette Real Estate Co pany, whose place of business was in the city of Portlan The respondent being acquainted with the officers of th company, he, at the request of the appellant, addressed a l ter to the secretary of the company, making inquiry in resp to the lots which the appellant had selected, and in answ the said secretary wrote: "We own the lots, three and four etc. (including the lots in question), "which we will sell f fifty dollars a lot." This letter the respondent sent to t appellant, but under the contents was written a note in le pencil: "Above find answer about lots. If any suit you, y can commence on it immediately."

In all this, there is no pretense that the respondent own the lots, or was authorized to sell or convey them. The lett which the respondent received from the company, and whi he sent to the appellant, plainly shows who was the owner the lots, and the terms on which they could be purchased, a this was the object in writing the letter to the company, a in sending their reply to the appellant.

All that remained for the appellant to do, was to notify t company of the lots he had selected, pay the price name and receive the deed for them. Nothing of the kind w done. This is the evidence of the appellant, and it is in wise inconsistent with the testimony of the respondent. T evidence of respondent is to the same effect. He says: ' never agreed to sell him the lots; as I was intimately a quainted with the railroad parties, Mr. Plymale wanted should write down to them, to see if he could buy those lo which I did, and sent their reply to him, that he could ha the lots for so much money paid for them, which he failed do." And again he says: "I never agreed to deliver him

. I merely wrote the letter to the party who owned accommodate him. I never represented that I was of the lots. I never had any right to sell and con-ts, and never told him I had. I did not place him ion at all." The fact that the respondent had e title or possession was known to the appellant.

nciples upon which courts of equity have avoided of frauds, upon the ground of part performance of greement, are well settled. The rule is, that such ement must be certain and definite in its terms, and roved in part performance must be of the identical et up, and must have been so far executed that a execute would operate as a fraud upon the party. a party claims to take the case out of the statute on the ground of part performance of the contract, ake out, by clear and satisfactory proof, the exist-e contract, as laid in the bill, and the act of part ce must be of the identical contract set up. It is n that the act is evidence of some agreement, but it nequivocal, and satisfactory evidence of the *par-*reement charged in the bill." (*Davis* v. *Bartholo-*nd. R., 490; 4 Md. R., 459, 462; *Brewer* v. *Wilson,* q. R., 182; Fry on Specific Performance, sec. 164; 2 341.)

his case the defect in the proof does not arise from ness, uncertainty, or conflict of the evidence in re-he alleged agreement, but it is a case of entire proof to establish the contract sought to be specifi-ted.

ws that the decree of the court below, dismissing int, must be affirmed.

affirmed.

1

GOODWIN v. MORRIS.

STATUTE OF LIMITATIONS.

The statute of limitations of this state affects the remedy only, and the right or title to personal property.

COMMON LAW RULE PRESUMED.

In the absence of any allegation or proof to the contrary, the court presume that the common law rule of limitation concerning the bri ing of actions to recover possession of this class of property, i force in Washington Territory, and under that rule the statute this state could not be plead there as a bar to an action of that cl

APPEAL from Umatilla. The facts are stated in the opini

Everts & Walker, for appellant.

The statute of limitations commences to run from the ti the possession becomes adverse. (11 Peters, 41, 52; 9 N. 329; 25 Mo., 197; 49 Mo., 399; 54 Mo., 315.)

Where there has been a continuity of possession, the ti of all adverse claimants may be taken together, and the v dee can plead possession in a vendor as a defense. (Code, s 4; 5 Met., 15; 17 Am. Dec., 820; 13 Id., 320; 9 Id., 690.)

The warranty of title by a vendor only extends to boundaries of the state. Contracts are governed by the *loci contractus.* (2 U. S. Digest, 763; 2 Met., 397; 6 Pete 172.)

The statute of limitations is sufficiently pleaded. (29 C 19, 45; 2 Estes' Plead., 741; 27 Cal. 278.)

Bailey, Tustin & Turner, and Bonham & Ramsey, for spondent.

Paragraph 8 of the charge of the court below has refere to the attempt of the appellant to show title in himself six years' possession. The answer does not contain any p of the statute of limitations. Possession of the mare more than six years would, if true, constitute no defense, cause, to constitute title by possession, it must be adverse a hostile to the true owner. By failing to plead, in pro

n adverse holding for six years, the appellant waived
efense. (5 Curtis, 224; Angell on Limitations, section
Smith's Leading Cases, 598, 603; 22 Ark., 466; *Wil-*
McEwan, 7 Or., 87; 38 Iowa, 158; 43 Georgia, 382;
, 294.)
statute merely suspends the remedy, it does not extin-
he right. (*Myers* v. *Beal*, 6 Or., 130; *Townsend* v.
n, 9 How., 413.)

he Court, WATSON, J.:

action was commenced and tried in the justice's court
ndleton precinct, Umatilla county, Oregon. Respond-
ere obtained judgment, and the case was appealed to
cuit court for said county. The cause was tried there
ury, and respondent again obtained a judgment, from
an appeal has been taken to this court.
ppears that appellant obtained possession of a certain
about the 1st of September, 1872, and kept possession
from that date, in said county, claiming her as his
ty, until in November, 1878, when he sold and delivered
respondent, together with a colt which she had foaled
o in appellant's possession, and warranted title to the

eptember, 1879, respondent took the mare and colt into
ngton Territory, where they were claimed by Jane
man as her property, and given up to her without suit.
action was brought to recover damages for a breach
warranty. The issues made by the pleadings were,
r appellant had title to the property when he sold it
respondent, and as to the damage.
appellant claims that his possession of over six years
gon gave him title to the property, and that an instruc-
ven by the judge of the circuit court to the jury, on
al, bearing upon the question of the sufficiency of his
ion under the statute of limitations of this state, was
ous, and injuriously affected his substantial rights.

We are of the opinion, however, that he could acquire
title simply by adverse possession for the period prescrib
by the statute within which an action to recover the possessi
of personal property must be commenced in this state, a
that it therefore becomes unnecessary to consider the instru
tion objected to.

It has been announced as the law in this state, governi
such cases, that the statute of limitations here only affects t
remedy, and does not extinguish the right. (*Meyer* v. *Be*
5 Oregon, 130.)

Notwithstanding the great diversity of opinion upon t
question of the effect of the statute of limitations, whi
appears in the numerous authorities upon the subject, we a
entirely satisfied to adhere to the doctrine of that decision.
is certainly a sound construction of our statute, based up
the obvious intention of the legislature that enacted it. Und
other provisions of the civil code, adopted at the same tim
a defense under that statute must be taken advantage of
demurrer or answer, or it is waived. (Secs. 66, 69 and 70
The following authorities also support this view: *Townse*
v. *Jemison*, 9 Howard, U. S., 413; 3 Parsons on Contrac
99 and 100; Story's Conflict of Laws, secs. 576, 582; *Decouc*
v. *Savetier*, 3 John. Ch., 218, 221; *Lincoln* v. *Bottelle*,
Wend., 485.

The bar of the statute of limitations in this state could n
be plead as a defense to an action for the possession of t
property in Washington Territory, where we must, in the a
sence of allegation and proof to the contrary, presume t
common law rule to prevail. (*Cressey* v. *Tatom, et al.*, d
cided at the present term; 3 Parsons on Contracts, 36
Angell on Limitations, secs. 14, 17, 20 and 21, and appendi
page 3, 5th edition.)

Respondent was wholly justifiable in surrendering up t
possession to the holder of the legal right and title to t
property, under such circumstances, as he had no defense, an
he thereupon became entitled to bring his action for damag

rranty. The judgment of the circuit court is af-

nt affirmed.

HOUGHTON & PALMER v. BECK.

PLEADINGS—VERDICT CURES DEFECTS.

a pleading, whether of substance or form, which would have tal on demurrer, is cured by verdict, if the issue joined be necessarily required, on the trial, proof of the facts de- stated or omitted, and without which it is not to be pre- hat either the judge would direct the jury to give, or that would have given the verdict.

from Multnomah. The facts are stated in the

& Gilbert, for appellants.

& Thompson, for respondent.

Court, LORD, C. J.:

e was begun in a justice's court; issue was joined adings, and a jury trial had, which resulted in a ver- udgment for the defendant. An appeal was taken uit court, and after the usual course of trial, resulted a verdict and judgment for the defendant. The brought to this court on a motion for judgment on ngs. The action is for labor and materials furnished nest of the defendant, for a certain sum, expressly on, in building a fire-place and chimney for the The answer specifically denies these allegations, , affirmatively, "that on or about the —— day of , defendant let the contract to build a house com- ne E. A. Brown, for the sum of ten hundred and

nine dollars, and that said fire-place and chimneys were b
by plaintiffs in said house at the request of said Brown,
that said Brown has been fully paid therefor by defendar

The reply denies any knowledge or information sufficien
form a belief as to whether, on the —— day of ——, 1879
any other time, the defendant let the or any contract to b
a house complete, or otherwise, etc. "Denies that said
place or chimneys, or either or all of them, were built in
house at the request of said Brown, or under any contrac
agreement with him."

The appellants claim that there is sufficient admitted by
pleadings to entitle them to judgment. We are unabl
concur in this view. The matter set up by way of defe
tested by technical rules, is undoubtedly defectively sta
but could have been cured on motion to make the plead
more definite. Mere vagueness in a pleading is to be
rected by amendment, and not visited by judgment. (*K*
v. *Barnett*, 16 How. Pr. R., 135; *Fairchild* v. *Gwynne*, 9 *A*
Pr., 23.)

The necessary facts are mentioned, not with fullness
accuracy of statement, but taken in connection with the re
no doubt can exist of the actual intent and meaning of
parties. Our statute has abrogated the common law doct
of an interpretation adverse to the pleader, and requires
in the construction of a pleading, for the purpose of de
mining its effects, its allegations shall be liberally constru
with a view to substantial justice between the parties. (C
Code, sec. 84.)

The courts are uniform in holding that strict formalit
not required in pleadings before justice's courts, and certai
if there is any occasion in which this liberal construction
the statute should be applied with favor, it is in proceedi
before these courts. (*Ross* v. *Hamilton*, 3 Barb., 610; *Bl*
v. *Graves, et al.*, 18 Iowa, 313.)

When the matter set up is sufficient to show the nature
the defense relied upon, and is not calculated to mislead

party, the authorities plainly indicate that the dispo- the higher courts is to sustain, not to reverse, the ts of such courts. *But, be this as it may,* there is that formal defects, such as imperfect statements, or sion of certain formal allegations, are cured by ver-

atter set up by way of defense and denied, necessarily full proof of the matter defectively stated, before the ld have reached the result of which their verdict is

le applicable to such cases, to be deduced from the es and elementary writers, as stated by Proffatt on als, sec. 419, is that "a defect in a pleading, whether nce or form, which would have been fatal on demur- red by verdict, if the issue joined be such as neces- quired, on the trial, proof of the facts defectively r omitted, without which it is not to be presumed er the judge would direct the jury to give, or that would have given the verdict." (*Dale* v. *Dean,* 16 79; *Stanbury* v. *Nicholl,* 30 Texas, 150.) The judg- the court below is affirmed.

ent affirmed.

SMITH v. COX, et al.

DEED—PAROL EVIDENCE.

existence and contents of a deed are the facts in issue, the tself must be produced, or its non-production accounted for, parol evidence of such facts is admissible, although such deed ween third parties, and void on account of the incapacity of rty making it.

EVIDENCE—FALSE REPRESENTATIONS.

tions merely false, but not known to be false by the party g them, inducing the execution of a bond, afford no defense action at law upon such bond.

APPEAL from Marion.

A. E. Smith, the appellant, brought an action in the cir court for Marion county, against Gideon S. Cox and Ge W. Cox, upon a bond to recover the sum of twenty-five h dred dollars, with interest from the 1st day of Novem 1879, and costs.

The bond was executed by the respondents, in favor of pellant, in the penal sum of four thousand dollars, lav money of the United States, on November 1, 1879, conditio for the conveyance of a title, in fee simple, to the south- quarter of the donation land claim of Gideon S. Cox and w in T. 6, S. R. 1 W., Willamette meridian, containing 160 a of land, with general warranty, and the usual full covena on the 2d day of January, 1880. The complaint sets out bond in full, alleges its due execution by defendants; breach of the conditions, and claims twenty-five hundred lars, with ten per cent. interest from November 1, 1879 damages, and costs of the action.

G. W. Cox made default; Gideon S. Cox, the respond filed his separate answer, denying the due execution of bond, and alleging facts, showing that he was induced to it under a misapprehension as to its contents, through the f and fraudulent representations of one Brown, the plaint agent in the transaction. That he was induced to believe such representations, at the time he signed the bond, tha merely obligated him to convey his interest, which was a life estate by curtesy, in a portion of the tract describe the bond, containing one hundred and forty-two and 21- acres, and another tract, in fee simple, adjoining it, from south-west quarter of said donation claim, seventeen 77-100 acres. That prior to October 6, 1866, he and his wife, Susannah, having become the owners in fee of said do tion claim, the defendant of the west half, and the said Su nah of the east half, according to the decision made by proper officers of the United States, agreed upon a diffe

their said claim, whereby twenty-six acres and a
n acre of the west half was added to the east half,
the plat attached to the answer.
division was made by them in good faith, and was
during the life of said Susannah, treated and
both of them as valid and binding, though no
passed between them to give effect to the same,
spondent has, ever since the death of the said Su-
still regards the said division as binding and valid
.
the 6th day of October, 1866, the said Susannah
d delivered to her son, the defendant George W.
le and separate deed to the south half of said
aim, according to the division thereof as agreed
resaid.
land intended to be conveyed by said deed con-
e hundred and forty-two and 21-100 acres of the
nd seventeen and 77-100 acres of the west half of
according to the patent, making one hundred and
nd 98-100 acres.
eupon, said defendant, George W. Cox, entered
on, and has ever since been in possession of said

or about January, 1869, the said Susannah died.
about November 1, 1879, the defendant, George
d to the plaintiff the land last above described,
land mentioned and described in the bond, for
d dollars.
defendant, Gideon S. Cox, received no part of said
s willing to quit-claim all his interest in the tract
rge W. Cox to appellant, without any considera-
is was what he intended to do, and understood he
himself to do, when he signed the bond, and that
's agent, Brown, made false and fraudulent repre-
this effect, and thus imposed upon him and ob-
ignature to the bond.

The plaintiff denied all the new matter set up in the answ in his reply. A trial was had before a jury and a verdict w rendered for the defendant. Judgment was entered accor ingly, and plaintiff appealed therefrom.

Bonham & Ramsey, for appellant.

The answer contains no sufficient plea of mistake. A mi take, to be available as a defense, even in equity, must alleged to have been mutual. (*Everts* v. *Steiger,* 5 Or., 15 6 Or., 196; 8 Or., 196; 10 Abbott's Pr. R., 84; 1 Story's E secs. 15 and 155; 2 Wharton on Evidence, 933.) The m take must be material. (Kerr on Fraud and Mistake, 408

It is not competent to aver or prove a mistake in a writt instrument, as a distinct ground of defense, in an action law. (5 Cowan, 510; 5 Cush., 418; 10 Maine, 85.)

N. B. Knight, for respondent.

The respondent Gideon S. Cox, bases his defense to t action of appellant, upon the ground that his signature to t bond sued upon was procured by the false and fraudulent re resentations of J. M. Brown, who was then acting as the age of the appellant, in preparing and securing the execution said bond.

The question of fraud having been determined by the ju in favor of the respondent, this court will not disturb the verdict, unless the record discloses some substantial error law at the trial.

Conclusive proof of fraud is not necessary, but it may inferred from the circumstances and conditions of the parti contracting. (51 Ill., 324; 48 Ill., 323; 8 Cal., 87; Id. 1 327.)

By the Court, WATSON, J.:

This case comes here on exceptions taken at the trial certain rulings of the lower court admitting evidence, and gi ing and refusing instructions to the jury.

The respondent, Gideon S. Cox, asked G. W. Cox, one

this question: "State whether, on or about the
ctober, 1866, your mother, Susannah Cox, made
the south half of the donation claim of Gideon
wife, according to the division agreed upon by
ellant objected to the evidence as incompetent
al. The court overruled the objection and ap-
ted. The witness answered: "She did."
ee was immaterial. The respondent having plead
e answer the execution and delivery of this deed
Cox for this land to G. W. Cox, in connection
cumstances, as altogether affording a reasonable
is understanding of the act he was binding him-
m, by executing the bond sued upon, and appel-
lenied all of them in his reply, and they, in our
rnishing grounds for such reasonable inference,
a sufficient motive on the part of respondent to
ather than the one expressed in the bond itself,
proving such circumstances, in connection with
cumstances plead and proved, must necessarily
strengthen his credit as a witness before the
new weight to his defense generally, by showing
ral and reasonable, on account of its accordance
tecedent facts.
ry thing to be proved in support of the theory
e was the existence and contents of this deed,
accomplished by the parol evidence of the wit-
Cox, above set forth. The admission of such
in violation of the general rule that the writing
est evidence, and must be produced, or its non-
tisfactorily accounted for, before parol evidence
ed. It did not alter this rule, that the deed was
parties, and void as a conveyance of the real
tioned in it.
al facts in this case were its existence and con-
effect as between third parties. In this view,
lf was improperly ruled out by the court be-

low, but this did not render the parol evidence admiss

The rulings in regard to the instructions to the jury, w were excepted to by the appellant, present the que whether a mistake of the respondent as to the character o bond which he signed, caused by the false representatio the appellant, and in the absence of which the bond w not have been signed by the respondent, would, if pr bar a recovery on the bond in an action at law, without p that appellant knew such representations to be false.

The court below seems to have proceeded on the suppos that it would. This we conceive to be erroneous. The cumstances under which false representations were made given case, may fairly justify the inference by the jury the party making them knows them to be false, but the c cannot assume them as a conclusion of law. Although f yet if honestly believed to be true by the party making t they were not fraudulent, and would afford no defense, i action at law, on the bond. (*Champion* v. *White*, 5 Co 510; *Harper* v. *Gilbert*, 5 Cush., 418; *Elder* v. *Elder* Maine, 85.)

We are satisfied that upon both these points the c below erred in its rulings, and that they were of such a na as to injure the substantial rights of the appellant.

The judgment of the court below is reversed with c and the cause remanded to the court below for further ceedings.

Judgment reversed.

JOHNSON v. SHIVELY.

ITTEN INSTRUMENTS—CONSTRUCTION—EXCEPTIONS.

tion of law for the court to construe and declare the legal f deeds, or other written instruments.

stion of law has been improperly referred to the decision of if it be apparent that the question has been correctly decided jury, exceptions for that cause will not avail.

from Clatsop. The facts are stated in the opinion.

rong & Sons, for appellant.

Fulton, for respondent.

Court, LORD, C. J.:

s an action brought by the respondent to recover of upon his warranty of title to certain lots in Shively's o the city of Astoria, the sum of two hundred and dollars and sixty-five cents, the amount alleged to paid by respondent to buy in an alleged superior g title in R. C. Shively. The verdict of the jury vor of the respondent for the sum of one hundred seven dollars and sixty-five cents, and judgment was for that amount, and costs and disbursements.

of exceptions discloses that the respondent, to sus- ction, introduced in evidence two deeds, executed nt and wife—one in 1862, and the other in 1864— covenants of warranty, to the lots in question, and conveyances to the respondent; also the decree of t court, rendered in the year 1857, conveying the among other property, to R. C. Shively and Joseph

October term of the circuit court, in 1879, R. C. mmenced an action against the respondent to recover sion of the undivided one-half of said lots, and the was notified to defend the same, which he failed to equently the respondent compromised with R. C. y paying him the sum of one hundred and two

dollars for his title, and taking a quit-claim deed from h

Exceptions were taken to the admission of the deeds a decree in evidence, none of which are availing, as disclosed the record. Among other things, the court charged the ju that, "Whether or not the deeds admitted in evidence sh title to the undivided one-half of the lots in R. C. Shive which is the foundation of this action, is a question of fact you to decide."

It is insisted that this instruction is error, because it is duty of the court to declare the legal effect of the deeds. T rule of law is considered to be well settled, that the constr tion of a written instrument is a matter of law for the co to define its terms and legal effect from the language us The exception to this is when the meaning and construct depend upon intrinsic facts which are doubtful and disput (*Edleman* v. *Genkel*, 27 Penn. St., 26.)

As to who holds title from certain deeds introduced in e dence, it is undoubtedly error to submit it to a jury as a qu tion of fact. (Proffatt on Jury Trials, sec. 306.)

In the *State* v. *Delong*, 12 Iowa, 455, the court say: ' was proper for the court to state who held the title to cert real estate from the deeds introduced, or when the quest was one of law from the evidence."

In *Livingston* v. *Junction Railroad*, 7 Ind., 598, it is h that it is for the court to declare the force and effect of a wr ten instrument called a release. (*Symmes* v. *Brown*, 13 In 320.)

The authorities are uniform in holding that it is the pr ince of the judge to charge the jury as to the legal effect deeds or other written evidence. (*Montag* v. *Linn*, 23 I 556; *Carpenter* v. *Thurston*, 24 Cal., 268.)

So, also, the construction of a deed is not to be submit to the jury, without limitation or restriction, or specific structions that they shall only determine certain matters fact. (*Morse* v. *Weymouth*, 28 Vt., 824; Hilliard on N Trials, 326, sec. 87, and authorities cited.)

Tested by the authorities, the instruction was error. But he principle is also well settled, that when a question of law as been improperly referred to the decision of a jury, and it apparent that the question has been decided correctly by hem, exceptions for that cause will not avail, and their verdict vill not be set aside. (*Woodman* v. *Chesley*, 39 Maine, 45; b., 173; *Simpson* v. *Norton*, 45 Maine, 281.)

Such we think was the fact in this case, and the judgment nust be affirmed.

Judgment affirmed.

SIMISON v. SIMISON.

APPEAL—SURETIES—UNDERTAKING.

taking an appeal from a judgment or decree, a party is not entitled to substitute a new undertaking, with different sureties, under section 115 of the civil code, providing for the justification of bail on arrest.

the appellant fails to file a sufficient undertaking within the time allowed by statute, he must apply for leave of the court to file it, if he wishes to perfect his appeal.

APPEAL from Linn.

. S. *Strahan*, for appellant.

owell & Bilyeu, for respondent.

By the Court, WATSON, J.:

This is an appeal from the decree of the circuit court for n county, reversing a decree of the county court of that nty, ordering a sale of certain real property belonging to estate, for the payment of claims against it, secured by rtgage on such property.

. H. Montanye, administrator of the estate of Simison, ellant here, but respondent in the circuit court, moved to miss the appeal in that court, for want of an undertaking,

which motion was overruled; and this ruling of the circ court is the first error complained of here.

The record shows that a notice of appeal from the dec of the county court was duly served and filed, and also t an undertaking for the appeal, in due form, was filed wit the ten days ensuing. That within five days after the fil of the undertaking, exceptions to the sufficiency of the sur were duly filed by the administrator. That within ten d thereafter the appellants in the circuit court, respondents he notified the administrator that on a certain day they wo appear before the clerk of the county court and give a n undertaking, with a different surety, under section 115 of civil code, the time designated being not less than five more than ten days after giving such notice.

The administrator did not appear, and the new undertaki was executed and filed in pursuance of the notice. The not of appeal was served and filed September 8, 1879, and new undertaking executed and filed on the 27th day of same month.

These facts presented the question squarely, whether a pa attempting, in good faith, to take an appeal from a decree the county court, and having caused a notice of appeal to served and filed, and also having filed an undertaking in d form, within ten days thereafter, can, in case the sufficie of the sureties is excepted to by the opposite party, and th cannot or will not justify, proceed, as in the case of bail arrest, under section 115, and file a new undertaking appeal, with new and unexceptionable sureties, after the days succeeding the service of the notice of appeal have pired. Respondents claim that this can be done, under s division three of section 527 of the civil code, which is these words:

"3. The qualifications of sureties, in an undertaking an appeal, shall be the same as bail on arrest, and if except to they shall justify in like manner."

Thus it will be seen the provisions of the chapter on arr

are referred to, and of course govern for two pur-
irst, to ascertain the qualifications of sureties;
ne mode of their justification when excepted to for
ncy.

ving of a new undertaking of bail is a distinct pro-
om the justification of the sureties on the original
ng, and is peculiar to the proceedings under arrest
It is a right not expressly given to a party seeking
from a judgment or decree, and one which cannot
d from the reference in the subdivision quoted.

er just or appropriate such a remedy may appear to
es of this character, it is enough to say that the leg-
has not given it. Subdivision 4 of section 527,
on the subject of appeals, contains ample provisions
elief of parties under such circumstances, and in our
affords the only legal mode of proceeding to obtain it.
ew of the law regulating the mode of taking appeals,
any consideration of the questions presented upon
s of the case.

urt below had no jurisdiction to proceed to a final
ation on the merits, there being, in legal contempla-
undertaking for the appeal. The decree of the cir-
t must be reversed and the appeal to that court dis-

reversed.

BANK OF BRITISH COLUMBIA v. HARLOW PAGE.

JUDICIAL SALE—CONFIRMATION—SURETIES ON APPEAL.

Under section 304 of the civil code, a purchaser at a judicial sale is titled to the possession of the property when not in possession tenant holding over under an unexpired lease.

An undertaking upon an appeal from an order confirming the sale of property, does not have the effect to defeat or suspend the right purchaser at a judicial sale to the possession of the property, continue the use and occupation of the property in the appellant providing, in addition to the payment of all costs, damages and bursements, for the payment for such use and occupation not to ceed a certain sum, not ascertained and fixed by the court, bu the appellant.

The right to the possession of the property being in the purchaser, appellant could only continue in the use and occupation of the p ises until the appeal from the order of confirmation was heard some agreement with the purchaser; but the obligation of the ties upon the undertaking includes no agreement of this char which renders them liable.

APPEAL from Multnomah. The facts are stated in opinion.

W. H. Effinger, for appellant.

This was a bond, under subdivision 2 of section 528 of code. The decree of confirmation is an essential part of decree of foreclosure. It completes it. Possibly this b was not, in all its features, complete as such statutory un taking, but such was its object, and substantially it was a g undertaking. The bank was entitled to the possession of property, and this undertaking continued Page in posses (*Smith* v. *Wiswall*, 2 Hall, 505; *Adams* v. *Bean*, 12 M 137.)

Shattuck & Killin, for respondent.

The bank, as is truly stated in its complaint, was enti to possession. from and after the sale. (Civil Code, sect 304, 413, 414.)

A bond or undertaking upon appeal can stay not

ecution on the judgment or decree appealed from, hence
ndertaking to stay proceedings for possession is void,
nt of consideration. (21 Cal., 234; *Paddock* v. *Hume*,
82.)

a an undertaking for stay of proceedings, as to posses-
' land cannot be given, and has no operation unless an
is made by the court or judge fixing the amount of it.
on 528, Civil Code.) In this case there was no such

the Court, LORD, C. J.:

. is an action upon an undertaking on appeal. The
ant foreclosed a mortgage executed by W. W. Page and
upon certain lots described in the complaint, and a
was rendered accordingly. The lots were sold by the
, and the plaintiff became the purchaser and entitled to
ssession thereof. Subsequently the circuit court con-
the sale, and Page appealed from the order of confirm-
to the supreme court, and in order to prosecute his said
, filed an undertaking, with the respondent and Gleason
eties, whereby, among other things, and in addition to
ing bound for damages, costs and disbursements, to be
red in the supreme court, it is alleged that the sureties
dertake and agree that if the said order of confirmation,
' part thereof, should be affirmed by the supreme court,
hen the said Page, appellant, should pay to the plaintiff
lue of the use and occupation of said premises, from
ne of said appeal, to wit: from the 2d day of July,
until the delivery of possession of said premises to the
ff, not to exceed the sum of five hundred dollars. That
age continuously occupied said premises from July 2,
until October 2, 1879; that the reasonable value of such
tion is the sum of four hundred and fifty dollars, and
ayment has been demanded and refused. The circuit
sustained a general demurrer, and rendered judgment,
which appellant appeals to this court.

that "By virtue of this right of possession, a purchaser a
judicial sale may enter and use and occupy the premises a
thereby preserve the premises intact, and better prevent wa
and destruction."

The undertaking filed could in no wise affect the possessi
or the right of possession, of the purchaser; nor did it con
upon Page any right to continue in the possession. If
purchaser had gone into possession of the premises after
sale, and was in the possession at the time of the order
confirmation, it would hardly be contended that this und
taking would have entitled Page to the possession; or, if Pa
after the sale, had refused to yield up the possession, and
purchaser had instituted proceedings to recover the possessi
that the undertaking would have been any defense to his ri
to the recovery of possession of the premises.

From the day of sale until a re-sale the purchaser was
titled to the possession, and if Page desired to continue in
possession until the appeal from the order of confirmat
could be heard, he could only do so by some arrangement
agreement with the purchaser. He could not defeat the p
chaser's right to the possession, or continue his own use a
occupation by including such additional matter in the und
taking as is made of the ground of action in this compla
The judgment of the circuit court is affirmed.

Judgment affirmed.

GLEASON v. VAN AERNAM.

PARTNERSHIP—DISSOLUTION.

ourt of equity has jurisdiction over the adjustment and settle- of the accounts of a dissolved partnership, it will take cogni-, under proper allegations, of distinct contracts entered into by artners at the time of dissolution, and materially changing their and liabilities on final settlement, and render full relief upon ame.

PLEADINGS—FINAL SETTLEMENT.

ttlement of partnership accounts must be plead to bar a suit for nt and settlement between the partners.

rtners dissolved their partnership by consent, and adjusted their nts so far as they occurred to them at the time, but separated r an agreement to meet again and divide some partnership lum- nd then finish their settlement, and never did anything further: not a final settlement.

L from Umatilla. The facts are stated in the opinion.

m & Ramsey, for appellant.

rt of equity has no jurisdiction of the subject matter uit, because the complaint shows that the partnership dissolved, and the accounts and business of the firm . The partnership being dissolved, and the property by mutual contract, it ceased to be partnership prop- d all remedies in relation to it are at law, and not in (1 Story's Eq. Jur., 528.)

y mistake had been made in the settlement, it could orrected in this suit, as it was not instituted to falsify harge the accounts. (1 Story's Eq. Jur., secs. 524,

n Everts, for respondent.

s of equity have jurisdiction to take an account upon ution of a partnership. (Willard's Eq. Jur., 707; 1 Eq. Jurisprudence, secs. 662, 672, 683; *Ross* v. *Cor-* Cal., 133; *Burns* v. *Nottingham*, 60 Ill., 531; *Wil-* *Henshaw*, 12 Pick., 378.)

gard to the lien of partners on the partnership prop-

erty, cites: Story on Partnership, secs. 77, 78; *Simpso Leek*, 86 Ill., 286.

By the Court, WATSON, J.:

This suit was commenced in the circuit court for Uma county, to obtain a settlement of partnership accounts, to force certain agreements entered into by the partners in gard to portions of the property which had belonged to firm at the time of the dissolution, and to establish a vend lien.

The complaint alleges the formation of the partners October 15, 1875, by the parties hereto; its continuance February 14, 1878, and its dissolution at the latter date mutual agreement. It further states, that at the time of solution, the plaintiff sold and relinquished to defendant undivided one-half interest in the saw-mill and the prem and improvements used in connection therewith (by the p nership), "and the defendant agreed to pay plaintiff a rea able sum therefor—said sum to be sufficient to compen plaintiff for the work and labor performed, and money pended by him, in and about the business of said partners and for which plaintiff had not already been paid. * That the accounts between plaintiff and defendant in re to said partnership, and the sale of the partnership prope have never been fully adjusted and settled, and there remains due from defendant to plaintiff the sum of six dred and fifty dollars, over and above all set-offs and cou claims, for plaintiff's interest in said partnership prope which was sold and relinquished by him to defendant"; for which he claims a vendor's lien on the property sold.

That it was also agreed at the time the partnership was solved, and was a part of the contract of dissolution, plaintiff should thenceforth hold and own, in his own vidual right, and as his share of the partnership propert certain logging team, wagon, etc.

That defendant has never complied with any of said a

has continued to use said logging team, wagon, t plaintiff's consent, and that the use of the same this suit was instituted was reasonably worth fifty ch he asks to have allowed him by the decree. A s was filed with the complaint.

er admits the sale of the half interest in the saw- nies any agreement to pay therefor, and avers that paid for out of the partnership assets. Denies rtnership accounts, etc., had been fully adjusted . Admits that plaintiff was to have the logging , etc., but avers that he was to pay defendant fifty his half interest therein, which he has failed to do. such agreement was a part of the contract for and denies any indebtedness to plaintiff on any

matter in the answer is put in issue by the repli- e decree of the court below was for the plaintiff of two hundred and eighty-five dollars, the recov- l logging team, wagon, etc., a vendor's lien on l property for two hundred and thirty-five dollars , and costs. Defendant appealed from the decree, ards plaintiff served a notice and filed an under- appeal, also.

cipal question raised upon the appeal is, whether uity can be maintained on the facts stated in the The appellant insists that it cannot, and hence error in the court below to proceed to a final decree . But this position seems to be untenable. The alleges that the partnership accounts have never ed or settled, and prays for an account. Equity ted jurisdiction over this branch of the case. (1 Jur., sec. 672.) It also states facts entitling the a vendor's lien, and prays also for that relief. clearly of the opinion that the agreements set up laint are so connected with the final settlement of

the partnership accounts as to render them proper subjec
litigation in this suit.

For instance, how can the respondent tell, until afte
account with the partnership has been settled, what am
he has "already been paid" for his services and disbursem
in the partnership business, or how much his labor an
penditures for the partnership amount to? It may b
jected that it would be possible for him to make this pro
an action at law, and that it is not absolutely essential
he should first have his accounts settled by a suit in eq

But conceding this to be correct, as a mere naked
proposition, does it follow that he has not a right still to
that account settled by a court of equity, which he can
cise if he chooses to do so? And, will not court of eq
acquiring jurisdiction for this purpose, under proper al
tions, proceed to administer full relief upon connected
dependent contracts?

The rights of the parties are not the same as they w
have been, unaffected by this agreement. The decree o
court would not protect the rights of the parties unless i
lowed the agreement. It was necessary, in our judgment,
it should be alleged in the complaint, as part of the resp
ent's case. So with the agreement respecting the log
team, wagon, etc.

Until a final adjustment of the accounts between the
ties, the respondent could not know whether anything
due the appellant for his half interest in the property, w
all agree respondent was to have; and it was equally nece
and proper that this agreement also should form pa
respondent's case.

We are fully satisfied, upon careful reflection, that the
below properly entertained jurisdiction over all the sub
of suit included in the complaint, and settled in one d
all the rights of the parties growing out of, or in any
connected with, any of such subjects.

The next ground of reversal put forward by appellan

vidence establishes the fact of there having been a ment of the partnership accounts and business be- parties, prior to the commencement of this suit. is no averment of any such settlement in the answer, re were, the testimony would not sustain it. J. C. who made out the statement of the accounts as far ere adjusted, testifies distinctly that there still a quantity of lumber which belonged to the part- the mill, and which had not been divided. That s agreed to go to the mill and divide this lumber return and finish the settlement. (See Franklin's , answers to questions 20, 49 and 50.)

ver came back to finish the settlement, nor did they reed, and divide the partnership lumber at the mill. are indisputable. We think it clear that there was nal settlement or adjustment as would have been a suit had it been pleaded. Enough, however, trans- ranklin's to denote the existence of such an agree- een the parties in respect to the respondent's receiv- nsation for extra work, and expenditures in the p business, as is alleged in the complaint, and in with his testimony we think sufficiently established

e other question remains to be disposed of, and s to the amount allowed the respondent in the court is very uncertain, upon the evidence, what the ount is that should be allowed the respondent. It ubtful if the full amounts charged by the respond- rvices and expenditures, properly included in his with appellant, should in every instance be al- nd in more than one item in his bill, respondent has laims which ought to be allowed him, with others ht not, and charged for them in gross.

possible to determine with accuracy, from the testi- precise separate value of each, and we can only te. After a careful examination of the evidence,

and as accurate a calculation of the amounts justly due
the items established by the evidence, as the nature of
proof would admit of, we find no material difference bet
our final conclusion and that of the learned judge who
the case below, as to the amount the respondent ough
recover, and we shall not disturb his decision. We think
decree below was fully supported by the evidence, and str
in accordance with the equitable rights of the parties.

Decree affirmed.

ABRAHAM v. CHENOWETH.

SHERIFF'S SALE—PURCHASER—REDEMPTION.

J. S. and A. S., his wife, mortgage the land of A. S. A. S. dies mortgage is foreclosed, and the land purchased by D. A pa the heirs of A. S. demise to C. C. pays D. the whole sum redeems and goes into possession. The grantee of J. S. b ejectment to recover possession of the life estate of J. S.: that he could not recover against C.'s possessory right a panying the execution title acquired from D.

APPEAL from Douglas. The facts are sufficiently state the opinion.

W. W. Thayer and Hermann & Ball, for appellant.

We admit that where the judgment debtor redeem restores the estate, for the statute says it shall, and we d doubt but that a redemption by the owner of an estate w have the same effect. For instance, A. owns an estate w has been sold upon execution; this deprives him of the session, but does not divest his legal title until the execu of the sheriff's deed. Now, by redeeming, he removes claim and his estate is necessarily freed from it, is restor him. In the latter case, the result indicated would not f

arty redeeming was the owner of the entire estate. the owner of a particular or reversionary interest, inct and separate moiety or portion, his redemp- not have the same effect, for he could not redeem particular interest. (Freeman on Executions, sec. v. *Renney*, 47 Cal., 147.)

case, the redemption was not by the judgment by an owner of the reversionary interest in the Starr was the debtor, though Mrs. Starr had estate with the debt. Two estates arose from the e of her death, to wit: a life estate in Starr, and ary interest in her heirs. Their redemption, or ir grantee, relieved their interest from the sale oreclosure proceedings, and left Starr's interest and till out of him. Although they were compelled whole amount of the bid, yet that did not restore estate or right to possession. The appellant was Starr's debt; but, having an interest in the e was entitled to redeem. (*Hustin* v. *Seely*, 27 *Gibson* v. *Crehone*, 5 Pick., 152; *Abadie* v. *Lo-* l., 397; Story's Eq. Jur., sec. 1,023; Washburn on rty, page 116.)

Willis, for respondent.

llant purchased the interest of part of the heirs Starr. This is all the interest or estate he ever now in the premises in dispute. He redeemed the sheriff's sale by virtue of his interest as suc- interest to the judgment debtors. This was a of the whole of the premises sold, and terminated of the sale. (Code, page 171, sec. 310; *Rich* v. Or., 339.)

ion is a creature of the statute, and that must be (Burroughs on Taxation, 358; Rorer on Judicial 906.)

oney be paid by a stranger, and accepted by the

purchaser, the redemption is good, and enures to the
chaser. (*Phyfe* v. *Riley*, 15 Wend., 248; *Coxe* v. *Sar*
21 Penn., 480; *Levick* v. *Brotherline*, 74 Penn., 149.)

The appellant can acquire by his deed no greater int
in the premises than the grantor; and this estate will n
enlarged by the sheriff's sale and redemption. (*Ri*
Palmer, above cited.)

Then the title to these premises has in no respect
changed by the mortgage, foreclosure, sale and redemp
and the respondent, as grantor of J. W. Starr, has an
therein for his life, and is entitled to the possession.

By the Court, WALDO, J.:

This is an action of ejectment for three hundred and tw
acres of land in Douglas county, the donation land cla
Adeline Williamson, afterward Adeline Starr.

In 1875, said Adeline died, leaving her husband, J
Starr, and several children surviving her. In 1879, a
gage on said land, given by said Adeline and her said hus
in 1874, was foreclosed, and the land purchased by Do
county.

The appellant claims title as grantee of the estate of a
tion of the children and heirs of the said Adeline, an
redemption from Douglas county. The respondent i
grantee of the life estate of J. W. Starr, by the curtes
said land, and claims that the redemption terminated the
of the sale, and restored Starr to his estate.

The position of the respondent is, that the appellan
owner of a reversionary interest, had no power to acquir
estate or interest in the land by redemption; that his rig
redeem was simply a power to remove an incumbranc
terminate the effect of the sale in order to protect his
interest.

The rule in equity was, that when several were inte
in an equity of redemption, and one only was willi
redeem, he had to pay the whole mortgage debt, an

ested, who refused to redeem, could not be com-
ntribute; for, it was said, it would be unreasonable
party to redeem, when, perhaps, it might be for
suffer the mortgage to be foreclosed. The party
g was entitled to hold the whole estate until he
eimbursed what he had been compelled to pay
lue proportion. He was considered as assignee of
ee, and stood, after such redemption, in the place
gagee. (*Gibson* v. *Crehore*, 5 Pick., 145; *Martin*
21 Minn., 13; *Street* v. *Beal*, 16 Iowa, 68; Id.,
v. *Anson*, 20 Id., 58.)

emption had the effect in equity to transfer to the
r the estate of the mortgagee. It was treated as
nt, by operation of law, of the title of the mort-
e redemptioner. (*Fletcher* v. *Chase*, 16 N. H.,
th v. *Lockwood*, 42 N. Y., 97.)

on, then, did not strictly discharge a lien—it had
defeat or transfer an estate. In this state, after
foreclosure of a mortgage, the property is sold on
ubject to redemption in like manner and with like
operty is sold on an execution issued on a judg-
property sold on an execution issued on a judg-
ect to redemption with like effect as property was
edemption under a decree of foreclosure in a court

on, in the sense of the statute, was a word un-
he common law; was borrowed from the equity
in its new station will retain its original meaning,
new sense is expressly or impliedly added to it.
e no reason why this should be so; for the title of
at an execution sale, before the time for redemp-
pired, is like that of a mortgagee in equity, after
foreclosure, and before the expiration of the time
redemption under the decree.

ce Sawyer shows this in *Page* v. *Rogers*, 31 Cal.
at case, speaking of the title acquired by a pur-

chaser at a sale on execution, he says: "To call the int
of the purchaser at a sale on execution, before the makin
a sheriff's deed, a lien merely, is not very exact. In a ge
sense it may be a lien, but it is more. The purchaser ob
an inchoate right, which may be perfected into a perfect
without any further act than the execution of a deed in
suance of a sale already made. It is not a mere right to
a certain sum, charged upon the property, satisfied out
The sum before charged upon the land has already been
fied by the sale, to the amount of the sum bid and pai
the purchaser. The purchaser has already bought the
and paid for it. The sale is simply a conditional one, w
may be defeated by the payment of a certain sum with
certain limited time. If not paid within that time, the
to a conveyance becomes absolute, without any further sa
other act, to be performed by anybody. The purch
acquires an equitable estate in the lands, conditional, it is
but which may become absolute by simple lapse of
without the performance of the only condition which
defeat the purchase. The legal title remains in the judg
debtor, with the further right in him, and his creditors
ing subsequent liens, to defeat the operation of a sale alr
made, during a period of six months, after which the e
able estate acquired by the purchaser becomes absolute
indefeasible, and the mere dry, naked legal title remai
the judgment debtor, with the authority in the sheri
divest it by executing a deed to the purchaser."

It is here shown that a sale, without the right of posse
given by our statute, creates an equitable estate in lan
the purchaser. This estate must continue to exist
determined in some manner known to the law. The
mode by which this can be effected is by merger in the
title. (*Atkins* v. *Augert*, 46 Mo., 518.)

In this case, had the sale taken place in the life-tim
Adeline Starr, and she had redeemed, the execution title,
ing with the legal title, in the same person, would

e effect of the sale would thus have been termin-
vould have been restored to her estate, of which
sted by the sale, the same as though the sale had
place, and this without any aid from the statute.
hen the statute says that a redemption by the
ebtor shall have the effect to terminate the sale,
him to his estate, it declares precisely what the
, had the statute been silent, would have accom-
ne operation of the principle of merger.
ne Starr dies, and it is only the reversion in fee,
ermination of the life estate of Starr, that descends
Hence when they or their grantee redeem, the
life estate of Starr prevents the merger of the
le in the legal title in fee, in reversion cast upon
The execution title in such case is not destroyed
It is not destroyed by operation of the statute,
te expressly confines its operation to the redemp-
judgment debtor, when it says the effect of the
terminated by the redemption. If the successor
ad succeeded to the legal title in the entire estate
estates, on uniting in him, would have merged.
ne owner of a reversion in fee expectant upon the
n of a life estate redeems, this result cannot

Starr's title, acquired by the purchaser at the
ts in Starr, he cannot recover; for he lost the
ession by the sale. This title and this possessor's
to the purchaser, and must remain with his title
nd until the effect of the sale is terminated.
not redeemed from the sale. But to avoid the
t arises here, the respondent claims that as to
of Starr, the appellant was a mere stranger; that
acquire anything by the redemption was confined
terest; that to effect a redemption of his own in-
as compelled *in invitum* to redeem the whole
t had no right or power to acquire or hold Starr's

interest, and that the redemption, so far as the interest
concerned, inured to Starr's benefit.

The interest of Starr had been foreclosed and sold, and
entire defeasible title was in the purchaser, subject to Sta
right to redeem. Any transaction between the purchaser
the appellant as to this title, so far as Starr is concern
would seem to be *res inter alias acta.* (*Merritt* v. *Jack*
1 Wend., 46; *Abadie* v. *Lobero,* 36 Cal., 396.)

In *Abadie* v. *Lobero,* Abadie, a stranger, supposing he
a right to redeem, when in fact he had none, redeemed f
the sale. The court considered that while the transac
was not a redemption, yet, having been acquiesced in by
purchaser, it could be treated as a purchase, and assignm
of the purchaser's title to Abadie.

The case of *Rich* v. *Palmer,* 6 Or., 239, was a sale
taxes, and a redemption by an equitable owner of part of
land. The sheriff, notwithstanding such redemption, mad
deed to the purchaser, and the equitable owner brought
to cancel this deed as a cloud upon his title. The defend
demurred to the complaint, alleging, as one ground of dem
rer, that the plaintiff should have described what portion
the premises he owned. But the court held that this
not necessary, since the premises had been sold as a wh
The effect of the redemption, as between other parties,
not a question in the case. The fact of redemption was
that concerned the purchaser, and was all that was decided
the court. But the court said, and this is what is cited
counsel, that "the plaintiff became restored to the inte
which he had before the sale, and his estate was not enlar
by the redemption, unless it might be to give him a cl
for contribution against the owner of that portion of the
mises not owned by the plaintiff."

It would seem to be the true view that a sale of land
taxes does not of itself divest the owner of any interest in
lands. The purchaser acquires rather a lien on, than an es

l by his purchase. (*People* v. *Hammond*, 1 Doug., 6, 180; *Lake* v. *Gray*, 35 Iowa, 44.)

38, chapter 57, general laws, page 767—that a tax eys to the purchaser all the estate or interest of the ther known or unknown," relates to the character mate title acquired by the purchaser—whether an t fee simple title to the land itself, or but the estate rticular person in the land. (See Blackwell on chapter 38.)

een determined by this court that the purchaser quire the legal title by the act of purchase. (*Dolph* 5 Or., 213.) He must acquire it, then, by the he title referred to in the above-mentioned section to the character of this title, whether absolute or

le v. *Cardwell*, 3 Cr. C. C., 316, the court say the period allowed for redemption, the purchaser the legal or equitable title. In *Brackett* v. *Gil-* Minn., 245, the court say the only equity he can g this period is "an equity contingent on non-re- to demand and receive a deed of conveyance, which sted after the time of redemption has expired, ainst the owner, it seems an abuse of words to say have any equity, or equitable rights."

v. *Hinckler*, 36 Ill., 265, where the sheriff had o affix a seal to the tax deed, a bill filed to correct was dismissed, the court saying that a purchaser ale has no standing in a court of equity. "A tax title at all, is so *stricti juris*. It is a purely as contradistinguished from a meritorious title, ls for its validity upon a strict compliance with the

le, the state has a lien on the land for the tax. this lien is transferred to the purchaser. The tax harged by the sale. (*Williams* v. *Townsend*, 31 .) The liability of the owner continues in favor

of the purchaser. When the purchaser is paid the amount his lien the tax is discharged, and as a consequence the l destroyed.

Hence, in considering this question, redemption, so-cal under tax sales, seems inapplicable, and ought to be laid of view. The word redemption, in such cases, seems to m merely the payment of a sum of money having the effect discharge a lien, while redemption under an execution a involves the transfer and acquisition of an estate.

Now, if the redemption transferred to the appellant the tate acquired by Douglas county at the sale, then the right the possession which belonged to that estate, must pass w it, and defeat at law the respondent's action.

This is manifestly the effect of the redemption by force the sense inherent in the term. Starr has done nothing, a nothing has been done for him, which reinvested in him estate and right of possession transferred out of him by sale. The appellant has done that which vests him with execution title, with its accompanying right of possessi and he must hold this title against respondent unless merg As we have seen, this cannot take place, and the appellan consequently entitled to the possession of the land.

Judgment reversed.

Watson, J., dissented but filed no written opinion.

DUNN, et al., v. THE UNIVERSITY OF OREGON.

SUIT AGAINST THE STATE.

oard of directors of the University of Oregon, created by the act f October 19, 1872, of the legislature, entitled "An Act to create, or- nize and locate the University of the State of Oregon," is a corpo- tion.

SUIT AGAINST THE STATE.

mmunity of a state from being sued applies only to its being made a rty to the record.

mmunity of the state does not extend to its agents, who hold the tle and possession of property against which a valid claim exists in vor of a third party.

PEAL from Lane.

is suit was brought by respondents in the circuit court ane county, to set aside a conveyance of real property ted in said county, from the Union University Associa- to the said board of directors of the University of on, executed on or about Dec. 31, 1873, upon the ground aud, and to subject such property to the payment of cer- judgments, which had been recovered in said court by ndents against said association.

e complaint alleges the due incorporation of the Union ersity Association as a private corporation under the laws regon, and the creation of the board of directors of the ersity of Oregon by act of the legislature, approved ber 19, 1872, subsequently changed to the "Regents of Jniversity," by act of the legislature of October 21, 1876. so shows that in the year 1873, and prior to the convey- sought to be impeached, the Union University Associa- became indebted to the respondents severally in large nts which have never been paid. That at the time said tedness accrued, and prior thereto, said association was wner in fee simple of certain real property in Eugene in said county, worth fifty thousand dollars, and a description of it by metes and bounds. That said real

estate was all the property owned by said association, that by conveying it to the board of directors of the versity of Oregon, it made itself insolvent, and there became and has ever since remained wholly unable to pa debts. That such conveyance was executed in fraud of rights of the respondents, and for the purpose of hinde and delaying them in collecting their said debts, and there was no consideration therefor, and these facts fully within the knowledge of said board of directors v they received said conveyance.

Prior to instituting this suit the respondents severally recovered judgments against the Union University Ass tion, upon their said claims, in said circuit court, and ca them to be duly docketed in said county, and executions t issued and placed in the hands of the sheriff for ser which were duly returned by him wholly unsatisfied. dates of recovery and amounts are as follows: Excelsior I Company, November 9, 1876, $1,056; F. B. Dunn and administrators of the estate of Charles Bowker, decea April 24, 1879, $2,475; F. B. Dunn, April 24, 1 $782.63.

Respondents pray for a decree setting aside said convey and that said property be sold to satisfy said judgments.

The board of regents demurred, and the court below o ruled the demurrer, and upon their failing to answer, rend a decree for respondents as prayed for in their compl From this decree the board of regents have brought appeal.

This court, however, on motion to dismiss the appeal, the service of the notice insufficient as to all the respond except F. B. Dunn, and dismissed the appeal as to the oth but retained it as to the separate judgment of F. B. Dun

Thompson & Bean, J. J. Walton and R. S. Strahan, appellant.

The board of regents of the university not being a cor

ot be sued. (Session laws, 1872, page 47; session
, 52 and 53.)

e agents of the state and part of the state govern-
2 Iowa, 335.)

tion of the university under the act was a valuable
ion for the property, and the state would take it
of any latent equities existing between any previous

rd of regents having no interest in the property,
trust for the state. The state being the real party
, must be sued or join in the suit. (Civil Code,

islature has no power to create any corporation
r municipal purposes." (Const. of Oregon, article
2.) The state is not suable without its consent
by some statute. (43 N. Y., 399; 7 Neb., 108; 16
317; 52 Ala., 2; 40 Iowa, 236; 6 Cal., 256; 39
9.)

& *Burnett*, for respondents.

ectors of the University of Oregon constitute a cor-
(Session laws, 1872, page 47.) The name of the
changed by the legislature to "The Regents of the
." (Session laws, 1876, page 54.)

ndest test of a corporation is the mode in which
ucceeds from one to another. When it does not go
s of the holder as a natural person, it passes to the
because it is holden in a corporate capacity. (2
2; 1 Blackstone, 123; Angell and Ames on Corpor-
0; 22 Am. R., 673; 42 Vt., 99; U. S. Digest,
)

veyance was a gift, and was prejudicial to creditors,
fendant, the university, can be compelled to account.
e, 411; 5 Oregon, 259.)

Court, WATSON, J.:

e state university itself was incorporated under the

provisions of the act of October 19, 1872, entitled "An to create, organize and locate the University of the Stat Oregon," is not claimed; but that the "board of directo created by that act was an incorporated body, can hardl denied. Section 2 declares: "The general government superintendence of the university shall vest in a boar directors, to be denominated the board of directors of University of Oregon, to consist of nine members, all of w shall be citizens and permanent residents of the stat Oregon."

Section 4 provides: "The board of directors shall the custody of the books, records, buildings, and all o property of the university. All lands, moneys, bonds, se ities and other property which shall be donated, transfe or conveyed to the said board of directors by gift, devis otherwise, for the use and benefit of the university, shal taken, received, held and managed, invested and reinve sold, transferred, and in all respects managed, and the ceeds thereof used, bestowed and invested in the manner, the purpose and under the terms and conditions respecti prescribed by the act of gift, devise, or other act, in respective cases. They shall have power, and it shall be duty, to enact by-laws for the government of the univer to elect a president of the university, and the requisite n ber of professors, instructors and employes, and to fix salaries and the term of office of each, and to do all other necessary and proper to carry out the design of this act

Sections 11 and 12 provide, that on or before Januar 1874, "The Union University Association of Eugene Oregon, shall secure a site for said university at or in vicinity of Eugene City, and erect thereon and furni building for the use of the state university, on a plan t approved, and after the erection of the same, to be acce by the board of commissioners for the sale and manager of the school and university lands, and for the investmen the funds arising therefrom; said building and furniture t

s value than fifty thousand dollars; and to convey
ite and building, in fee simple, free from all incum-
o said board of directors, on or before said January

amendatory act, passed October 16, 1874, the time
ded to January 1, 1877, for securing such site and
nd conveying them to the board of directors.
t cannot be denied that some of these powers might
ed by a board of directors in their collective capacity,
eing incorporated, it is equally undeniable that some
ould not. The capacity and power to take convey-
ands and hold and dispose of them for the use and
the university, according to the various and diverse
posed upon them by their donors, and to transmit
nds to their successors in office in perpetual suc-
ithout intermediate conveyances, could not belong
ard of directors unless incorporated.
ne the legislature has not declared it to be a corpor-
xpress terms, but this was not essential. (Angell
on Corporations, section 76; *Thomas* v. *Dakin*, 22
, 103, 106.)
ndeed, a principle of law which has been often acted
where rights, privileges and powers are granted by
association of persons by a collective name, and
no mode by which such rights can be enjoyed, or
ers exercised, without acting in a corporate capacity,
ciations are, by implication, a corporation, so far as
them to exercise the rights and powers granted."
nd Ames on Corporations, sec. 78.)
s contended by appellants that whether incorporated
e board of directors are mere agents or officers of
and hold the property in controversy in trust for the
real party in interest. Hence they infer that the
directors are shielded by the immunity from suit
ongs to the state. But this is an error. The im-

munity of the principal in such a case does not extend to agent.

It matters not if the state is the real party in interest, vided the legal title and possession are in the agent, so th is not necessary to make the state a party on the rec (*Osborn* v. *The Bank of the United States*, 9 Wheat., *Michigan State Bank* v. *Hastings*, 1 Douglas, [Mich. 225; *Garr* v. *Bright*, 1 Paige Ch., 157.)

An agent of the state, whether incorporated or not, by tue of his character simply, possesses no such immunity being sued. He must show in his defense to an action or for interfering with private rights, that he proceeded wi the authority conferred by a valid law, or his defense fail.

We think these propositions are clearly established by authorities cited, and in our view of the questions prese by the transcript, they are decisive in the case before us.

It is not necessary to decide whether the board of direc under the act of October 19, 1872, is a public or private poration. The decision in either case must be the same.

The plaintiffs allege the facts showing that they were *bona fide* creditors, and have reduced their claims to j ments against the Union University Association, a pri corporation, docketed them and issued executions, which been returned wholly unsatisfied, and that the conveyanc the board of directors was not only voluntary, but made intent to defraud them out of their just demands, and tha board of directors had full knowledge of such purpose. U the demurrer the facts stand confessed.

They had a plain right to the remedy they resorted to, the decree was entirely proper. The decree of the c below is affirmed with costs.

Decree affirmed.

POMEROY v. LAPPEUS.

PLEADING CITY ORDINANCES.

omes necessary to plead a city ordinance, a mere reference to nber, title and date of enactment, is not sufficient. It must orth in the pleading as any other fact of which the courts judicial notice.

HABEAS CORPUS—JURISDICTION.

ing of *habeas corpus*, the court to which the writ is return- nires jurisdiction to make a final order in the cause, by the f the writ upon the defendant while the prisoner is still in dy; and such jurisdiction cannot be ousted by any act of ndant without the consent of the court.

from Multnomah.

7th day of July, 1880, the respondent applied by the Hon. Raleigh Stott, judge of the fourth ju- ict, for a writ of *habeas corpus*, directed to the The petition set forth the unlawful imprisonment ioner, the place thereof, and supposed cause. The ued as prayed for, and made returnable before said o'clock the following morning. It was duly served ellant, who was chief of police of the city of Port- ame day it was issued.

me and place designated in the writ, the appellant eturn, setting forth, in substance, that on July 7, rested the respondent on a warrant issued by L. , police judge of the city of Portland, upon a having violated Ordinance No. 321 of said city, ordinance to prevent and punish trespass upon the res and other public property of the city of Port- ing upon that public property of said city known lic levee, and digging up said public levee, and he earth therefrom; and that at the time the writ , he held respondent in his custody, in the city aid warrant, and by order of said police judge, for d charge, which had been set for one o'clock P. M.,

of the same day on which the return was made. That the time of his arrest, the respondent's bail had been fixed fifty dollars, which he had given and been dischar from custody between the service of the writ and the time making the return; and that the respondent had not si been in his custody, but was then in court. The origi writ and a copy of the warrant of arrest were annexed to return.

The city attorney and J. N. Dolph appeared for appella and John M. Gearin, Ellis G. Hughes and C. B. Belling appeared for respondent, and filed a general demurrer to return. The court sustained the demurrer, and appell refusing to plead further, ordered that the respondent be charged. From this ruling and order of the court this app has been brought.

By the Court, WATSON, J.:

The demurrer was properly sustained. Under the provisi of our statute relating to the proceeding on *habeas corpus* return is a pleading, and is to be construed and have same effect as in an action. (Section 619, Civil Code.)

The reference to the city ordinance by number, title a date of enactment only, was insufficient. If not recited full, at least the provisions of the ordinance of which the a attributed to the respondent were alleged to be a violati should have been recited. The want of such allegations the return rendered it fatally defective on general demur (*Harker* v. *Mayor of New York*, 17 Wend., 199; *People Same*, 7 How. Pr., 81.)

The principal portion of appellant's argument upon hearing related to the validity of the city ordinance; but such question arises upon the record before us, and we can consider or express our opinion on it. The record only sh that the court below held the return insufficient upon gene demurrer.

We think the decision was correct, and it is immaterial

determination here whether the reasons for that decision e sound or otherwise. But it was claimed by appellant, he hearing, that the statement in the return, that the ondent had given bail and been discharged after service e writ, but before the return was made, alone rendered eturn sufficient on general demurrer. We are unable to ver any sound basis for this proposition.

e circuit court acquired jurisdiction to examine into the of respondent's imprisonment, and to either remand or arge him, according to the facts disclosed upon such ination, and the law applicable thereto, as soon as the was served on the appellant, having the respondent still custody. Thereafter the appellant was bound to detain in his custody upon that writ, subject to the orders of the from whence it issued.

e respondent might have become legally entitled to his arge from the original detention and imprisonment, the service of the writ in the habeas corpus proceeding. n contemplation of law he was then in custody upon that t, and the power to discharge him had vested in the bunal issuing it.

Without the sanction of that tribunal, neither of the parties ld by any act of his own simply, oust it of its jurisdiction make a final order in the case.

It could not make any difference in the determination of e case, that the appellant disclaimed having the respondent his custody, in his return to the writ. It showed that he s present in court at the time, in person, and subject to its lers. Besides, the respondent had a right to insist on a al adjudication in that proceeding. It was capable of ording other benefits and advantages besides a simple ease from confinement at the time.

Questions finally determined in it could not be re-examined on any other proceeding by habeas corpus. (Civil Code, tion 639.) And the respondent's immunity from future est and imprisonment under the same authority, could

only be secured by a final order declaring such autho illegal and invalid. No error appearing from the transcr in any of the particulars assigned by appellant, the or appealed from is affirmed.

Judgment affirmed.

HAZARD'S APPEAL.

DISTRICT ATTORNEY'S FEES.

A district attorney is not entitled to fees in suits to foreclose mortg given to the board of commissioners for the sale of school and versity lands, and for the investment of the funds arising theref to secure loans made from such funds.

The whole power of management of such funds is vested in such bo

APPEAL from Benton.

R. S. Strahan, for district attorney.

W. W. Thayer, contra.

By the Court, WATSON, J.:

The only question here is, whether a district attorney ha right to appear in suits or actions growing out of the mana ment of the school and university funds, on behalf of state, without any authority from the board of commission and claim fees therefor, under section 1041 of the civil co

We are clearly of the opinion that he has not such rig The whole power of investment and management of th funds is invested, by the constitution and laws, in the govern secretary of state and state treasurer, as a board, and wh the state is not a party to the record, no other officer rightfully intervene and assume any authority over subject. The power and responsibility belong exclusively the board.

n the state is a party to the record, as in the case of claim for fees (6 Oregon, 465), it would be interested extent of costs at least, and the district attorney would itled to appear and represent it. But in the present is not such a party, and could not in any event have y interest of its own in the result; and the general t of the public in the management and investment of nds is, as we have already stated, confided to the board missioners. The judgment of the circuit court must med with costs.

gment affirmed.

MANNING v. KLIPPEL.

AND SHERIFF'S COMPENSATION—LOCAL AND SPECIAL LAW VOID.

f the legislature, approved October 25, 1880, entitled "An act to ide the compensation of the sheriffs and clerks," of the fourteen ties named in the act, and also "to provide for the payment to counties of fixed sums of money for the performance of said ices by the sheriffs and clerks of said counties," provided annual ries for the said sheriffs and clerks, and established a table of for services performed by said officers for said counties, different n that established by law for other counties in the state. The act her provided that the fees so established should be collected by sheriffs and clerks of the counties included in the act, and paid to said counties: *Held:* That said act was a local law for the ssment and collection of taxes for county purposes, within the ning of subdivision 10 of article 23, of the constitution of Ore- that the legislative assembly shall not pass local or special laws the assessment and collection of taxes for state, county, township oad purposes, and, consequently, void.

APPEAL from Jackson. The facts are sufficiently state the opinion.

E. C. Bronaugh and J. W. Whalley for appellant.

No appearance on the part of the respondent.

By the Court, WALDO, J.:

This is an appeal from the judgment of the circuit c for Jackson county, in a proceeding by mandamus, requi the clerk of said county to record a deed of conveyance, to accept as his fee therefor the sum fixed for such servic the act of the legislature, approved October 25, 1880. appellant claims that said act is unconstitutional, becaus

1. It violates section 22 of article 4 of the constitutio Oregon, that "no act shall ever be revised or amended mere reference to its title, but the act revised or sec amended shall be set forth and published at full length."

2. That it is an act for raising revenue, and originate the senate, when, under section 18 of article 4 of the stitution, it should have originated in the house of repres atives.

3. That it is a local law regulating practice in court justice, contrary to subdivision 3 of section 23, of article the state constitution.

4. That it is in conflict with subdivision 10 of section of article 4 of the constitution, that the legislative assem shall not pass local or special laws for the assessment collection of taxes, for state, county, township or road purp

We shall consider only the last ground of objection. act in question is entitled "an act to provide the compensa of the sheriffs and clerks of the counties of Linn, L Jackson, Benton, Yamhill, Marion, Douglas, Coos, Cu Clackamas, Union, Umatilla and Polk, in this state, an provide the manner in which such compensation shall paid, and also to provide for the payment to said cou fixed sums of money for the performance of certain serv by the sheriffs and clerks of said counties."

t provides that the sheriffs and clerks of the counties
the act shall be paid salaries by their respective
and further provides a table of fees that shall be paid
ounties, for services performed by their sheriffs and
der the act. Nine out of twenty-three counties in
are excluded from the operation of the act. The
ioned are to be paid, as stated in the act, for services
d for the counties by their sheriffs and clerks.

eriffs and clerks described in the act are public
The services performed by such officers are not
they are public services. When the clerk records a
when the sheriff serves a summons or other process,
r the state, and performs the service at the command
te. It is only on the ground that the services per-
y such officers are public services, that the power of
ature to compel them to pay their fees into the
easury can be maintained.

ndoubtedly true that the whole matter of fees and
tion of sheriffs and clerks is subject to the control of
ature. There can be no other reason for this than
c character of the offices of sheriff and clerk, and the
aracter of the services they perform. Were the
rformed simply an individual service, the legislature
ve no more right to order the fees of such officers to
into the county treasury than they would have to
same disposition of the earnings of private labor.

this principle of their public character that such
e entitled only to such compensation as the law has
provided. Where no compensation has been pro-
a service by law, they are entitled to none on a
meruit, or otherwise, either from private persons or
c. (*Bridge* v. *Cage*, cited in *Hatch* v. *Mann*, 15
); *Debolt* v. *Trustees*, 7 Ohio St., 237.)

s were formerly paid by fixed salaries from the
d were not entitled to charge fees. So, formerly,
ven of superior courts, were paid by fees. Now the

state lays taxes for this purpose. But it is only because t services are public that this can be done. A tax can onl laid for a public purpose. A tax laid for a private pur is void. (*Whiting* v. *Railroad Co.*, 25 Wis., 165; *Ta* v. *Chandler*, 9 Heisk., 349; *The People* v. *Salem*, 20 M 452; *Loan Association* v. *Topeka*, 20 Wall., 655.)

Now, if these services of judge, of sheriff, or of c should be compensated, not by contributions laid upon public generally, but by specific contributions laid upo particular class, it would seem to be a surprising result money raised by the same power, and which performs cisely the same office, should in one case be levied under power of taxation and be a tax, and the other be outside of taxing power. "No change of name can change the esse feature of a thing, nor can it escape constitutional regula by a mere play on words, or by giving it a different desig tion." (*Taylor* v. *Chandler*, 9 Heisk., 374.)

That parties in courts of justice derive special benefit f the administration of justice, may be a reason why should contribute specially to the maintenance of courts their officers. The same thing occurs in the assessment the cost of grading and paving a street upon the adjoining owners. Such lot owners are called upon to pay the cos such improvements because of the special benefits they supposed to derive from them. But such assessments taxes, and the power of the legislature to lay them can be upheld on this ground. (*Mayor* v. *Brooklyn*, 4 N. Y., 4

It is not a ground to distinguish a special contribution at the command of government, from a special tax, that who pays, derives, or is supposed to derive, some spe benefit from its payment. Says Green, J., in *William Detroit*, 2 Mich., 567: "Every species of tax in every m is in theory and principle based upon an idea of compensat benefit or advantage to the person or property taxed, ei directly or indirectly. Taxation, not based on any idea benefit to the person taxed, would be grossly unjust, tyrann

ppressive, and might well be characterized as public y." (See also *Sears* v. *Cattrell*, 5 Mich., 275, Camp-.)

rts are created not alone for the convenience of the s applying to them, but because they are essential es in insuring domestic tranquility and good order. v. *Keep*, 9 Wis., 379.)

rts and their officers are an essential part of the nery of government. Government must provide them ry out its ends and secure its own existence. The right vate persons to apply to them is beyond legislative erence, but they may be taxed on the exercise of the (*Harrison* v. *Willis*, 7 Heisk., 35; Cooley on Taxation, *nes* v. *Keep*, above, 383.)

special contributions can only be lawful under the power. In any other view such requisitions would in direct conflict with section 10 of article 1 of the ution of the state, that justice shall be administered and without purchase.

case of *Falk* v. *The Board of Commissioners of e County*, 46 Ind., 150, affirming the opinion of en, C. J., in *Wallace* v. *The Board of Commissioners rion County*, 37 Ind., 383, was upon a law of Indiana g to the fees of sheriffs and clerks, similar to that the court, requiring such fees to be paid into the treasuries. It was held in that case that a law requiring s and clerks to pay fees collected by them to the county rer was void, as in conflict with that provision of the tution that justice shall be administered freely and t purchase. We have the same provision in our con-on in section 10 of article 1.

ould seem the better view that such special contributions reality special taxes, which the legislature has power to (*Harrison* v. *Willis*, 7 Heisk., 35; *Townsend* v. *Town-* Peck's R. [Tenn.] 15).

grounds of that decision would seem to apply not only

to the case before the court, but would go to the extent
showing that all such contributions are illegal and void.
only sound principle upon which it would seem possible
avoid this result is to consider these contributions, disgu
under the name of fees, to be in name, what they are in f
special taxes.

These are burdens or charges imposed by the legisla
power upon persons or property to raise money for pu
purposes, or to defray the necessary expenses in administe
the government. They are contributions levied on individ
for the service of the state. (*Glasgow* v. *Rowse*, 43 Mo., 4

In the case of Washington Avenue, 69 Penn. St., 359,
new, J., says that "in order to take the money and effects
the citizen, and apply them to public uses, beside the powe
taxation, I know none other than that of eminent domain.

These contributions, under the name of fees, are not ta
from individuals by their voluntary consent. They are
posed on the exercise of a right, and are as essentially
invitum as the payment of taxes upon corporeal property.
either case the government imposes. The government has
power to impose but for a public purpose, and impositions
government for public purposes are taxes. Turn the sub
as we may, it will reduce to this.

It follows, therefore, that the several sums named as
in the act come within the definition of taxes laid for a spe
purpose. The language of the constitution, as before ci
is that no local or special law shall be passed for the ass
ment or collection of taxes for state, county, township or
purposes. There would seem no good reason why this
guage should not cover the whole extent of the taxing po
for the purposes named. There is no restriction in
language unless the word assessment must be held to con
the meaning to such taxes only, as are extended for valuat
made by an assessor. Such a construction would excl
from the constitutional protection of this subdivision spe
taxes—a species of tax by which it is easily possible to col

e whole revenue of government. The general legal meaning the word assessment is authoritative imposition. The eaning of the word in said subdivision 10 should be co-ex-nsive with the power which it is the object of this subdivision limit; and thus all objects be protected from local and ecial legislation upon which such laws, as understood in e constitution, could operate.

The act of October 25, 1880, must, therefore, be held to be n act to assess and collect specific taxes for public purposes, nd, if a local law, is void. In *Kerrigan* v. *Force*, 68 N. Y., 81, an act entitled "an act relating to the expenses of udicial sales in the county of Kings," was held to be a local aw within the meaning of the constitutional provision that o private or local bill should contain more than one subject, hich shall be expressed in its title. Church, C. J., delivering e opinion of the court, says: "I entertain no doubt that is is a local act within the meaning of the constitution. It plies to an officer of a single county, and to the property d sales made therein. It is not general, and does not apply the people of the whole state. True, all persons, whether ng in or out of the state, foreclosing mortgages in that nty, would be bound by the act, and they would be so nd because they would then come within the operation of local act."

he act in question is a local act because, for one reason, it rges the sources of revenue from the counties named rein, beyond those excluded from its provisions. One nty, for instance, has a source of general revenue under act denied to another, as much so as if the legislature had sed an act confined in its operation to one county, levying er *capita* tax upon a particular class in that county—such act would not be liable to the charge of want of uniformity. he authorities seem decisive on this point. It would probably e valid under every other clause in the constitution. It ollows that the act is local, and is, consequently, void.

Judgment reversed.

ANN
ORE.

OCTOBER TERM, 1881.

(375)

(212)

REPORTS OF CASES

DETERMINED IN THE

UPREME COURT,

OCTOBER TERM, 1881.

EGONIAN RAILWAY COMPANY *v.* HILL.

RAILROADS—APPROPRIATION OF PRIVATE PROPERTY.

constitution of this state the legislature cannot authorize, by ocess, a private corporation, such as a railroad, to appropriate operty of an individual without just compensation first as- and tendered.

COMPENSATION FOR LAND TAKEN.

statute the initiative in the exercise of the right of eminent lies exclusively with the corporation, and their use of land is made dependent upon previous payment of the compensa- certained by the process given.

STATUTE MUST BE STRICTLY PURSUED.

in pursuance of any law, the property of an individual is to ested against his will, there must be a strict compliance with provisions of the law authorizing such proceedings.

ASSESSMENT OF DAMAGES—JUDGMENT.

the payment into court of the damages assessed by the jury, e court is authorized to render judgment appropriating the nor can the court render any other than the particular kind gment the statute itself authorizes.

from Linn. The facts are stated in the opinion.

er & Gearin, for appellant.

roceeding for the condemnation of land, the court r a special stated authority, and is clothed with no that particular to render any other judgment than

such as the statute authorizes. (*Gear* v. *The Dubuque Sioux City Railroad Company,* 20 Iowa, 527; *Balti and Susquehanna R. R.* v. *Nesbit,* 10 How., U. S., *Railroad Co.* v. *Wilder,* 17 Kan., 247.)

A default does not admit the amount of damages v the respondent is entitled to recover. The court is not au ized to assess damages without proof and without a (*Parker* v. *Smith,* 64 N. C., 291.)

L. Flinn, C. E. Wolverton and J. K. Weatherford respondent.

No reply was made to the answer. Its allegations therefore confessed. A judgment for want of a reply effect a judgment for want of an answer, and from su judgment there is no appeal. (Bliss on Code Pleading, *Sands* v. *Hildreth,* 12 Johns., 493; *Henry* v. *Cuyle* Johns., 469; *Golden* v. *Kercherback,* 2 Cow., 31; *Cam* v. *Stokes,* 2 Wend., 145; *Dorr* v. *Birge,* 8 Barb., 351.)

By the Court, LORD, C. J.:

This is a statutory proceeding to condemn certain lan the defendant for the use of plaintiff's railroad. The plaint is in the usual form, and based upon the inabili the parties to agree upon the proper compensation to be for the land sought to be appropriated. (Sections 40 an Misc. Laws, 534.) The answer sets up no defense, but the value of the land and the damages resulting from th propriation thereof, in conformity with section 45 of the laws. These are the only pleadings specifically mention the laws under consideration, except that section 41 prov that such proceeding shall be commenced and proceeded final determination in the same manner as an action at except as otherwise specially provided in this title. reply was filed to the averments of the value of the land the damages resulting from the appropriation, and motion, judgment by default was rendered on the plead

fect that the plaintiff have and recover the strip of railroad purposes, and that the defendant have and f and from the plaintiff the full amount of damages and costs and disbursements. It affirmatively ap- m the record, that there was no assessment of dam- he court or by a jury, but that judgment *in personam* ered upon the allegations in the answer as by default. s judgment comes the appeal, and the error assigned e court had no jurisdiction to render such judgment, therefore void. The question to be determined by assigned is an interesting and important one, and is of careful consideration, as it involves an examina- ur constitution and laws in respect to the terms and s upon which the property of the citizen may be d devoted to the public use under the power of emi- nain.

constitution of this state it is provided, that private shall not be taken for public use without just com- , and, except in case of the state, without such com- first assessed and tendered. (Art. I., sub. 18, Const. n.) It is manifest by this provision, except in case ate, when it is proposed to take the property of an l against his will for public use, by the exercise of r of eminent domain, it cannot be done without just tion, first assessed and tendered. Not simply com- , but *just* compensation is a condition precedent to ed and tendered, before the citizen can be deprived operty.

cussing the general provision, that private property be taken for public uses without full compensation, or Kent says: "The better opinion is, that the com- , or offer of it, must precede or be concurrent with re and entry upon private property under the author- e state. The government is bound, in such cases, to ome tribunal for the assessment of the compensation nity, before which each party may meet and discuss

their claims in equal terms, and if the government pro without taking these steps, then officers and agents may ought to be restrained by injunction." (2 Kent's Com. note.) He further says: "The settled and fundamental trine is, that government has no right to take private pro for public purposes without giving *just compensation*, a seems to be necessarily implied that the indemnity shoul cases which will admit of it, be previously and equitably a tained, and be ready for reception, concurrently in poi time, with the actual exercise of the right of em domain."

In *Bursely* v. *The Mountain Lake Water Compan* Cal., 306, the court say: "The constitution is express vate property shall not be taken for public use without pensation. The compensation precedes the title." The pensation must be adequate. But adequate when? Of co when the property is taken. In *Cook* v. *South Park missioners*, 61 Ill., 120, it is said, that it has always bee doctrine of that court that the damages must be paid b the possession of the land can be taken, or any right acquired. (*Chicago and Milwaukee R. R. Co.* v. *Bul* Ill., 218; *Johnson* v. *Joliet and Chicago R. R. Co.*, 23 203; *Shute* v. *Chicago and Milwaukee R. R. Co.*, 26 436.)

Mr. Mill, in his work on Eminent Domain, says: most of the states a strict rule has grown up, requirin payment of compensation before entry. The conden party, in order to enter, must have paid damages and have necessarily ascertained the amount." (Sec. 89, Mills Domain.)

Even in the constitutions of those states which do require in direct terms a previous indemnity, but contai general provision that private property shall not be take public uses without just compensation, the current of au ities hold that the payment or tender of the compensatio an appropriate provision therefor, is generally required t

propriation of the owner's property. (See *Cairo*
R. R. Co. v. *Turner,* 31 Ark., 503, and numer-
ities cited.)

comment, it is sufficient to say from this review
horities, it is manifest that under the constitution
e the legislature cannot authorize, by any proceed-
ate corporation, such as a railroad, to take the pri-
rty of an individual for public use without just
on first assessed and tendered. The reason for the
n behalf of the state is well stated in *Walther* v.
5 Me., 287, and in which it is also said that "pri-
rations do not possess an inexhaustible fund for the
f their liabilities, such as municipal bodies possess
ons and things within their jurisdiction subject to
nd they of course may fail and prove unable to pay
, and this is a sufficient reason why what has been
favor of the state should not be extended to private
ns." (Mills on Eminent Domain, sec. 126, and
cited in notes.)

uance of this provision of the constitution, and to
vate corporations to construct therein great works
l improvement, our legislature has provided by
particular mode by which corporations may con-
lands of individuals necessary for the purpose of
mplated improvements, upon the payment of com-
Of course, this has no reference to the power of
ture to authorize an entry upon private property
mpensation, for the purpose of making the pre-
xamination and survey before the location of the
se provisions are, that whenever any such corpora-
umerated in the statute, is unable to agree with the
o the compensation to be paid for the lands sought
ropriated, etc., such corporation may maintain an
he circuit court of the proper county against such
the purpose of having such lands appropriated to

its use and for determining the compensation to be pai
the owner.

The initiate of the proceeding lies exclusively with the
poration, and then only when the parties are unable to a
as to the compensation to be paid for the land sought t
appropriated. But when that fact is made to appear in
complaint, accompanied with a sufficient description of
land, the essential requirements of the statute in regar
the complaint have been complied with. The owner
may set up any legal defense to the appropriation of the l
or omitting such defense, may, as in the present case, ave
true value of the land, and the damages resulting from
appropriation thereof. It is then provided, "upon the m
of either party, before the formation of the jury, the c
upon the request of either party, shall order a view of
lands in question, and upon the return of the jury,
evidence of the parties may be heard and the verdict of
jury given. (Sec. 46, Misc. Laws, 534.) And now fol
the provision in which is prescribed the kind of judg
which the court in such proceedings is authorized to ren
It is as follows: "Upon payment into court of the dam
assessed by the jury, the court shall give judgment appr
ating the lands in question to the corporation, and there
such lands are the property of such corporation." This
vision of the statute is explicit and in complete harmony
the constitutional provision before referred to, in requi
the payment of the damages assessed, the just compensa
before the corporation can acquire any legal rights to ap
priate the land. The court is not authorized to give j
ment of condemnation except upon payment into court o
damages assessed by the jury. Until that is done the co
ation has no rights in the land, and cannot lawfully approp
it. This "just compensation" must be first assessed
tendered—ascertained by the jury and paid into court—be
the legal right to take the land under the judgment is
plete. The right to render judgment is not absolute,

l: it is upon the payment of the damages assessed
ry that the judgment of condemnation is rendered,
ight of the corporation to appropriate the lands is
Nor can the court in such proceedings render any
ifferent judgment than the particular kind of judg-
cribed by the statute. It is a principle of law, sus-
numerous authorities, that whenever, in pursuance
w, the property of an individual is to be divested
s will, there must be a strict compliance with all the
of the law authorizing such proceedings.

v. *The Dubuque and Sioux City Railway Co.*, 20
, it was held, "that although the district court is a
eneral jurisdiction (the same as here), yet so far as
the matter of the condemnation of land for public
s under a special statutory authority, and is clothed
ower in that particular to render any other judg-
such as the statute itself authorizes. Any judg-
r or beyond that authorized by the statute would,
be without authority, so far at least as it exceeded
conferred by the statute." The reason of the prin-
aid to be, that such proceedings being out of the
the common law, and in derogation of common
s essential that the statutory requisition should be
ursued. (*Rietenbaugh* v. *The Chester Valley Rail-*
21 Penn. St., 100.)

Ellis v. *The Pacific Railroad Co.*, 51 Mo., 203,
say: "Authorities are not wanting in point of num-
spectability which hold that *quoad* these summary
gs, courts of general jurisdiction stand upon the
ing as those tribunals whose jurisdiction is special
ed." (See *Adams* v. *Saratoga and Wash. R. Co.*,
328.)

ear, from these authorities, that whenever it is pro-
legislative enactment to take private property for
e, a strict compliance with every essential require-
he statute should characterize the proceeding. The

proceedings for condemnation simply fix the price at wh
upon actual payment, the corporation may appropriate
property, and no other judgment than such as the stat
authorizes can be rendered in the premises. Upon the p
ment of the damages assessed by the jury, our statute p
vides that "the court shall give judgment appropriating
lands in question to the corporation." This is the only ju
ment the court is authorized to render in such proceedi
and any other, therefore, would be without authority of l
and a nullity.

In *The State, ex rel., Hayes* v. *Cincinnati and Indian*
olis R. R. Co., 17 Ohio St. R., it was held that the court l
no jurisdiction to proceed, on motion of the land-owners,
thereupon render a judgment, or order, for the payment
the corporation of the amount of the verdict, and that
finding of the jury not being complied with, the parties
in statu quo, as if no proceedings had ever been commenc
And in *Walther* v. *Warner, et al.*, 25 Mo., 286, it was deci
that, in a proceeding of this character, instituted by a railr
corporation to obtain title to land upon which it had loca
its road, and against which a judgment was rendered for
damages assessed and an order transferring the title to
corporation, that actual payment of damages was essential
vesting of the title in the corporation, and also that a ju
ment against a private corporation is not sufficient. In *G*
v. *The Dubuque and Sioux City R. R. Co., supra,* it
held that a judgment assessing the amount of damages pa
no title to the company before payment, and does not bin
to accept the lands and pay the amount assessed.

In *The Railway Co.* v. *Wilder,* 17 Kansas, 247, the co
say: "The judgment simply determines the amount wh
the railway company shall pay to secure the right of way
is in the nature of an award of damages, except, that as
costs, it may be in the ordinary form of a personal judgme
after the judgment the company may take the land or not,
its option. An owner of land would not want to take a ju

against an irresponsible and insolvent railroad company
ayment for his land, nor would a railway company want
ay an enormously excessive award for its right of way.
efore, it is right that each should have some choice in the
er."

K. C. E. and S. R. R. Co. v. *Russell*, 25 Kansas, 422,
ourt say: "The court attempted to authorize the collec-
of the damages by execution against the railroad com-
. This cannot be done. The judgment in such case
d be in the nature of an award of damages, as is made
he condemnation commissioners." (See, also, *The Chi-
and Milwaukee R. R. Co.* v. *Bull, supra;* Mills on
nent Domain, secs. 130 and 131; *Cook* v. *South Park
missioners*, 61 Ill., 125.)

ow, in the case under consideration, the court undertook
ender a judgment *in personam*, for the whole amount of
ages claimed in favor of the land-owner, and at the same
, and without the payment of the damages as required by
statute, to adjudge the title of the land sought to be ap-
priated in the corporation. The authorities cited are
nimous that this was error. No such judgment is war-
ed by the law. The statute is explicit: it is only upon
nent that the court is authorized to render any judgment
tever, and that is a judgment condemning the land to the
of the corporation. The payment precedes the legal right
ppropriate, and renders it impossible in such proceeding
ive judgment for the damages assessed, except upon pay-
t as provided by law.

ut in the case at hand, no reply was filed, nor jury called
ssess the damages. Conceding, however, for the purpose
rgument, the failure to reply was a legal admission of the
unt of damages claimed, and of equivalent legal import
n assessment of damages by a jury, still the statutory
irement of payment remained, and must be complied
before the court would be authorized to render a judg-
t appropriating the land to the use of the corporation.

The fact that the land-owner may agree not to require
ment in advance of the damages assessed, or waive its
ment into court, according to the provisions of the statut
a matter of his own concern, but by no means authorizes
court to render any judgment not warranted by the lav
proceedings of this character. Let it then be granted
the admission upon the record is equivalent to an assessm
of damages by a jury, still that does not obviate the neces
of a strict compliance with the statute, and authorize the c
to render a judgment not within the purview or contempl
by its provisions. The land-owner might waive his dam
and authorize the court to render judgment of condemnat
but he cannot authorize the court, in proceedings of
nature, to render a judgment *in personam* for damages asse
and at the same time a judgment appropriating the land
the corporation. Such judgment is clearly not warranted
the statute. As was said in *Sherman* v. *Mil., L. S.*
Western R. Co., 40 Wis., 651, "there are two ways only
which a railroad company can lawfully enter into posses
of land not acquired by purchase: upon making just comp
sation under its exercise of the right of eminent domain
by permission of the owner. In the latter case, the ow
waives compensation as a condition precedent, but not
compensation itself. He therefore assumes to himself
process of ascertaining the compensation which would ot
wise have devolved upon the railroad company." Under
statute the initiative in the exercise of the right of emi
domain is clearly and exclusively put upon the corporati
and their use of land taken is made dependent upon prev
payment of compensation ascertained by the process gi
And if the corporation undertakes to appropriate lands w
out the consent of the owner, and without having ascertai
and paid the compensation under the process given by
statute, the remedy of trespass or ejectment clearly lies.
Redfield on Law of Railways, 535; *Daniels* v. *R. R. Co.*,
Iowa, 129; *Sherman* v. *The Mil. L. S. and Western*

Wis., 645, and authorities cited; *Blisch* v. *The Chi-d Northwestern R. R. Co.*, 43 Wis., 192.) It follows ese views that the judgment of the court below must rsed.

ment reversed.

WEILL v. CLARK'S ESTATE.

ADMINISTRATOR TRUST DEED.

H., W. and C. purchase real estate, and cause it to be conveyed rust to secure the repayment of advances made by W. and C. the purchase, and of subsequent expenses, by sale of the prop-, the residue to be conveyed to all three of the parties in certain portions, and C., for a valuable consideration, assigns to H. a ain amount of claims for such advances, and dies without hav- received any portion thereof, and while such trust remains lly unexecuted. *Held:* That H. has no claim against C.'s es- which his administrator could properly allow, or for the pay-t of which, in the event of a deficiency of personal assets, the nty court could legally order the sale of real estate left by the dent.

sale of the property by the heir and widow of decedent does not r the condition of H.'s demand, in reference to C.'s estate.

TENDER—SALE OF REAL PROPERTY.

ender of the amount of a legitimate claim against the decedent's te, made by his heir or the heir's grantee, conditioned upon the gnment of such claim to the party making such tender, or a ler by the trustee of the above described trust, as such, is in-d. and constitutes no legal ground for refusing an order of sale he real estate to pay such claim.

APPEAL from Linn.

Whalley & Fechheimer, and Weatherford & Blackl
for appellant.

R. S. Strahan, and Flinn & Chamberlain, for respon

By the Court, WATSON, J.:

The facts of the case appear to be, that John Co
administrator of said estate, in Oregon, presented his app
tion to the county court of Linn county for a license to sel
interest of the decedent in some real property, in this s
to pay off a claim allowed by him in favor of T. Ege
Hogg, amounting to $11,687.23, and one in favor of
Willamette Valley and Coast Railroad Company, of $1,11
and the expenses of administration, approximated at
Various objections were filed to both these claims by pr
parties, which were overruled and the license granted, alth
Hogg's claim was reduced by the county court, when
license was granted, to the sum of $5,452.18.

This decision having been affirmed by the circuit cour
appeal has been taken to this court. By the terms of
stipulation filed in the cause, the claim of Hogg is t
deemed based upon the following contract, in conne
with four other contracts, which will be considered herea

"I, the undersigned, have advanced nine thousand do
towards the payment of the purchase money of three twe
fourths, of the Willamette Valley and Cascade Wagon
Companies' stock and lands, and to pay the balance of
purchase money for said three twenty-fourths, and
advances as may be required on the part of said t
twenty-fourths, as per agreement with Hogg, Weill
Clarke. Now this is to certify that when from the
of said property, road or lands, or any part of either,
advances by me shall be repaid, one equal one-hal
the nine thousand dollars, that is to say: $4,500 thereof
be paid to the said T. Egenton Hogg, the said $4,500 ha

his property through and by means of an agreement etween said Hogg and myself, and for a valuable ation to me paid by said Hogg, the receipt whereof I by acknowledge, there is to be paid said Hogg, out irst proceeds of the sale of lands and property, the $952.18 in addition to the sum of $4,500 aforesaid. ence of which I have hereunto set my hand, this 22d September, 1871.

"H. K. W. CLARKE."

greement between Hogg, Weill and Clarke, referred ted September 1st, 1871, and shows that on the 19th the preceding August, they purchased all the capital oad and lands of said company for $160,620.89—dvancing $140,526.39 of the purchase money, and the balance—and took a transfer and conveyance of perty to trustees for temporary convenience.

s agreement the interests of the parties in the property fined, new trustees designated, and provisions made sale of the property, application of the proceeds of l division of the unsold residue among the parties.

apital stock was to be transferred to Weill, and the onveyed to one David Cahn, in trust.

roperty was not to be sold without the written con- all the parties; but when sold the first proceeds were plied in payment of the purchase money advanced by d Clarke, and any other advances it might be neces- them to make, in perfecting the title to the property nanaging and disposing of it, with ten per cent. per nterest thereon, compounded at the end of each year, interest was declared to be eight twenty-fourths, thirteen twenty-fourths, and Clarke's three twenty- and when all the advances had been repaid out of the of sales, the trustees were to transfer and convey the esidue to the parties in said proportions.

e 22d day of the same month this agreement was by another, in writing, duly executed by all the

parties, by which the trustee, David Cahn, or his succes should, after the lapse of seven years from that date, if s cient money had not by that time been realized from the of lands and property to pay off said advances and inte sell in a prescribed manner a sufficient portion of said la for that purpose, without the written assent of the partie

The two other agreements referred to in the stipulation w secret agreements between Hogg and Clarke, by which t contracted together to consolidate their respective intere and own equal interests, and share equally in the net profit the investment.

It appears that a transfer and conveyance was duly mad Weill and Cahn in pursuance of the agreements between parties, and that they accepted the trusts, but no sale of pr erty was ever made, nor any profits therefrom ever reali and the trusts still remain wholly unexecuted. Clarke all the time a resident of the state of California, and d therein about May 20th, 1878. Frederick W. Clarke, sole heir, was duly appointed administrator of his estate in state of California. Afterwards, on April 9th, 1879, the Frederick W. Clarke, as heir, and Sarah W. Clarke, the wi of deceased, made conveyance of said property to Alexan Weill for the aggregate consideration of $11,000. H presented his claim to said administrator in the state of C fornia, by whom it was rejected March 29, 1879, and af wards presented it to the administrator in Oregon, by whom was allowed, as already stated.

We deem it useless to discuss or determine several of objections urged here against the allowance of this claim, the facts found, in our judgment, disclose one of a fun mental and decisive character.

Hogg's demand is not a "claim" against Clarke's est within the meaning of our statute conferring power upon ministrators, with license from the proper county court, to the real estate of decedents to pay claims against their esta

event of a deficiency of personal assets. (*Walker* v. 79 Ill., 473.)

word "claim" means a "legal demand for money to be t of the estate." (*Gray* v. *Palmer*, 9 Cal., 616.)

based upon the personal obligation or liability of the t, and must have accrued against him during life, or ich a nature that it would have accrued against him if l continued to live. (*Godding* v. *Porter*, 17 Abb. 4.)

is claim of Hogg's could not have been recovered from before his death, nor since, if he had continued to live, s very plain that it cannot be a claim against his estate hands of his personal representative, which the latter ner properly allow or make the basis of an application sale of the real property belonging to the decedent he power conferred by our statute.

the very nature of the claim, as disclosed by the argu- upon which it is based, shows conclusively that Clarke as and never could be personally liable upon it, simply e of the terms of such agreements; and no other acts part are claimed. Property belonging to Hogg, Weill arke, in common, was conveyed to trustees, to hold in until certain amounts advanced by Weill and Clarke be repaid out of the proceeds of sales to be made of operty, in accordance with the agreement between the creating the trust.

e, for a good and valuable consideration, assigns and rs to Hogg, by a written instrument, a certain interest laim for advances under the trust deed and agreement. claim for advances is a charge upon the interests of nd Weill, as well as of Clarke, in the property con- n trust, and under the terms of their agreement the of each should contribute proportionally toward quidation. It is evident that Clarke could have l repayment of his advances only through an execution rust so created, and his assignment of a portion of his

claim for such advances to Hogg, only put him in the s
position.

It is an equitable right merely, in either, which must
pursued in equity under the terms of the trust. The cou
court, sitting in probate, has no jurisdiction over the execu
of trusts, such power belonging to courts of equity al
(Willard on Executors and Administrators, 420 and 421.

As Clarke never received any portion of his advances,
never did anything to make himself personally liable to H
upon or concerning this claim, we are forced to the conclu
that it never became a charge against his estate, within
legitimate sphere of administration in the county court.

We have treated the agreement upon which Hogg's cl
was based, in connection with the other agreements mentio
as amounting virtually to an assignment by Clarke of a cer
interest in his claim for advances, and we think it can rea
ably have no other construction.

There was certainly no intention to make Clarke person
liable for anything, but only to give Hogg a right to a cer
amount out of a specific fund, when arising from sale
property, and this to be accomplished through the interven
of trustees, and in conformity with the provisions of
agreement declaring the trust.

The sales by the heirs and widow to Weill could
possibly affect Hogg's claim, and convert it from an equit
demand upon the proceeds of specific property in the ha
of a trustee, into a legal claim against the estate of Cl
generally. These sales were unquestionably subject in la
his rights under the trust in David Cahn.

The county court of Linn county had no jurisdiction
the claim, and its proceedings in relation to it were cle
erroneous. But the objections relating to the claim of
Willamette Valley and Coast Railroad Company, we do
think equally well taken.

The tenders of the heir and his grantee were coupled
the condition that the claim should be assigned to them;

der of David Cahn, the trustee, was clearly officious
uthorized. The latter had no beneficial interest in the
y, and was under no obligation or necessity as such
to prevent the sale of the decedent's interest, subject
rust. In no view do these alleged tenders seem to us
ess any validity, and we think they were properly
ded.

esult of the views we have here advanced is, that the
in the court below should be modified so far as to
the claim of T. Egenton Hogg from being considered
against the estate of H. K. W. Clarke, deceased, and
the sale of the real property described in the petition
dministrator, to a sufficient quantity thereof to satisfy
off the expenses of administration and said claim of
lamette Valley and Coast Railroad Company.
ppellants to have costs and disbursements of suit.

JACKSON v. TRULLINGER.

EASEMENT—HOW ACQUIRED.

t to overflow adjoining lands, like the right of way across the
of another, is an easement, and will pass by a conveyance as
ppurtenant, when agreeing in nature and quality with the prin-
thing granted.

MILL PROPERTY—WATER POWER.

rant of a mill "with the appurtenances," the dam and all the
leges of flowing which are essential to the enjoyment of the mill
head of water pass, and this is true without the word "appurte-
es," because the incident goes with the principal thing—a prin-
said to be especially applicable to water privileges, in grants
nills and factories dependent on a flow of water for motive
r.

CONVEYANCE BY METES AND BOUNDS.

has often been held that a conveyance by metes and bounds, of
ll-site, carries the right to take and convey and discharge water
and across land not within the boundaries given by the deed,
the reason that the power so to do is necessary to the full en-
ent of the property specifically conveyed.

These decisions rest on the principle that the grantor conveys by deed, as an appurtenance, whatever he has the power to grant wl is practically annexed to the granted premises, at the time of grant, and is necessary to their enjoyment in the condition of estate at the time.

APPURTENANCES AND INCIDENTS.

By the conveyance of certain real estate known as the Centreville property, by metes and bounds, with the privileges and appu nances *thereto belonging*, all privileges of flowing which were ne sary to the enjoyment of the mills and head of water, passed incidents and appurtenances, with the premises conveyed, so far they legally existed in the grantor at the time of his conveya

COVENANTS—BREACH OF.

Nor is this construction of the deed inconsistent with the intention of parties, as disclosed by the evidence, as it appears that no such ri of flowage in adjoining lands, as alleged, was legally appurtenan the premises conveyed, or was necessary to the useful operation the mill property, in the manner in which it had existed, and been used previous to the grant, and there was consequently breach of the covenants.

APPEAL from Washington. The facts are stated in opinion.

Caples & Mulkey and Geo. W. Yocum, for appellant.

It is not essential that by the terms or tenor of the d the right to maintain the dam at the height of nine feet sl be expressly mentioned. The fact that it was "mill propert that was sold and conveyed, carries with it every right t is essential to the beneficial enjoyment of the property. covenants extend not only to the land itself, but to all s things as should be properly appurtenant to it, and pass b conveyance of the freehold. (*Powers* v. *Dennison*, 30 V mont, 752; *Van Wagner* v. *Van Nostrand*, 19 Iowa, 4 *West* v. *Stewart*, 7 Barr., [Pa.] 122.)

Everything necessary to the enjoyment of the prope passed by the deed. (Wash. Real Property, 3d Ed., 3 *Wickersham* v. *Bills*, 8 Ind., 387; *Brugger* v. *Butler*, 5 450; *New Ipswich Factory* v. *Bachelder*, 3 N. H., 190.)

Thomas H. Tongue and B. Killin, for respondent.

An easement which is extinct, or which has no legal ex

ough used *de facto,* does not pass an appurtenance. *. James,* 5 Barn. and Adol., 791; *Kent* v. *Wait,* 10 38; *Patterson* v. *Hull,* 9 Cow., 747; *Manning* v. 5 Cow., 289.) The covenant of warranty is not than the grant. Nothing is warranted which is not (3 Wash. R. P., 475.)

nt of a thing will include whatever the grantor had convey which is reasonably necessary to the enjoy- the thing granted. A grant of a house with appur- will pass a pipe or conduit by which water is con- it, but this depends upon whether the grantor owns duit. (*Broce* v. *Yale,* 4 Allen, 393; *Philbrick* v. 97 Mass., 133; Angell on Water Courses, section 153,

e Court, LORD, C. J.:

s a suit to foreclose a mortgage given by defendants the payment of a promissory note, executed by John inger to the plaintiff, on the 28th day of November, th interest. The defendants admit the execution of and mortgage, but deny that any payments have de on the note sued on.

separate answer the defendants allege that the note tgage were given as a part of the purchase price of the described in the mortgage, and further allege, sub- y: That on the 28th day of November, 1870, the conveyed by deed to the defendant, John C. Trul- n consideration of $6,000, certain mill property and te, set out in plaintiff's mortgage, and description in d, as follows, to wit: "The following described real the county of Washington, state of Oregon, known Centreville Mill Company, and bounded as follows, to ere follows by metes and bounds the boundaries of acres of land.) To have and to hold the above premises with the privileges and appurtenances *belonging,* to the said J. C. Trullinger, his heirs and to their use and behoof for ever. And I, the said

Ulysses Jackson, for myself and for my heirs, executors a
administrators, do covenant with the said John C. Trulling
his heirs and assigns, that I am lawfully seized in fee of
afore granted premises, that they are free from all incu
brances, that I have good right to sell and convey the sa
to the said J. C. Trullinger as aforesaid; and that I w
and my heirs, executors and administrators shall, warra
and defend the same to the said John C. Trullinger,
heirs and assigns forever, against the lawful claims and
mands of all persons."

That at the date of said conveyance defendants allege t
there was on said premises a saw-mill and grist-mill, opera
by water, in a creek running through said land; that in or
to furnish necessary water, a dam ten feet high was ma
tained across said creek, and that said dam caused the wat
of the creek to flow back upon and overflow about three ac
of land, owned by one J. W. Marsh; that about eight ye
after said conveyance, Marsh, by a judgment duly obtai
against defendant, J. C. Trullinger, compelled him to lo
said dam five feet, and to pay $250 for damages, caused
said dam, etc., and that by these proceedings defendant
damaged in the sum of $10,000. Although the answer c
tains three separate defenses, only two were relied upon
the argument. These were, in brief: First. That at the ti
of making said conveyance, plaintiff falsely represented t
he had the right to maintain said dam ten feet high and
keep and maintain a ten-foot head of water in said dam, a
a right to overflow about three acres of land owned by the s
J. W. Marsh; and, Second. That plaintiff expressly co
nanted with the defendant that he had such rights; that
same were appendant and appurtenant to said proper
were necessary to propel the machinery of said mills at
time of said purchase and conveyance, and that without s
dam, head of water, and rights of flowage, said mills co
not be made useful, or be beneficially enjoyed. At the pro
time, and when we come to examine the evidence, it will h
reference to and include both of these defenses. At pres

uiry must be confined to a construction of this grant, such case, the court will take into consideration the which the parties had in view, and the nature of the matter of the grant. What, then, does the deed in n purport on its face to convey? Plainly, not merely ne a specific piece of land by metes and bounds, or to out of a larger area a specific piece of ground, but to certain "real estate" which is known as the "Centre-ills Property." Land solely is not the subject matter grant, but "real estate" which, from the uses to which been subjected, and the character in which it has been l, is known and designated as the "Centreville Mill ty." It is as such "real estate" having the qualities, ibutes of mill property, that is the principal thing l, and constitutes the subject matter of the convey-This is the "above-granted premises," referred to in *endum*, which the defendant, John C. Trullinger, was e and to hold, with the privileges and appurtenances belonging. Such, then, being the subject matter of nt, and it being conceded that the covenants of war-re co-extensive with the subject matter of the grant—would pass by the terms "with the privileges and ap-ances thereto belonging?" It may be observed that re some things which pass by a conveyance of lands dents appendant and appurtenant thereto, although ntioned therein. But regularly "nothing can be ap-t and appurtenant unless it agrees in nature and with the things whereto it is appendant and ap-ant." (Bac. A., 6, Little Grant L., 4.)

asement is defined to be the right which one man has the land of another for a specific purpose. (3 Kent 528.) The right to overflow adjoining lands, like the f way across the lands of another, is an easement, and ss by a conveyance as an appurtenant, when agreeing ure and quality with the principal thing granted. *xen* v. *McGhee*, 12 Ill., 386.)

The maxim of the law is that whoever grants a thing supposed, also tacitly, to grant that, without which, the gr would be of no avail. Where the principal thing is grant the incident shall pass. (Co. Litt., 152.)

By the grant of a mill, or the grant of land with the thereon, the waters, flood-gates, and the like, which are necessary use to the mill, pass as incident to the princi subjects of the grant. (Shepherd's Touchstone, 989; 4 Ke Com.)

Again, by another text writer, it is said that by a grant a mill, "with the appurtenances," the dam and all the pr leges of flowing which are necessary to the full enjoyment the mill and head of water, will pass. (Angell on Wa Courses, sec. 358.) And further, that the word "appu nances" is not necessary to the conveyance of the easem or water right in such cases, because the incident goes with principal thing, and that this principle is especially applica to water privileges in grants of mills and factories depend on a flow of water for motive power. (Secs. 153 a, 153 b, 1 166.)

Now let us examine some of the reported cases and as tain the extent to which this principle is applied. In Blai *Lessee* v. *Chambers*, 1 Serg. and Rawle, 169, the court deci that "a grist-mill and appurtenances" carried with it w was actually used as an appurtenant by the testator in his time, and Yeates, J., said, "by these words, everything ne sary for the full and free enjoyment of the grist-mill, requisite for the support of the establishment, such as a d water, the race leading to the mill, a proper portion of gro before the mill for the loading and unloading of wag horses, etc., as used by the testator, would pass, for with these appurtenances the grist-mill could not be worked."

In *Pickering* v. *Staples*, 5 Serg. and Rawle, 107, Cl Justice Tilgman says: "The water right was appurtenant the mill and passed by the word appurtenances." In *Str len* v. *Todd*, 10 Serg. and Rawle, 63, it was decided that b

ance of a mill, the whole right of water enjoyed by the
as necessary to its use, passes along with it as a
ry incident, and this the grantor cannot, by the con-
of another lot of ground through which the stream
impair the right to use the water already vested in the
antee. (*Swartz* v. *Swartz*, 4 Penn. St., 354.)

lake v. *Clark*, 6 Greenleaf, 436, the court decided,
e term "mill" may embrace the free use of the head
er existing at the time of the conveyance, as also a
way, or any other easement which has been used with
, and which is necessary for its enjoyment.

aylor v. *Hampton*, 4 McCord, 96, it was held, that
d was an appurtenance of the mill, and the purchaser
right to keep up the water to the height to which it
sed at the time he purchased, although the consequences
be to overflow the grantor's land.

ilson v. *Brockway*, 8 N. H., 465, the description used
conveyance was: "A certain tenement, to wit: one-
the corn-mill, situated in Washington, in the county of
e, in lot No. 1, with all the privileges thereto belong-
nd the court say: "The design was, without doubt,
under the phrase, 'a certain tenement, being one-half
rn-mill,' the land on which the same was situated, to-
with that portion of the water privileges which was
l to the use of the mill, and such is the proper legal
f the terms made use of." And this case was cited
proved in *Sheets* v. *Selden's lessee*, 2 Wall., [U. S.]
to the effect of the description in the conveyance.

Whitney v. *Olney et al.*, 3 Mason, 280, Judge Story
The good sense of the doctrine on this subject is,
der the grant of a thing, whatever is parcel of it, or of
ence of it, or necessary to its beneficial use and enjoy-
r in common intendment included in it, passes to the
."

parks v. *Hess*, 15 Cal., 197, the court held the true
e to be, that everything essential to the beneficial use

and enjoyment of the property granted, is to be conside
in the absence of language indicating a different intention
the part of the grantor, as passing with it, either as pa
thereof or appurtenant thereto. (Angell on Water Cou
sec. 165.)

In *Tabor* v. *Bradley*, 18 N. Y., 113, the court say: '
this conveyance, in terms, of a 'mill,' or 'mill race,'
'privileges,' would undoubtedly pass the right to flow s
cient to raise the necessary head of water to carry the mi
although that was a case in which it was held, where con
ances on their face purpose to convey only the land within
boundaries described, nothing more than the lands are ear
by them; but Judge Pratt, in delivering the opinion of
court, says: "There is no allusion to any mill or water ri
or privileges in the conveyances," and this is noted by Ju
Folger in *Voorhees* v. *Burchard*, 55 N. Y., 106, as an
portant feature of that case, in which he says: "It seem
be conceded that a deed purporting to convey by metes
bounds, may be legally construed, in the light of surround
circumstances, to include also privileges annexed to or
nected with the main subject of the grant."

Again he says: "It has often been held that a conveya
by metes and bounds of a mill-site carries the right to
and convey and discharge water from and across lands
within the boundaries given by the deed, for the reason
the power so to do is necessary to the full enjoyment of
property specifically conveyed." But in the majority, if
in all, these cases, it will be noticed that the easement ei
legally existed in the grantor, and passed as an appurten
with the principal thing conveyed, or was connected with
belonged to other lands of the grantor, and was necessar
the beneficial use and enjoyment of the premises conve
The principle of law is, that where a thing is granted
grant implies a right to all the means of enjoying it, so fa
the grantor was possessed of those means. (1 Saund.,
823.)

e, it is held, when mill property is granted, that such f flowage as is legally appurtenant to the premises, or n other lands of the grantor, and is necessary to the operation of the mills, passes as an appurtenant with ncipal thing granted, without being specially named in ed. (See also *Philbrick* v. *Ewing*, 97 Mass., 134; *y* v. *Sprague*, 17 Mass., 281; *Dunkler* v. *Wilton R.* 4 Fost., [N. H.] 489; *New Ipswick Factory* v. *Back-* N. H., 190; *Oakley* v. *Stanley*, 5 Wend., 523; *Voor- Burchard*, 55 N. Y., 99; *Coolidge* v. *Hagar*, 43 Vt., 1.) *hilbrick* v. *Ewing*, *supra*, Judge Hoar stated the rule 'that the grantor conveys by his deed, as an appurte- whatever he has the power to grant which is practically l to the grantor's premises at the time of the grant, necessary to their enjoyment in the condition of the t that time." And further, that an easement, "where t expressly described in the conveyance, must actually to the estate conveyed, in order to pass by implication." *wazey* v. *Brooks*, 32 Vt., 483, it was held, that the *ppurtenances* in the *habendum* of a deed, when none cified, will not be construed to convey anything except as legally appurtenant to the lands in the hands of the r, and therefore will not be extended so as to convey an nt in the land of another, etc., unless accompanied by words describing it, and showing the intention of the r to pass it.

in *Bliss* v. *Kennedy*, 43 Ill., 71, it was decided, that a factory, and the land on which it stood, with the ap- ances, were conveyed, the factory being the subject of the grant, all that belonged to the tract conveyed, er which the grantor had dominion, passed by his deed the term "appurtenances," and nothing more; that "he be held by his deed to have sold and conveyed anything land and factory specified in it, and the appurtenances land and factory then belonging."

It must, therefore, be evident, that by the conveyanc
certain real estate, known as the Centreville Mill Prope
by metes and bounds, with its privileges and appurtena
thereto belonging, all privileges of flowing which were
essary to the full enjoyment of the mills and head of wa
passed as incidents and appurtenances with the premises
veyed so far as they legally existed in the grantor at the t
of his conveyance. Nor is this construction of the deed
consistent with the intention of the parties as disclosed
the evidence, as it appears that no such right of flowag
adjoining lands, as alleged in the separate defenses, was leg
appurtenant to the premises conveyed, or was necessary to
useful operation of the mill property in the manner in wh
it had existed and had been used previous to the grant,
there was consequently no breach of the covenant.

A brief examination of the evidence will make this cl
It appears from the evidence that the mills were construc
by J. B. Jackson, sometime in the year 1858, and oper
by him until his death in the year 1868, when his brot
the plaintiff in this suit, succeeded to the management
operation of the mill property as administrator of the es
of J. B. Jackson, deceased, until some time in July, 1
and then, as owner, until some time in November, 1870, w
he sold the property in question to the defendant.

It seems at the time the mills were built and first opera
there was another saw-mill further up the creek, that it
thought might be damaged by the head of water necessar
run the Centreville mills, and as an experiment the head
water was raised eight to ten feet high to see what effec
would produce on the mill above. That experiment hav
demonstrated that no injury would result to it, and si
seven feet of head being all that it was supposed would
necessary to operate the mills, only a head of water of
height was used when the mill was first operated. But in
course of a year or so, J. W. Marsh complained of injur
his land from the backwater, and the head of water then b

an was essential or necessary to operate the mills, the
s lowered to a five-foot head, and from that time until
th of J. B. Jackson, as well as after his death until the
d conveyance of the mill property by the plaintiff to
endant, a five-foot head of water was all that was used
ate the mills. Moreover, the testimony indicates that
ime of the purchase of the property, there was not to
a four-foot head of water in the dam. Nor was there
his time, so far as the testimony discloses, any com-
rom, or any injury done to, or overflow of the lands of,
Marsh, produced by the head of water maintained and
y to operate the mills.

at the time of the sale, did the plaintiff claim to have
ht of flowage upon the land of J. W. Marsh, nor was
l overflowed by the head of water maintained and nec-
o operate the mills successfully. He had a right to
land of John Marsh, but for this he had a deed, and
l the defendant to it. The truth is, and the evidence
ntly discloses it, that the defendant is, and was at the
the purchase of the property, a man of large mill
nce, and of a good deal more than ordinary intelligence
ect to such matters, and that he had not only inquired
d examined the records as to the extent of the water
es, but took the further precaution to employ an able
y to advise him of and secure all his rights in the sub-
tter of the sale.

purchase price paid for the mills was six thousand dol-
There is no doubt that much of the machinery was old
of the latest improvements, and that the property was
t of repair. It is disclosed, however, by the evidence,
n after his purchase the defendant proceeded to make
many improvements, to put in extra burrs in the flour-
l and saws in the saw-mill, and generally to improve
rease the machinery of the mills. The result was that
r to procure the extra power required to operate the
ed machinery, the defendant raised the dam three or

four feet higher than it ever had been maintained b
plaintiff or J. B. Jackson.

According to the testimony of A. S. Dudley, who op
the mills for three years after the purchase, the mills
have been successfully run, even with the increased mach
with a five-foot head of water. He says: "It could b
with profit at that head, but there would be more profi
an eight-foot head of water than a five-foot head." The
produced by this raising of the dam and head of wate
to cause the waters to overflow the lands of J. W. M
Nearly six years after the purchase—in October, 1876—
Marsh brought suit against the defendant, Trullinger
among other things, alleged in his complaint that "durin
year 1870, defendant raised said dam higher than it had
before," and that since said time had increased the hei
said dam to his damage, etc., and obtained a judgmen
decree that said dam be taken down, or so much ther
would reduce the height of said dam sufficiently to wit
the backwater from Marsh's land, and to a height not e
ing five feet above low water mark. It is clear, from th
timony, and particularly the defendant Trullinger's, t
the time that suit was instituted, he was operating and
ning the mill with a ten or twelve foot head of water
that the overflow of Marsh's land was occasioned by th
creased head of water.

It is equally clear, also, that not more than a five-foot
of water was maintained at the time of the purchase, an
the lands of J. W. Marsh were not overflowed in consec
of it, and that neither the plaintiff or J. B. Jackson
accustomed to raise more than a five-foot head of water
vious to the grant, to successfully operate the mills.

Some estimate of the improvements made on this pr
and of the defendant Trullinger's estimate of the value
property, may be formed by an insurance he effected, in
he made the statement that the mills, exclusive of la
water, or water rights, were worth from $14,000 to $1

e insurance of the mills, too, was effected after the Marsh dgment, in the fall of 1878, and were destroyed by fire in e April following. But it is not necessary to pursue the bject further. We are satisfied from our examination of e evidence that the plaintiff made no fraudulent representa-ons in respect to this property, and that there was no breach f his covenants.

From these views it follows that the decree of the court low is affirmed.

Decree affirmed.

NY AND McKENZIE *v.* MULVANEY AND BEMIS.

an issue as to the merchantable quality of saw-logs, the testimony witnesses that they saw a portion of the lumber manufactured ere from, and that all of such portion was "good merchantable lum-r," was competent evidence tending to prove that the logs were rchantable. Testimony that the saw-logs in question were such were usually manufactured into lumber in the locality where the ntract to deliver "good, sound, merchantable logs" for the purpose being converted into lumber, was to be executed, and that a por-n of them were actually manufactured into lumber there, by the rties to whom such logs were to be delivered under such con-ct, was admissible for the same purpose. For the same reason t estimony of a witness that he hauled and put into the water, ere the logs were to be delivered, a certain portion of them, ich were actually received and sawed into lumber by the parties ght to be charged for their stipulated price, under said contract, s also competent evidence on behalf of the parties who under the ntract were to deliver "good, sound, merchantable logs," even ough the description given by the witness in the same answer hat "the logs were average logs, for that timber," should be deemed t variance with the description of the quality of logs to be deliv-ered in the contract.

Syllabus.

Where the defendants, in an action on such contract, admit the deliv of 35,000 feet of logs of the stipulated quality, but deny the deliv of any greater quantity, and the plaintiffs claim to have delivere much larger quantity, and the bill of exceptions on appeal, fails show affirmatively that the testimony of a witness, on behalf of plaintiffs, tending to prove the merchantable quality of a speci portion of the logs in controversy, referred to the portion admit by defendants, and as to the quality of which there was no issue, appellate court, in support of the correctness of the rulings of court below, admitting such testimony, will presume that it refer to the remaining logs, the quality of which was in issue, and h that it was therefore relevant and admissible.

The same presumption will be indulged in reference to the prelimin proof of the contents, correctness and loss of an original memor dum, to justify the admission of a copy as secondary evidence. T the original in this case, being merely a private memorandum of measurement of the logs in question, made on behalf of the plaint in the course of their own business, solely, and not at the time of, connected with, any delivery to the defendants, nor offered to pr delivery, but only to show the quantity cut by the plaintiffs un their contract, to establish their claim for damages for the alle breach thereof by the defendants, by refusing to receive and scale logs so cut, and otherwise preventing the plaintiffs from perform their portion of the contract, by delivering the quantity of logs sti lated for, its correctness must have been proven by the parties made it, or others having knowledge of the facts, or have b admitted at the trial by the defendants, as well as its loss, or ot circumstances excusing its non-production, before secondary evide of its contents by copy or otherwise could properly have been mitted. But the bill of exceptions not disclosing the absence of s preliminary proof at the trial, it will be presumed, in support the correctness of the rulings of the court below, to have been m at the proper time.

A copy of such original memorandum, made by a witness by enter correctly on a separate sheet of paper, the items in the original, read off to him by another person for that purpose, a short ti after the original was made, the witness himself having made original, either alone or in connection with another party, and tifying, in effect, that the copy was a true and correct copy of original to the best of his knowledge and belief, and it not appe ing that the testimony of the person who read off the items fr the original could have been procured at the trial by the plaintiff, that other or better evidence was in their power, was sufficien proven to justify its submission to the jury, although the witn testified that he did not make any comparison of the copy with original with his own eyes.

laintiffs alleging damages covering the net profits they would have ealized on all the logs they could and would have delivered under eir contract, in addition to the stipulated price for those actually elivered, and defendants having put such damage in issue by their nswer, testimony showing the existence of a sufficient quantity of itable timber, within the limits where the logs were to be procured the terms of the contract, to supply the additional quantity of gs, was relevant to such issue, and properly admitted.

ony offered by defendants to show the relative cost of procuring gs within 300 yards of a certain creek, and in a certain canyon here the contract provided that the plaintiffs should procure 400,000 et of the logs which they were to furnish the defendants, was properly rejected by the court below, there being nothing in the pleadgs or bill of exceptions, showing any issue as to the relative cost procuring logs in the two localities.

a count in the complaint of work and labor performed for the efendants by the plaintiffs, at the special instance and request of e former, of the reasonable value of $32.50, without specifying the ature or setting forth the items of such service, it was not competent or the plaintiffs to offer testimony to prove that ten dollars of such harge was for work and labor performed by them, in removing a rift from a certain creek, which defendants had verbally agreed to emove, but had failed to do. If recoverable at all, it was in the ature of damage for breach of the verbal agreement, and must have en so alleged. But as the extent of the injury to defendants aris- from the admission of the testimony was inconsiderable: *Held*, at the judgment ought not to be reversed if respondents will re- se the said amount and pay the costs of appeal.

nt affirmed conditionally.

EAL from Marion. The facts are stated in the opinion.

ham & Ramsay, and W. R. Willis, for appellant.

Kelsay and N. B. Knight, for respondent.

the Court, WATSON, J.:

case has been here twice before, on appeal from the ents of the circuit court for Douglas county, and a new warded in each instance. (8 Or., 129 and 513.) Upon ge of venue to Marion county, a third trial by jury has ad, and the respondents have for the third time received ent against the appellants upon their demand, and the ted parties have again brought the case here by appeal, sk to have the judgment reversed for errors alleged to

have been committed by the circuit court for Marion cou
in admitting certain evidence on the trial, on behalf of
respondents. The case itself is an action for damages
alleged breach of a written contract, which is in these wo

"This article of agreement made and entered into this 2
day of May, 1878, between N. E. Mulvaney and E. C. Be
of firm name of Mulvaney & Bemis, of the first part, and
O. Tenny and Neil McKenzie, of the firm name of Tenn
McKenzie, parties of the second part. Parties of the
part agree to pay parties of the second part, four dollars
twenty-five cents per thousand feet, for good, sound
chantable logs, delivered at the boom in Pass Creek;
agree to furnish timber for logs, not to exceed a mile f
the bank of the creek, to scale each one hundred thous
feet that is in floating water. The parties of the second
agree to furnish logs to the parties of the first part, one
lion feet with privilege of furnishing as much more as ca
put in the creek, in the year, from this date, in the boo
Pass Creek; the parties of the second part shall keep
on hand for the parties of the first part, so that the mill s
not be shut down during the year, and are to cut four thous
feet, more or less, from Rickey Canyon."

MULVANEY & BEMI
TENNY & McKENZIE.

And also upon an account for work and labor perform
declared upon as follows: "And the plaintiffs, for a sepa
and further cause of action, allege that the plaintiffs, o
about the months of June and July, 1878, in the precinc
Drain, in Douglas county, Oregon, and at the special inst
and request of the defendants, performed work and labor
men and teams, for the use and benefit of said defendants,
that said work and labor was and is necessarily worth the
of thirty-two dollars and fifty cents. That no part of the s
has been paid, and the same is now due and owing,
unpaid, from the defendants to the plaintiffs."

The respondents claim in their complaint to have delive

pellants, under their written contract, set out above, eet of good, sound, merchantable logs in the boom, 654 feet in floating water, above the boom, and had ge quantity of logs and were proceeding to complete l agreement, when, about the 6th day of August, appellants, without the consent of the respondents, heir obligations under said agreement, and prevented ndents from proceeding further towards its fulfill- heir part.

ppellants admit in their answer, the delivery of et of good, sound, merchantable logs in the boom, 00 feet in the floating water above, and deny any uantity, and deny the rest of said allegation, and respondents put into the boom, and in the water rge amounts of unsound, unmerchantable logs, and l the appellants from getting logs to keep their mill etc., all of which is put in issue by the reply of the nts.

he trial the following question and answer, in the n of E. A. Estes, a witness for the respondents, was by the court, and read to the jury, on behalf of the nts, over the objection of the appellants that it was al and irrelevant.

6. "What quality was the lumber that you know ferring to the defendants) to have manufactured ir logs? (referring to logs cut by plaintiffs in 1878 dants)."

"Well, I bought some of the lumber, and I consid- ood, merchantable lumber; at least I paid full price leven dollars per thousand for rough, and twenty nalf for dressed, at the mill."

ling of the court was duly excepted to, and is the r assigned here by the appellants. The bill of s failing to show that the lumber spoken of by the as manufactured from the 35,000 feet of logs which s had admitted in their answer to have been delivered

by respondents, and to have been of the quality stipulated in the written agreement, and as to the quality of which th was no issue in the pleadings, we must presume in favor the correctness of the ruling below, admitting this testimo that in connection with admissions, or other proofs made the trial, it was applicable to the issue in the pleadings a the quality of the remainder of the 165,169 feet which respondents claimed to have delivered, of the stipulated q ity, after deducting the 35,000 feet admitted by the ap lants. "Error must be affirmatively shown by the record will not be presumed." (*Dalph* v. *Barney*, 5 Or., 191.) this reason the exception cannot be sustained.

The next exception taken by the appellants was to ruling of the court admitting, over their objection for irr vancy and immateriality, the following question and ans in the deposition of W. A. Perkins, on behalf of the spondents.

Ques. 7. "Were the logs which you scaled (referring to logs which plaintiff claimed they had cut for defenda under their contract, as set out in the complaint) of the cl acter of timber from which lumber is manufactured in t locality? (referring to the locality of defendant's saw-mill

Ans. "I am of opinion that they do manufacture lum of such logs as we scaled there. I believe some of them w manufactured into lumber, though I did not see them."

This evidence appears to refer to all the logs which respondents claim to have cut and delivered under th contract with the appellants, and was properly admitted un not tending to prove the delivery of logs of the quality sti lated for in the written contract between the parties. words used in that contract, to denote the quality of l to be delivered, are "good, sound, merchantable logs." I dently these descriptive words should be construed togetl and in view of the use to be made of the logs which written instrument shows to have been in contemplat of both parties when they executed it, and with reference

lace where the contract was to be performed. (*Tenny dvaney*, 8 Or., 517.)

og might be "good, sound and merchantable" for many oses, and yet not fit for being manufactured into lumber, he same log might, owing to a difference in the settled s of the business in two different localities, be deemed nerchantable" log in one and not in the other. "Mer-table" logs, then, in reference to the business of manu-ring lumber in any particular locality, are such logs as ordinarily used for that purpose at that particular place, if the usage of the business in that locality requires the ordinarily used to be "good and sound," then the word rchantable" would include the particular meaning of and render their employment of no utility in any such act.

t whatever distinctions should properly be made as to espective meanings of the words used in this instance, ink it was clearly competent to show by the witness he logs in controversy were of the quality usually man-ured into lumber in that locality, to prove that they were chantable" logs. And this we understand to be the acy of his testimony, as well as the object of its intro-on. This was one step in the proof, and if it afforded no mption that the logs were "good and sound," as well as chantable," it afforded no inference to the contrary, assuredly, nor does the bill of exceptions disclose any d for such an inference. This exception must therefore erruled also.

e third ground of objection insisted upon here is to the of the court below, admitting in evidence, on behalf of espondents, a certain paper, which the witness Perkins ed to be a copy of the list of measurements of said logs, original list had been made by himself and one Wm. is in the employment of the respondents, some time in ear 1878. Perkins' testimony, as set out in the bill of tions, shows that Morris and himself measured the logs

as they lay in the creek and in the woods, and made a me
orandum of the measurements, showing the dimensions of t
logs, in a book called a "scale-book," at the time. How th
proceeded in doing this, does not appear from the bill
exceptions, and we cannot look outside of what it contai
and into the transcript of the depositions which have be
brought up, to ascertain how they did proceed. We can on
draw the conclusion from what does appear in the bill
exceptions, that the entries made in the "scale-book" of t
measurement of the logs, at the time, by the witness Perki
and Wm. Morris, was merely a private memorandum, ma
exclusively in the course of the respondents' own busine
disconnected from their transactions with other parties, a
not standing upon the same ground as entries in the course
official business, or entries made in the usual course of busin
transactions with other parties, is inadmissible to prove
own contents after proper authentication, as a book of origin
entries, but admissible only to refresh the memory of w
nesses, who made the measurement of entries, or had know
edge of them, at the time they were made. (See *Price*
The Earl of Torrington, 1 Smith's Lead. Cases, 535, wh
the various cases involving the question are ably reviewe

But if these witnesses had been produced at the trial, a
had testified that the measurements were correctly made, a
truly entered in the "scale-book," and had shown by th
testimony at the trial sufficient recollection of the previo
transaction to qualify them to so testify, although unable th
to testify from memory alone to the correctness of the p
ticular items, so ascertained and entered, without reference
the "scale-book," the respondents would have been entitl
to introduce the "scale-book" itself in evidence, in connecti
with such testimony. This we deem to be the rule est
lished by the best considered authorities as the prevaili
doctrine on the subject in the United States, and at the sa
time the most just and practical solution of the matter th

advanced. (*Russell* v. *The Hudson River Railroad* N. Y., 134.)

if such proof had been in respect to the original ndum and it had been lost, or other circumstances xcusing its production at the trial, we can perceive objection to the admission of secondary evidence as ontents—either parol or a duly authenticated copy. *Administratrix*, v. *Smith*, 4 Mass., 454; *Wallace* v. 18 N. H., 455; *Holmes* v. *Marden*, 12 Pick., 169.)

the objection of the appellants to the introduction of produced by the witness Perkins, was that it had "identified as the list that was made originally, and petent and irrelevant." Considering that this objec- only went to its secondary character as evidence, but ented the question whether the necessary preliminary already indicated as essential to its admission in , had been made, still we are convinced, from a careful the bill of exceptions, that the issues thus made are d down in this court to the single question as to the cy of the proof produced by the respondents at the show that the paper claimed to be a copy was in fact t copy of the original memorandum of the measure- the "scale-book."

es not appear from the bill of exceptions that Wm. was not called as a witness, or that the correctness of surements and entries in the "scale-book" was not orily proven by either Morris or Perkins, or admitted rial in accordance with the views expressed above; or testimony of Perkins set out in the bill of exceptions, ding to show the loss of the original "scale-book" in justify the introduction of the copy, which, standing t must be confessed seems very slight and hardly t for such a purpose, was the only proof of such loss s made at the trial.

tatement in the bill of exceptions in regard to the and immediately following the portions of Perkins'

deposition copied therein, is to the effect only that such p
tions of his deposition contain all the evidence given u
the trial touching his knowledge of the quality of the s
logs, or of lumber manufactured therefrom, as well as all
the evidence given on the trial tending to identify or auth
ticate "Exhibit B" (the copy now under consideration) a
correct copy of the original memorandum in the "scale-boo

It is plain that all the proof we have indicated as be
necessary to justify the admission of such a memorandum
evidence, as well as all necessary proof of loss of the origi
or of other circumstances dispensing with the necessity
producing the original memorandum, before offering second
evidence of its contents, by copy or otherwise, may have b
made, without in any manner conflicting with anything c
tained in the bill of exceptions, and we are bound under s
circumstances to presume that it was made upon the princi
already announced in passing upon the first exception.

The portion of Perkins' deposition referred to above sh
that he assisted Morris in making the measurement of l
and original memorandum thereof; that soon after that t
(the exact period is not stated by the witness), he made
copy under consideration in the following manner: Some c
whom the witness was unable to remember at the trial, cal
off the particular items of measurement, in the original me
orandum, and the witness set them down as called off in
copy. These entries were only of the dimensions of the l
as ascertained by the measurement. The witness, after co
ing the dimensions as called off from the original, mad
calculation of the number of feet which each log contain
according to such dimensions, upon a separate sheet of pa
and transcribed the aggregate amount on the copy.
further testified in answer to question 12 that this copy c
tained a correct scale of the measurement made by Morris
himself of the logs in controversy, according to the "sc
book" by which he and the other person who called off
entries as above stated, ascertained the result. In answe

13 he testified that to the best of his knowledge and
e dimensions of each log, as shown by the copy, was
as it was entered in the original memorandum. In
o cross-questions 12 and 13 the witness stated that he
npared the letters and figures on the copy with those
riginal memorandum with his own eyes, but only by
hem read from the original and entering them in the
already explained.

vas all the evidence that was given on the trial, to
the correctness of the copy. Was it sufficiently
o justify its submission to the jury? It does not
rom the bill of exceptions that the testimony of the
ho read off the items in the original memorandum to
when he copied them, could have been produced at
by the respondents; or that any better or additional
upon the question was in their power. We are of
ion that the copy was sufficiently authenticated by
mony of Perkins to justify its admission under the
ances. In the absence of any testimony to the con-
s testimony would justify the jury in finding the copy
orrect transcript of the original memorandum, and in
g their verdict accordingly.

such testimony is competent to prove a copy and
e the admission as secondary evidence, in a case where
nal cannot or need not be produced, there can be no
In addition to cases cited, *supra*, see *Perkins* v. *Crow*,
26; and *Edwards* v. *Noyes*, 65 N. Y., 125.

ase of *Thomas' Garnishee* v. *Price*, 30 Maryland,
d by appellants, is not in point. This decision was
n the ground that Hancock, the witness who, like
in the case before us, made copy offered in evidence,
ly from hearing the original—a mere private mem-
like the present—had no knowledge of the correctness
ectness of the items in the original memorandum, and
mere copy" of such would not be admissible as evi-

The court did not decide that the copy had not been su ciently proven to be a correct copy of the original, but effect, as we view the doctrine, that the original itself, being a book of original entries, would not have been adm sible if it had been produced, and only authenticated as su books are required to be, to prove its own contents, and t the copy could have no greater force than the original. T impliedly admitted the sufficiency of the proof as to correctness and authenticity of the copy in that case.

The testimony of H. J. Mattoon and Wm. Rosee, w nesses for the respondents at the trial, which was objected by the appellant, but admitted by the court and excepti taken, was properly admitted. Mattoon's evidence refer exclusively to the logs hauled by him, and put into P creek for respondents, under their contract with appellan and which he testified, were "average logs for that timb and defendants sawed them into lumber."

It seems hardly necessary to discuss the description of th logs given by the witness when his testimony shows that which were covered by the description, were accepted by appellants and sawed into lumber. The appellants could longer object to this portion of the logs in dispute, af having received and converted them into lumber, and as testimony was limited to them, it could not have misled jury as to the rest, even if the description had been incons ent with the requirements of the contract, upon which need not express our opinion.

Rosee testified to the amount of good, sound, merchants timber remaining within the limits, from which the respo ents were to cut the logs to be delivered under their c tract, after they had procured the quantity which t claimed to have cut and delivered to the appellants. they claimed damages for all they could and would have and delivered under their contract, had they not been p vented by appellants, as well as for the quantity actually and delivered, this testimony was relevant and proper establishing their claim to these prospective damages,

as no error in admitting it. The testimony of Jonas rg, offered by the appellants to show that it would re to get logs from Rickey canyon, where respondents heir contract were to cut 400,000 feet, than from any ithin 300 yards of Pass creek, and the proportional getting logs from the two places was correctly ex- as it nowhere appears in the bill of exceptions that idence was offered at the trial to establish the cost of logs within 300 yards of Pass creek, or within any pecified distance, or that respondents had produced any ny tending to show the relative cost of getting logs in places.

last exception, however, to the admission of the testi- f Neil McKenzie, one of the respondents, to establish ount of "work and labor, etc.," pleaded in the com- s a separate cause of action, showing that respondents verbal contract with the appellants, by which the lat- lertook to remove a certain drift in Pass creek, which their way while rafting the logs down the creek to the l of the former, and that upon the failure of the nts to remove the drift as per said verbal agreement, pondents removed it, at a necessary expenditure of d labor to the amount of ten dollars, which constituted n of the account of $32.50 sued upon, is clearly well ed. There was no allegation in the complaint as to h contract, and if entitled to recover this item of ten at all, it was as damage for a violation of such verbal ent, and not upon any implied promise to pay under rm of the allegation in the complaint. (*Miller* v. r *Church*, 7 Greenleaf, 51; *Loker* v. *Dunn*, 17 284.)

as this error could only affect the verdict to an amount l compared with the whole amount recovered, we shall erse the judgment if the respondents will release this on the judgment and pay the costs on appeal, but let l affirmed for the balance. (*Boyd* v. *Foot* and *Cole*,

5 Bosw., 120 and 121; *Dall* v. *Teller*, 16 Cal., 432; 4 I
Smith, 46.)

On the point of sufficiency of the proof of the copy o
memorandum to justify its admission, Justice Waldo expr
no opinion.

WILLIS v. HOOVER.

WAGERS ON ELECTIONS VOID.

Wagers on the result of public elections are illegal and void
grounds of public policy.

ACTION LIES TO DISAFFIRM ILLEGAL CONTRACT.

There is a distinction between an action in affirmance of an illega
tract, and where the action proceeds in disaffirmance of such
tract. In the first case, such an action can in no instance be
tained, but in the latter, the authorities are in favor of recov
back money paid, where the contract is void as against public p
if such contract has not been executed, and the plaintiff seeks t
affirm his contract.

STAKEHOLDERS LIABLE FOR MONEY DEPOSITED.

When money has been deposited as a wager with the opposite par
may be recovered back from him at any time before the even
happened upon which the wager was made; and against a stakel
at any time before the money has been paid to the winner,
before or after the event has transpired, and even where the
holder paid the money over to the winner after notice not to

DEMAND—WHAT CONSTITUTES.

Where the court charged the jury, "as to what constitutes a dema
instruct you that no formal words are necessary to constitute
mand, any words expressive of a prohibition to pay absolutel
conditionally, are sufficient to revoke the authority of the stakel
to pay it over:" *Held*, Not error.

Where the following instruction was asked: "That any demand fo
whole bet of one hundred and twenty dollars by plaintiff on de
ant is not proof of the demand in plaintiff's complaint," an
court refused to give the same: *Held*, Not error.

APPEAL from Douglas. The facts are stated in the opinion.

John Kelsay, for appellant.

W. R. Willis, for respondent.

By the Court, LORD, C. J.:

This was an action to recover money deposited with the endant by the plaintiff as a stakeholder, on a wager depend- on the result of the presidential election in the state of nnsylvania; and among other things it is alleged that the spondent, at various times thereafter, and particularly on e 6th day of November and on the 30th day of November, 80, at Roseburg, demanded of the appellant the money so osited, but that appellant refused to return the same to the ondent, and that no part of the same has been paid. The plaint was demurred to on the ground that no cause of n was stated, and upon being overruled an answer was in which the demand for the money so deposited was ed, except as follows: That no demand was made upon ppellant until about the 30th day of November, 1880, at that time the said sum had been by the appellant, as holder, paid over to F. P. Hogan, the other party in said r mentioned in the complaint.

e reply denies that appellant paid to F. P. Hogan the of money mentioned in the complaint before the re- ent demanded the return of the same, but avers that ently, between the 6th day of November, 1880, and re the money was delivered to Hogan, he demanded the urn of the same and notified the appellant not to deliver e same to the said Hogan. Upon the issue thus joined the ry found for the respondent, and the court rendered dgment in his favor, from which this appeal is taken. The st ground of error specified is the overruling of the demur- r. It is conceded that the wager out of which the question der consideration arose is not a valid contract. Wagers upon e result of public elections are held to be illegal and void

upon grounds of public policy. In *Vischer* v. *Yates*, 11 Jo
R. 21, Chief Justice Kent says: "When we consider the
portance of popular elections to the constitution and libe
of this country, and that the value of the right depends u
the independence, moderation, discretion and purity
which it is exercised, we cannot but cherish a decision w
declares gambling upon such elections to be illegal, as b
founded in the clearest and most incontestable principle
public policy." There is, however, a distinction taken in
books between an action in affirmance of an illegal cont
and where the action proceeds in disaffirmance of
contract. In the first instance such an action can in no
be maintained, but in the latter the authorities are in f
of recovering back money paid, where the contract is voi
against public policy, if such contract has not been execu
and the plaintiff seeks to disaffirm the same. And i
claimed by counsel for the appellant that, to establish a c
of action against the stakeholder, it must be alleged in
complaint that the wager was repudiated, and a return of
money demanded, before the election took place, and
thereafter. His view of the law is that any time before
happening of the event upon which the wager was m
either party may disaffirm the wager and recover his mo
of the stakeholder, but that after the event has happened
in the present case, and the party has lost his money,
contract of wager as to him is executed and he cannot rec
it back of the stakeholder. If this position is tenable, it
error to overrule the demurrer, for in such a case it make
difference that a demand is made or alleged, after the e
has happened, but while the money still remains in the ha
of the stakeholder, no action can be maintained upon suc
state of facts by the loser to recover it of the stakeholder.
sustain this view, two authorities are cited and relied u
viz.: *Yates* v. *Foote*, 12 Johns., 1; and *Johnson* v. *Rus*
37 Cal., 670. In the case of *Yates* v. *Foote*, it was
that after the event has happened, no action will lie by

ainst the stakeholder, upon notice and demand, while
ney remains in his hands. In *McKeon* v. *Cherty*, 3
494, Chief Justice Savage stated in effect the law to
een thus settled by the case of *Yates* v. *Foote*. In
v. *Russell*, 37 Cal., 670, the court approved the
ng of Senator Sanford in *Yates* v. *Foote*, and declared
y saw no satisfactory reason for the distinction made
English cases between actions directly between the
to the wager and actions between the loser and the
lder; that the reason of the rule, as laid down in *Yates*
e, was founded upon the better morality, and that
e money has been lost or won, and the result generally
neither party ought to be heard in a court of justice.
distinction which the English cases make is, that
he money has not been paid over by the stakeholder,
h it has been lost by the happening of the event, upon
nd demand, the stakeholder is liable to the loser for
ount by him deposited. (*Colton* v. *Thurland*, 5 T.
; *Lancassade* v. *White*, 7 T. R., 535.)
hen the money has been once paid over to the winner,
where made recoverable by statute, the parties being
in *pari delicto*, no action can be maintained to recover
(*Howson* v. *Hancock*, 8 T. R., 575.)
e first case, the contract is said to be executory, and
r may disaffirm his wager and recover the money
y him, but in the second case the contract is executed,
parties being in *pari delicto*, the law will lend its aid
er.
, then, money is deposited as a wager with the oppo-
ty, it may be recovered back from him at any time
the event has happened upon which the wager was
nd against a stakeholder at any time before the money
paid to the winner, either before or after the event
spired, and even when the stakeholder has paid the
ver to the winner after notice not to do so, for the
hat in all such cases, the contract being void as against

public policy, and not executed, an action in disaffirmanc
it may be maintained. (*Hastilow* v. *Jackson,* 8 Barn.
Cress., 221, and cases cited above.)

In *Vischer* v. *Yates,* supra, money was deposited in
hands of the defendants by the plaintiff and others, on
event of the election of governor of New York. After
result of the election had been ascertained, the defendant
notified not to pay over the money to the winner, and
refused to pay it over to those who made the deposit. U
this state of facts Chief Justice Kent reviews the Eng
cases, and from them he declares the true rule to be, tha
action may be maintained against the stakeholder, upon no
and demand, before he pays over the money, as well afte
before the happening of the event. This was the doctrin
the English cases approved and fully sustained upon princi
by the individual opinion of the supreme court. It is
that this decision was reversed in the case of *Yates* v. *F*
supra, by the court of errors of New York, but the deci
rendered in this last case is barren of any authority to sus
it, and in *Wheeler* v. *Spencer,* 15 Conn., 31, the court
"And it is not, perhaps, unworthy of notice that the le
lature of New York soon after interfered and re-enacted
common law as it was held to be by their supreme court.
Rev. Stat. N. Y., 662.) Subsequently it became the dut
several of the different states of the union, in passing u
this subject to review the cases of *Vischer* v. *Yates,* su
and *Yates* v. *Foote,* supra, and the doctrine of the law
deduced from the English cases, and approved by the un
mous opinion of the supreme court of the state of New Y
in *Vischer* v. *Yates,* was approved as sound and correct
more consonant with good morals, and better sustained u
authority and principle than the case of *Yates* v. *F*
reversing it in the court of errors. (*McKee* v. *Maurice*
Cush. R., 358; *Wheeler* v. *Spencer,* 15 Conn., 531; *Woo*
Duncan, 9 Porter, [Ala.] 231; *Perkins* v. *Hyde,* 6 Ye
[Tenn.] 293; *Stacy* v. *Foss,* 19 Maine, 336.)

ter, however, in *Johnson* v. *Russell*, supra, Mr. Justice lerson ably reinforced the argument of Senator Sanford, *ates* v. *Foote*, and declared the rule in that case to be ıded in the better morality, that the distinction made as actions between the parties and between the loser and keholder, is not satisfactory, and that persons who allow ir stakes to remain until after the bet has been decided, l the result has become generally known, are entitled to no sideration, and that neither party ought to be heard in a rt of justice. We acknowledge the force of reasoning and weight of authority to be attached to this decision, but are unable to give it our assent. The right of the loser to over back the money of the stakeholder, before payment by to the winner, although the event has happened, upon ch the wager was made, or after, if the authority to pay was revoked before payment, is too unquestionably led by an imposing array of authorities in England and in country to be disturbed.

he notions of honor discussed in connection with this ject are only fancied—they are not connected with a thy transaction, but an illegal and immoral one, founded on ansgression of law, and in our judgment it best comports public policy and good morals, and is more consonant authority and principle, to arrest the illegal transaction re it is consummated.

Perkins v. *Hyde*, supra, the court say: "In an illegal saction money may always be stopped while *in transitu* ıy the party entitled under such illegal transaction. Such e situation of money in the hands of a stakeholder, and it untermandable at any time before the payment is made." e are unable, therefore, to concur in the view suggested he learned counsel for the appellant, that the complaint, showing that the money was demanded of the stakeholder ore the election took place and the result became generally wn, that no cause of action is stated. There was no error verruling the demurrer.

This brings us to the consideration of the instruc given, refused, and excepted to. The court charged the as follows: "As to what constitutes a demand, I instruc that no formal words are necessary to constitute a den any words expressive of a prohibition to pay absolute conditionally are sufficient to revoke the authority o stockholder to pay it over." This is excepted to, and al as error in the bill of exceptions. In *Ivey* v. *Phifer,* 11 535, it was held that no particular form of words is nece to inform a stakeholder that a party depositing money i hands as a wager, objects to its payment to the sup winner, any words expressive of a prohibition to pay lutely, or conditionally, are sufficient to revoke the auth of the stakeholder to pay under any circumstances, or the condition is performed. There was no error in this ch

The appellant asked the following instruction: "Tha demand for the whole bet of one hundred and twenty d by plaintiff on defendant, is not proof of the dema plaintiff's complaint," which being refused by the cou assigned also as error. This identical question was rais the case of *Perkins* v. *Hyde,* 6 Yerger, 294, and the say: "The demand of the whole sum staked included a de for the sum deposited by the plaintiff, and if he wa entitled to receive the whole, he was not the less entitl his own deposit, because he demanded more than he l lawful right to." The refusal of the court thus to ins the jury was not error. The other matter in the char which exception was taken and another instruction refus is unnecessary to consider, for the reason that the view law as already expressed upon the sufficiency of the com disposes of these objections. The judgment of the below is affirmed.

Judgment affirmed.

MANN v. FLANAGAN.

PARTNERSHIP—COMPENSATION FOR SERVICES.

eral rule is, that one partner is not entitled, as against the other ners or the firm, to any compensation or commission for his or services employed in the partnership business, unless there is xpress agreement to that effect; but this rule, though of general, ot of universal, application; as, where such agreement may be im- d from the course of dealing between the partners, or other cir- stances of equivalent force.

a partner is entitled to commissions for services rendered the , depends upon the intention of the parties, and in order to ascer- this fact, the circumstances which surrounded the parties, and r relative situation toward each other, should be considered.

CAL from Coos. The facts are stated in the opinion.

Sam R. Willis, for appellant.

Strahan and S. H. Hazard, for respondent.

he Court, LORD, C. J.:

is a suit in equity for the settlement of a partnership t. The complaint substantially alleges, that on the 5th June, 1866, S. S. Mann, Patrick Flanagan and James gan (the latter now deceased), entered into a copartner- greement, for the purpose of mining and selling coal. and merchandise, in Coos county, Oregon, and to trans- oal to market. That they furnished an equal amount ital, and were to be equal in profit and losses; that they ued in business, under said agreement, until the first April, 1878, at which time James Flanagan died in- , leaving the defendant, Ann Flanagan, who was his his only heir.

t on the 3d day of May, 1878, Patrick Flanagan was ted administrator of the estate of James Flanagan, and acting as such; and that on the 1st of July, 1878, the iff, S. S. Mann, was appointed administrator of the rship estate, and is now acting as such administrator. arrying on the partnership business by virtue of an

order of the county court, etc. That said partnership been fully administered, and the final account filed, and said administrator is ready to be discharged as soon as interest of the respective parties can be ascertained.

That James Flanagan, during the existence of said part ship, resided in San Francisco, and sold the coal shipped t by the company, received the money therefor, and wrongf retained and refused to pay over or account for the sam the amount of $32,912.72, and at the time of his death the same in his possession.

That in 1874 and 1875, he applied $7,135.00 of the m belonging to said partnership to the payment of his indivi debts and liabilities, and directed and caused the book-ke of said copartnership to charge said amount to the firm; a short time before his death he represented to the book-ke that he had paid debts of the company to the amount of 741.25, and fraudulently caused said book-keeper to c him with that amount, when he had not paid said debts, had applied the same to his own use; and that the plai since his appointment as administrator, has been compelle pay, and has paid, said debts to the creditors of the firm

That about the year 1877, Jas. Flanagan had in his po sion $400 of the moneys of said copartnership, and had f to account therefor, but converted the same to his own That during said copartnership, from time to time, he the further sum of $3,680.85, and refused to account fo same; that the total amount of moneys and credits w James Flanagan wrongfully received is $47,828.64.

That during the continuance of said copartnership, Pa Flanagan drew out of the funds thereof the sum of $10,11 which was properly charged to him on the books, and between the 1st of November, 1874, and the 1st of A 1878, he wrongfully, and against the protest of the plai charged to the copartnership $200 per month during a said time, for his services in the business, and drew fro funds therefor $8,200; that he should be credited on the

n, $679.37, charged to his account by mistake, leaving the ount drawn by him, $17,640.92.

hat P. Flanagan is entitled to receive $30,187.99, and ntiff, S. S. Mann, $29,481.72, from the assets of said partship, to make their respective proportions equal to the unt received by James Flanagan, and that to pay them said sums it is necessary to sell the interest of said James nagan in the partnership.

hat each partner owned an equal undivided one-third of the real property, and that it cannot be divided without a thereof.

he answer denies that the real estate described in the comnt was partnership property, or used for partnership purses, except a small part, and alleges that it was the individ- property of the partners; denies that James Flanagan ngfully retained or refused to account for $32,912.72, or part thereof, but alleges that it was agreed between the tners that James Flanagan should reside in San Francisco transact the business there, and S. S. Mann and P. Flan- n should reside at Newport, Oregon, and transact the busi- there; that the firm furnished them and their families es, gardens, etc., free, and for a long time goods and merdise for themselves and their families, and in considera- thereof, it was agreed, understood and acquiesced in by of said partners, that James Flanagan should receive a mission on each ton of coal sold by him; that said sum is e aggregate of said commissions, for all of which James lanagan rendered his monthly statements, and that the same were duly entered up in the books of said firm, at Newport, by S. S. Mann, or his book-keeper. Denies each allegation of converting other moneys to his use, or causing the same to be entered on the books.

To which answer plaintiff filed his reply, and upon issue being joined the evidence was taken, and the court, after taking the same under advisement, found as conclusions of fact, among other things: "That James Flanagan, in his life-time

and during the continuance of said partnership, wrongfu
withdrew from the funds of said partnership, and conver
to his own use, the sum of $32,461.14, with which sum
should be charged in the partnership account; that Pat
Flanagan drew from the funds thereof, and converted to
own use, the sum of $17,640.65, with which he should
charged in the partnership account; that S. S. Mann d
from the funds thereof, and converted to his own use, the s
of $18,336.92, with which he should be charged in the p
nership account." And the court, after ordering the prope
belonging to said partnership to be sold, among other thi
adjudged and decreed that Patrick Flanagan is entitled
receive and draw from the partnership, before the estate
James Flanagan is entitled to receive anything, the sum
$14,820.49, in order to make the amount drawn by him eq
to the amount drawn from the funds of said partnership
James Flanagan in his life-time; and that S. S. Mann is e
tled to receive and draw from the funds of said partners
before the estate of James Flanagan is entitled to receive a
thing, the sum of $14,124.22, to make the amount drawn
him equal to the amount drawn by James Flanagan in
life-time.

The first objection made by the appellant is based upon
refusal of the court to allow the whole amount of commiss
received by James Flanagan during the continuance of
partnership. It is urged that the arrangement entered
by the partners at the commencement of the partnership,
continued for some time afterwards, the entries on the p
nership books, the manner in which the business was
ducted, and the conduct of the partners in dealing with
other, clearly indicates that James Flanagan was to be re
nerated for his services, and that such was the understand
and intention of the partners, as manifested by the en
conduct of their business up to his death.

The general rule undoubtedly is, that one partner is
entitled, as against the other partners, or the firm, to

nuneration or commission for services rendered in the busi-
ss of the copartnership, unless there is an express agree-
nt to that effect. (Story on Partnership, sec. 182, and
ses cited in note, also section 185, and cases cited; Parsons
Contracts, vol. 1, page 197.)

This general rule results from the fact, "that there is an
plied obligation in every partner to exercise due diligence
d skill, and to devote his services and labors for the promo-
n of the common benefit of the concern." But this rule,
e all general rules, has its exceptions. As where such an
reement may be implied from the course of business be-
een the copartners, or from the nature of the services ren-
red in connection with the duties and obligations imposed
the copartnership articles upon the several members of the
n.

There can be no doubt that a partner is entitled to be
nunerated for his services, if it can be clearly implied from
e course of dealing which the partnership adopts, or other
umstances of equivalent force." (*Marsh's Appeal*, 69
St., 30; Parsons on Contracts, sec. 203, and cases cited;
dford v. *Kimberly*, 3 John. Ch. 431.)

The application of these principles to the evidence will
ermine whether the objection of appellant is well taken.
Appears from the evidence that the copartnership under
sideration was entered into by the parties on the 5th day
June, 1869, and continued until the death of one of the
bers, James Flanagan, which occurred on the first day of
l, 1878.

There was no agreement as to what portion of the business
any member of the firm should perform. Soon after the for-
mation of the copartnership, James Flanagan, upon his own
motion, as it seems, went to San Francisco and made a con-
tract with an agent to sell the coal of the Newport coal mine,
for a commission of fifty cents per ton. For this commission
the agent was to sell the coal, become responsible for the sales,
and make a return of the accounts thereof to James Flana-

gan, who thereafter and during the existence of the partn ship continued to reside in San Francisco. The commiss of the agent was paid out of the funds of the partnershi "the proceeds of the sales of coal belonging to the compan But in addition to this commission allowed the agent, Ja Flanagan retained a commission, or special compensation, the services he rendered.

The evidence is, that "for several years he retained f cents a ton; afterward for some time, thirty-seven and a l cents per ton, and for a small portion of the time, twenty- cents per ton." This compensation or commission was tained in this manner: "James Flanagan made a mont return to the Newport mine of the net proceeds of coal, a paying all expenses, and the net proceeds show that he tained, as personal commissions, the amounts as above state From the commencement of the copartnership until the of 1873, S. S. Mann and Patrick Flanagan resided at N port, Coos county, Oregon; the former having "charge of store, books and general accounts of the mine, ordering go conducting all correspondence," etc., and the latter "supe tendent of the mine and all labor outside."

During this last named period, the evidence discloses t S. S. Mann and Patrick Flanagan occupied houses, the pr erty of the partnership, and the grounds and gardens attac thereto, without the payment of any rent therefor, and received goods, supplies and provisions from the store belo ing to the partnership, for their own and the use of t respective families, without any charge.

It thus appears from the evidence, that at the commer ment of the partnership, each of the partners betook him to particular duties, all of which was essential and neces to the success and prosperity of the copartnership, and while two members of the firm remained at Coos Bay manage the business there, they occupied the houses and la of the firm, rent free, and supplied themselves and their f ilies with goods and groceries from the company's store, w

st or charge; the other members of the firm resided in
'rancisco, superintended the business there, and made
of the sales of coal, and out of the same retained a
ssion for his services.

s arrangement was acquiesced in by the course of deal-
tween the partners, and continued until the fall of 1873,
all the partners removed to San Francisco.

s true there is some evidence tending to show that Mann
ed to his partner, James Flanagan, receiving the com-
tion or commission for his services which he retained,
peared by "the net proceeds of coal, after paying all
ses." But the letter of Mann to James Flanagan, the
er in which the business was conducted, taken in con-
n with other attendant circumstances, shows conclusively
he objection was not so much to the allowance of a com-
n to James Flanagan for the services he rendered, as
mount of commission he charged and retained for such
es; or, in other words, Mann thought the compensation
oo much, and ought to be reduced; and we think the
nce shows, particularly after the sales increased, there
some reduction in the amount of the commission upon
on.

at the services performed by James Flanagan were of
advantage, and conduced to the prosperity of the copart-
ip, is evidence from the testimony, and made more mani-
by the letter of Mann to James Flanagan, 1872, in which
fers to "the great advantage it has been to the business
ve some one at San Francisco who could give his undi-
l attention to the business."

before stated, the other partners had remained at Coos
where they and their families were in fact supported by
company. James Flanagan had gone to San Francisco,
his residence there necessarily incurred to him additional
nse, without any of the advantages of free rent and sup-
which the other partners enjoyed, and we think there
no error in the court allowing him the commissions

charged the firm from the commencement of the partners until the fall of 1873, when the existing arrangement se to have been broken up and all the partners removed to S Francisco. But after the fall of 1873, and until his de about the first of April, 1878, James Flanagan continued deduct his commission from the sales of coal, against repeated protests of Mann, and without any authority exp or implied from the firm, or other circumstances from wh such authority to take commissions might be implied.

All of the members of the firm were now in San Franci and all of them, according to the evidence, were devot their skill and services for the promotion of the common in ests of the copartnership. Nor did the other two memb of the firm enjoy, at this time, any peculiar advantages special privileges, which furnished James Flanagan any rea whatever for his retention of a commission for his servi nor was there anything in the course of dealing which partnership adopted from this time until the death of Ja Flanagan from which the right to retain commissions by might be fairly implied.

The evidence is that Mann daily attended the office, t charge of the Coos Bay correspondence, purchased a port of the supplies for the miners, and had in fact almost the charge of an organization called the Newport Coal Compa organized by Flanagan & Mann, the duties of which w onerous, embracing the issuing of receipts, advertising, ploying agents, receiving their returns, and keeping an count of all transactions. These duties Mann continued perform until the spring of 1877, when he returned to N port, and from that time until the death of James Flana he was engaged in the general supervision of the books accounts of the firm.

During the whole of this period, Mann neither charged received from the partnership any fee, salary or commis whatever for the services he rendered. Nor did Patrick F agan receive any compensation for the services he rende

e resided in San Francisco; and he testifies that there mutual agreement between the members of the firm ne allowance of special compensation; and further, to ct that James Flanagan retained a special compensation any authority from the firm, and against the objec- f Mann, who asserted the inequality of such an allow- nd his purpose to require an account of the commis- ius wrongfully appropriated by James Flanagan. He tifies as to how and by whose suggestion he came to the firm the sum of two hundred dollars per month, ne first day of November, 1874—that being the time San Francisco and returned to Newport—until the first April, 1878, and admits that the money thus received services during that period was without the consent of in fact wrongful and unauthorized, and consents by ulation that the sum of $8,200—the same being the ite amount thus appropriated—be charged to his .

evidence also plainly indicates that James Flanagan expected to be required to account for the commis- e had retained. His conversations with other members firm, with the book-keeper and others, when the mat- his taking commissions against objection and protest of vas brought to his notice, he almost invariably answered effect that he would make some settlement or satisfac- rrangement at some future time. He seems to have nder the impression some time before his death that e of the mine could be advantageously effected for the n benefit of the firm, and that then he would arrange torily and settle the matter of commissions.

unnecessary to review the testimony further on this To our minds it is clear, from the evidence, that there express agreement mutually entered into between the rs, nor anything in the course of dealing adopted by rtnership from which an agreement may be implied. authorized James Flanagan to take extra compensation

or commission for any service which he rendered the firm a
a partner, from the fall of 1873 to the 1st of April, 1878
and that the court below did not err in charging the commis
sions thus appropriated by him during that period to hi
individual account.

The next item to which objection is made, is the sum o
$7,135, charged by the court below to the individual accoun
of James Flanagan. It appears from the evidence, that som
time in the month of July, 1874, James Flanagan sent t
Mr. Graham, the book-keeper, an item of $1,010 for paymen
on note and expenses, to be credited to his account, and tha
subsequently, in 1874, he sent another item of $6,125, whic
was also credited to his account; but the book-keeper not be
ing able to find any liability to which these sums could b
charged, entered them on an account called the "Suspens
Account." In respect to this matter, Mr. Graham testifie
that "these amounts were in his accounts, and were receive
at Newport while I was manager there. Mr. Flanagan di
not state in his account for what purpose this money was pai
out. He afterwards told me that it was an individual note
with interest thereon, that he owed to his sister, Mrs. Ka
Mullen." And again, in further explanation, the same wi
ness testifies: "In the accounts which James Flanagan sen
me to Coos county, this $7,000 which I have spoken of, wa
returned to me to be charged to the San Francisco branch o
the firm of Flanagan & Mann; that is, to be credited to hi
as having been paid out for the San Francisco branch, but th
account did not show for what purpose it was paid out. I
merely purported to be on F. & M. note, and so to be charge
I thereupon charged it up to the suspense account, not know
ing exactly what it was for, or where it should be charge
Flanagan afterwards told me that the amount consisted of
note for $5,000, in favor of his sister, and interest thereon—
his individual note for his individual indebtedness." An
further, in response to the question, whether or not he kne
the firm of Flanagan & Mann was not indebted for said su

$7,135 at that time, the witness says: "I did not know any such indebtedness by said firm. I was aware they re not so indebted, and the books did not show any such debtedness, and it was this fact that caused me to put it in suspense account. That charge in the suspense account s never adjusted, but still remains as it was charged."

Mann testifies that he "was not aware of these credits to mes Flanagan on the books, until a short time before his ath." "I positively knew that the above amounts were ever paid for any liability of the partnership, and I do know hat these several amounts were paid to the sister of James Flanagan in liquidation of his personal note, and interest—o his sister, Mrs. Mullen." Upon cross-examination in reference to this particular item, the witness says: "I have been fully familiar with all the transactions of the partnership since its commencement, and no liability of such an amount could ave occurred without my knowledge. James Flanagan himself informed me that he had given his notes to his sister, Mrs. Mullen, for a large amount."

It appears also from the evidence of this witness, that the te was given in consideration of money loaned James anagan, and used in carrying on business in the territory Idaho, some time after 1860, and previous to the formation the partnership of Flanagan & Mann. Patrick Flanagan ifies that the note due Mrs. Mullen was for "private money anced to James Flanagan when living in Idaho, and before partnership existed," and that neither the firm of Flana- & Mann, nor Mann, nor himself, to his knowledge, was ted to Mrs. Mullen to any extent whatever—"we never her a dollar."

here is other evidence bearing directly upon this matter, sufficient has already been referred to, to make it evident t his sum must be charged to the account of James Flanagan. Nor do we deem it necessary to review the testimony respect to the other remaining items in the controversy, further than to present the result of our investigation.

In addition, we find that James Flanagan should be cha
with the sum of $1,782.33, instead of the sum of $2,74
as alleged, the difference being in the disallowance of the
of Berryman & Doyle for the sum of $958.92; that he sh
be charged with the sum of $3,680.86, the same being
amount of money and other things he drew out of the p
nership for his individual use, and for which he shoul
made to account; and also the sum of $400, which, by
direction of James Flanagan, was wrongfully charged to
account of Patrick Flanagan; making, in the aggregate,
sum of $32,267.66, which James Flanagan wrongfully c
from the funds of the partnership, and converted to his
use, instead of the sum of $32,461.14, as found by the c
below. That Patrick Flanagan drew from the funds of
partnership, and converted to his individual use, the sum
$17,640.65, and that S. S. Mann drew from the funds of
partnership, and converted to his own use, the sum of $
336.92; and that Patrick Flanagan is entitled to receive
draw from the partnership, before the estate of James Fl
gan, deceased, is entitled to receive anything, the sum
$14,627.66, instead of the sum of $14,820.49; and S. S. M
the sum of $13,930.74, instead of the sum of $14,124.22
found and decreed by the court below; and that with t
exceptions and modifications, the decree of the court belo
in all things affirmed.

SIMON v. PORTLAND COMMO

ELECTION CONTEST—FINAL JU

Section 22 of the charter of the city of Portlan
tificate of election is primary evidence of
but the council is the final judge of the qua
the mayor and of its own members, and
tween two persons claiming to be elected th
same."

DECISION OF COUNCIL CANNOT B

In a contest before the common council betwe
of mayor, the council counted the ballot
declared the vote a tie. S. claimed that
errors in counting the ballots, which, if le
and such alleged errors corrected, would
votes were cast for him. On an appli
directed to the council, *Held:* That the
final and conclusive.

APPEAL from Multnomah. The f
opinion.

R. *Williams, and Bellinger & Geari*

That the common council, sitting
tested elections, is an inferior tribun
supervisory control of the circuit court
the meaning of the constitution, has bee
supreme court of West Virginia, in a
under a constitution similar to ours. (Cu
2 West Va. 422.)

The unquestionable weight of authority
if an appeal be not given or some speci
provided, that the superior common law c
tiorari, examine the proceedings of munic
even although there be no statute giving this
same rule applies in contested election ca
Mun. Corp., [3d ed.] sections 926, 440, and
1st vol.; *Gibbons* v. *Sheppard*, 65 Pa. St., 2
Dorsey, 27 Wis., 119; *Robertson* v. *Groves*, 4

ple v. *Wilkinson,* 13 Ill., 660; *Hastings* v. *San Francisco,* Cal., 58; *Lessee, etc.,* v. *Ink,* 9 Ohio, 142.)

It has been universally held that where, by the act creat an inferior tribunal, its adjudications were declared to be fi nevertheless, a writ of *certiorari* would lie. (*Thompson Multnomah County,* 2 Oregon, 39, 40; Wells on Jurisdict of Courts, sec. 73; *Cunningham* v. *Squires,* 2 West Va., 4 *Ex parte Heath, et al.,* 3 Hill, 50, 51, 52; *Ex parte Ma of Albany,* 23 Wend., 287; *LeRoy* v. *Mayor, etc.,* 20 Joh 430; *King* v. *The Rockdale Canal Co.,* 6 Eng. L. & E., 2 *Lawton* v. *Com. of Cambridge,* 2 Caines, 182; *Ackerman Taylor,* 8 N. J. L., 376; *State* v. *District Medical Soci* 35 N. J. L., 200; Smith's Leading Cases, 984; *Robertson Groves,* 4 Or., 210; *State* v. *McKinnen,* 8 Or., 493; *Pe* v. *Hall,* 80 N. Y., 117; *State* v. *Fitzgerald,* 44 Mo., 4 *Murfree* v. *Leeper,* 1 Overt [Tenn.], 1; *Reardon* v. *Gray* Hayw. [N. C.], 245.)

The evident purpose of section 22 is, merely, to make determination of the council upon the question of the elect and qualifications of the mayor and of its own members fi when collaterally drawn in question between third part and in the first instance and in the same sense that the ju ment of any inferior court is final—conclusive so far as t tribunal is concerned, and until set aside by some appropri proceeding. This very section, in express terms, permit contest between two persons claiming to have been elect and declares that the common council *shall determine s contest.* It does not provide that the determination of t contest shall be final or conclusive, and that no court sh take cognizance thereof, but merely directs the council determine the same.

Geo. H. Williams, Hill, Durham & Thompson, Whal & Fechheimer, for respondent.

Independent of the express language of the statute, it obvious from other considerations, that the intent of the le

ature was that in a contest before the council its decision hould be conclusive upon the parties.

To maintain the doctrine that the common council is the inal judge in this matter, the following authorities are cited: (*Selleck* v. *Common Council*, 40 Conn., 359; *People* v. *Fitzgerald*, 41 Mich., 2; *Snell* v. *Bridgewater Cotton Co.*, 2 Pick., 296; *Commonwealth* v. *Jones*, 10 Bush [Ky.], 725; *Rogers* v. *Johns*, 42 Texas, 339; *Echols* v. *State*, 56 Ala., 131; *State* v. *Stewart*, 26 Ohio St., 216; *Ex parte Strahl*, 16 Iowa, 369.)

To hold that the decision of the council is subject to review is to exscind the word "final" from the statute. No possible use of the word where it stands can be imagined if it was not used to signify an end to the controversy to which it relates. The word final is sometimes applied to the judgment of a ourt to distinguish it from interlocutory judgments. When used it is intended to signify a judgment by which all the estions in a case have been determined as contradistinguished om a judgment in the same case by which one or only a rt of the questions therein have been decided. The word inal' in this statute is not used in any such sense. It is re applied to the court. That is to say, the council shall the appellate tribunal to which all questions arising before subordinate tribunals or boards shall be referred for a al adjudication. The letter, spirit and reason of the stat- all point to this conclusion.

Taking the constitution and the laws of the state together, s clear that the appellate jurisdiction or supervisory control the courts over election boards is not to be exercised upon rit of review or writ of error, but a contest in the courts r an election is to be carried on in the nature of a suit, in ich the court exercises an original jurisdiction, and in which the facts of the case are to be examined and reviewed, and the will of a majority of the legal voters ascertained. It is within the power of the legislature to say in what courts, and as to what offices, and in what manner, these contests shall be

conducted, and when and where they shall terminate. Thi power has been exercised by the legislature of this state, an all considerations of public policy require that it should b sustained. To support these views, reference is made to th following authorities: (*State* v. *Marlow*, 15 Ohio St., 114 *People* v. *Matteson*, 17 Ill., 167; Sec. 139, Dillon Municipa Corporations; *O'Docherty* v. *Archer*, 9 Texas, 295; *Ewing* v *Filley*, 43 Pa. St., 384; *Commonwealth* v *Leech*, 44 Pa. S 332; *People* v. *Mahoney*, 13 Mich., 481; *Steele* v. *Martin* 6 Kansas, 430.)

By the Court, WALDO, J.:

This is an appeal from the judgment of the circuit cou for Multnomah county, quashing a writ of review directed t the common council of the city of Portland.

At a general election for municipal officers, held in the cit of Portland on the 20th day of June, 1881, the appellan Joseph Simon, and D. P. Thompson were candidates for th office of mayor. On the 23d day of June, 1881, a certificat of election was awarded to Thompson. The appellant co tested the election before the common council, where the vo was declared to be a tie.

The grounds upon which the appellant relies to reverse th decision of the council are, that said council, in counting th ballots, rejected two ballots from the count which should hav been counted for the appellant, and counted two ballots, calle "posters" in the argument, for Thompson, which should ha been rejected. The ballots which the appellant claims shoul have been counted for him, designated in the transcript an argument as ballot 100, and ballot 200, contained the nam of both candidates. Ballot 100 contained the name of D. P Thompson in print, the name of Jos. Simon written in penc in a line with and over the name of Thompson, and a penc line drawn along, intended to erase either one or both name Ballot 200 contained, for the office of mayor, the name of D P. Thompson in print, and the name of Jos. Simon writte in pencil.

s of fact cannot be re-examined on a writ of review
orari, and the most that can be claimed is that the
f the council in counting the two ballots for Thomp-
rejecting the ballots 100 and 200, and not counting
r Simon, was erroneous in point of law. But an
to the consideration of the question presents itself at
shold.

n 22 of the charter of the city of Portland provides:
ificate of election is primary evidence of the facts
ut the common council is the final judge of the quali-
and election of the mayor and of its own members,
ase of a contest between two persons claiming to be
thereto, must determine the same."

this section counsel for the respondent say in their
To hold that the decision of the council is subject to
is to exscind the word 'final' from the statute. No
use of the word where it stands can be imagined, if
not to signify an end to the controversy to which it
The word *final* is sometimes applied to the judgment
urt, to distinguish it from interlocutory judgments.
used it is intended to signify a judgment by which
questions in a case have been determined, as contra-
ished from a judgment in the same case in which one
a part of the questions therein have been decided.
d *final* in this statute is not used in any such sense.
e applied to the court." "Can any intent be imag-
imputed to the legislature other than an intent to oust
diction of the courts over an election contest as to the
nd members of the common council of the city of
d? They either changed the law in that respect or
not. If they did, the circuit court has no jurisdic-
this case; if they did not, then the word *final* in the
has no meaning or effect."

t of the legislature of Connecticut provides: "That
d of councilmen for the city of South Norwalk shall
nal judges of the election returns, and of the validity

of elections and qualifications of its own members." In
leet v. *Common Council of South Norwalk,* 40 Conn.,
it is said of this provision: "It makes the common cou
of the city final judges of the election, returns, and quali
tions of its own members. By the use of the word *final*
legislature intended to devest the superior court of juri
tion in such cases, and make the common council the
tribunal to determine the legality of the election of its
members."

So in *People* v. *Fitzgerald,* 41 Mich., 2, a provision
city charter making the common council the *final judge*
the election of aldermen, was held to exclude the jurisdic
of the court on a *mandamus* to reinstate one whom they
excluded without a proper hearing on the merits. So o
analogous provision in the statute of Kentucky, Chief Ju
Simpson says, *obiter,* in *Bateman* v. *Megowan,* 1 Met
538: "The decision of the contesting board is made
and conclusive by the statute. By this provision the leg
ture evidently intended to accomplish a two-fold purpose.
speedy and summary mode of deciding cases of conte
elections, and determining finally and conclusively which
of the claimants was entitled to the office, was very imp
ant, and to effect this object the organization of this b
was provided for. Another object equally important wa
withdraw these contests from the jurisdiction of the cou
and, as was said in the case of *Newcum* v. *Kirtly,* 1
Monroe, 517, 'to prevent the ordinary tribunals of ju
from being harassed, and indeed overwhelmed, with the
vestigations, and involved in the excitements to which t
cases may be expected to give rise.' This object was
effected by making the decision of this board final and
clusive in all cases of contested elections. From the deci
of this board there is no appeal. Its decisions are fina
all questions of *law* or *fact* which may be involved in
investigation of the rights of the claimants to the office in
contest." See, also, *Coon* v. *Mason County,* 22 Ill.,

Mayfield, 47 Ill., 167; *Peavey* v. *Robbins,* 3 Jones,

judge is therefore one whose decisions are final *and* e. To show that notwithstanding this section of the he circuit court still had power to review the deci- ne council on *certiorari,* the appellant cited the fol- uthorities: *Thompson* v. *Multnomah County* 2 Or., *ningham* v. *Squires,* 2 W. Va., 422; *Ex parte* Hill, 50; *Ex parte Mayor of Albany,* 23 Wend., *oy* v. *Mayor,* 20 John., 430; *Lawton* v. *Com. of ge,* 2 Caines' Rep., 182; *State* v. *District Medical* 35 N. J., 200; 3 Lansing, 149; 17 Iowa, 387; 2 411; 9 Ark., 73; 9 Minn., 166; Smith's Leading 4; *Robertson* v. *Groves,* 4 Or., 210; *State* v. *Mc-* 8 Or., 493; *People* v. *Hall,* 80 N. Y., 117; *Mur- Leeper,* Overton [Tenn.], 1; *Reardon* v. *Gray,* 2 N. C.], 245.

considering how far these authorities go to show ellant claims for them, it may be well to look at a er cases, and note the principle on which they rest. , it must be remembered, that "courts of limited on must not only act within the scope of their , but it must appear on the face of their proceedings did so; and if this does not appear, all that they do *non judice,* and void." (Washington, J., *Kemp* v. Pet. C. C., 36.) In *Rex* v. *Croke,* Cowper, 29, proceedings were quashed on *certiorari,* Lord Mans- : "This is a special authority, delegated by act of nt to particular persons, to take away a man's prop- estate against his will, therefore, it must be *strictly* and must appear to be so upon the *face* of the

in *State* v. *Metzger,* 26 Mo., a conviction for an nd battery before a justice of the peace in Gasconade vas set aside, because it did not appear on the face of edings that the assault was committed in the county.

So in *Proctor* v. *The State of Delaware,* 5 Harr., 38
conviction before a justice of the peace of a non-residen
negro coming into the state, was quashed on *certiorar*
cause, for one reason, the record of the conviction di
show that the coming into the state was after the passa
the act, the court saying: "In a specially delegated ju
tion and a proceeding under a penal law, the record must
everything requisite to bring the case within the jurisdi
and the offense within the law."

Now, the oft-cited case of *Rex* v. *Morely,* 2 Burr.,
arose under the conventicle act of 22 Car., 2, c. 1. M
was a Methodist preacher, and had been convicted unde
act before a justice of the peace, had appealed to the qu
sessions, been tried by a jury and judgment given agains
on their verdict. A *certiorari* having been issued o
King's Bench, counsel for prosecution contended that aft
this, a writ of error might lie, but not a *certiorari,* whic
only lie where there is no other remedy. They also ci
clause in the sixth section of the act: "That no other
whatsoever shall intermeddle with any cause or caus
appeal upon this act, but they shall be finally determin
the quarter sessions only." Counsel for the writ argue
these words "meant no more than that the facts shall
re-examined, but the legality may, or a want of jurisd
may be taken advantage of. The case may be such th
justice had *no* jurisdiction of the matter." The cour
unanimously of the opinion that the writ ought to issu
say: "A *certiorari* does not go to try the *merits* of the
tion, but to see whether the limited jurisdiction have *exc*
their bounds." The defect in the proceedings was, that
not appear on their face that the defendant was a subj
the realm, which was an essential requisite.

The case of *King* v. *Jukes,* 8 T. R., 542, was that
conviction, and an appeal to the quarter sessions with
to hear and finally determine the matter. Yet the conv
was quashed in the King's Bench on *certiorari,* becau

ation did not negative an exception introduced into the
e. The objection, the court said, was one of substance,
as similar in principle to that urged against the convic-
n *Rex* v. *Morely*.

Cates v. *Knight*, 3 T. R., 442, it is said by Erskine,
ord, Garrow and Marryat, in argument: "This is a
on which goes to the jurisdiction of the court, concern-
hich the rule has long been settled, that the superior
at Westminster can only be ousted by express words."
reporter, in a note, cites the case of *Rex* v. *Morely*,

will be noticed that not one of these cases goes to the
of holding that where an inferior tribunal is proceed-
thin the bounds of its jurisdiction, with power to hear
nally determine, its decisions can be reviewed on *cer-*
i for error, strictly, either of law or fact. The point
een expressly ruled otherwise in *People* v. *Betts*, 55 N.
00. The court were not cited to this case by counsel,
s relevancy to the question under consideration requires
it should not be overlooked. The case was a common
certiorari to commissioners on their second report, ap-
ed to assess damages to the owner of real estate, taken
railroad company for the purpose of its road. The
e enacted that "the second report shall be final and con-
e on all the parties interested." Notwithstanding this
age, it was insisted that the way was still open by a
on law *certiorari* for a review of any *legal errors* com-
d by the commissioners, upon a second appraisal. The
on, by Mr. Justice Folger, says: "We fail to perceive
xemption is attained from the express prohibition of the
e, that the second report shall be final and conclusive on
e parties interested, any more by a common law *certiorari*
by any other proceeding for a review and correction of
The office of a common law *certiorari* is, in strictness,
y to bring up the record of the proceedings of an in-
court or tribunal, to enable the court of review to deter-

mine whether the former had proceeded within its ju
tion, and not to correct mere errors in the proceedings."

The learned judge then goes on to show how the or
office of the writ had been extended in New York by ju
decisions, "not only to bring up the naked question of
diction, but the record, as well as the ground or princip
which the inferior jurisdiction acted, and the question c
on which the relator relies." Further on he says: '
when the statute says that the second appraisal shall be
and conclusive, it is not that it means only to refuse that
of remedy (appeal), but that it means to deny any re
Nor do any of the decisions above cited authorize, ho
intimate, that in such case the common law writ of *cert*
may be availed of to review *erroneous decisions,* or pr
ings of boards or inferior tribunals."

The weight of this authority presses heavily against th
made for the appellant. The distinguished and able co
who appeared for the appellant, were unable to find an a
ity that showed, or tended to show, that legal errors
mitted by an inferior tribunal, proceeding within the b
of its jurisdiction, can be reviewed on *certiorari,* whe
statute makes such tribunal the final judge of the matte
mitted to its decision. The only semblance of an aut
for such a position was a dictum from *State* v. *Cock*
Richardson [S. C.], which, counsel did not note, had
overruled in *Ex parte Childs,* 12 S. C., 111.

In the case of *Ex parte Heath,* 3 Hill, 50, the r
claimed to have been elected assessor of the sixth ward o
York. It was the duty of the mayor to administer the
of office, which he refused to do, because, in the special r
of election made to him by the board of canvassers, the
they were unable to declare what persons were elected
reason of the lawless violence committed upon the insp
of the first district, whilst in the act of counting the b
and the dispersion of the ballots before they were co
the history of which is contained in the return of said i

copy of which is hereto annexed." There were four
in the ward, from three of which regular returns
ade and received by the mayor. The relator moved
rit of *mandamus* to be directed to the mayor, com-
g him to administer the oath of office to the relator,
court directed the writ to issue, because the failure to
e return from the first district did not annul the elec-
Among other things, it was urged by counsel, that ex-
cognizance of all questions concerning elections be-
to the common council. The court did not deem the
on the application for the *mandamus* identical with
stion of election. But referring to the words, "each
hall be the judge of the qualifications of its members,"
opinion that it would be difficult to show that the
ent amounted to anything more than the bestowment
wer concurrent with its own. The words did not, like
rter of 1830, speak of a *sole* power in the common
Commenting on that charter, they then go on to
f the words of the charter had, or came afterwards
the force of a statute, still it might be answered that
ins no clause expressly denying to the King's Bench,
court holding its place, the exercise of its general
n the particular place. The word *solely* might, by a
construction, imply an intent to take away the power.
t a statute declaring the decision of an inferior court
ve or final, be construed to take from this court the
o review the decision by *certiorari*. But it has been
at these or the like words shall not be construed to
superior court of its supervisory power; and that to
tatute such an effect, the legislature must say, in so
ords, that they 'intended to take the power away.'"
Lawton v. *Com. of Cambridge*, 2 Caines' Rep., 179;
ng v. *Com. of Fens*, 2 Keble, 43; *Rex* v. *Morely*,

views, as construed for appellant, are irreconcilable
e decision of Mr. Justice Folger, in 55 N. Y. But.

in fact, there is no conflict between them; as may be rea
shown. The opinion in *Ex parte Heath* was written by
Justice Cowan, and the same judge gave the opinion of
court in *Ex parte Mayor of Albany*, 23 Wend., 277, 278,
he there cites the case cited by him above, from 2 Ke
which was a question whether the commissioners had *pure*
their power, and says: "This case declares another prine
which has been held by this court, that a writ of *certio*
will lie to an inferior tribunal, even though the act by wh
it is created declared its adjudication to be final. (Vide *L*
ton v. *Com. of Cambridge*, 2 Caines' Rep. 179.) In 2 K
it was held to lie, though the act declared the proceed
should be without appeal. This was a vigorous assertion
jurisdiction, but the compass of the writ is carefully lim
at the same time, as we have lately held in a series of ca
The amount of these is, that we will not go beyond the q
tion of *power*, which is *another word for jurisdiction.*"

The opinion of the same judge, in *Birdsall* v. *Philips*,
Wend., is explicit that the erroneous decision of an infe
tribunal, upon questions of either law or fact, cannot be
viewed on *certiorari*. "This writ," he says, "is but an e
nation from the general supervisory duty of the supreme co
to restrain the action of all inferior magistrates within t
legal grasp." Thus it clearly appears, that by his languag
Ex parte Heath, he meant no more than that the writ
where the inferior tribunal exceeded its legal bounds.

In *Lawton* v. *Com. of Cambridge*, 2 Caines' Rep. 117,
commissioners of highways had laid out a highway, wh
on an appeal to the judges of the common pleas, had b
confirmed, and the statute declared the decision of the ju
conclusive. The court take it as well settled, that a *certio*
will lie even where the inferior tribunal is authorized fin
to hear and determine. But, as in all the other cases,
objections made to the proceedings, though not sustained, w
deemed jurisdictional; counsel arguing, "for as the whole p
ceeding is in derogation of the rights of individuals, noth

be taken by way of intendment." On the face of the
rn it appears that the road was laid out contrary to law.
he cases of *Leroy* v. *The Mayor*, 20 John., 43, and *Peo-*
v. *Assessors*, 3 Lansing, add nothing to the case. In 3
sing the court say, "the writ lies in such cases for the
pose of ascertaining whether the inferior tribunal has kept
in the *power* conferred upon it."

he case of *Ackerman* v. *Taylor*, 8 N. J. L., [3 Halstead]
draws the distinction between the power to review on the
ts and for excess of jurisdiction, and goes to maintain the
of the respondent. The case was upon a statute provid-
that no *certiorari* shall be issued to remove proceedings
in pursuance of the provisions of the act. But the court
suppose the proceedings are had, not *in pursuance*, but
er *pretense*, of the statute? Can it be supposed that the
lature intended, in such a case, to deny the use of the
f They were of the opinion that, notwithstanding the
te, legal subjects of inquiry might be presented for their
deration on *certiorari*, but say: "Although we do not
mine the merits of their decisions, from which we are
ained by the just effect of the final and conclusive quality
hed to them, we nevertheless inquire whether they have
ised or exceeded the jurisdiction given to them; whether
have pursued the powers granted in their creation, or
ed others never confided to them. The superintending
of this court, and the use of the writ of *certiorari*, are
ubt within the scope of legislative action; may be re-
ed, abridged, perhaps abolished. Yielding on the one
to the will of the legislature, we are on the other to deny
rit to a citizen in no case where he may lawfully claim it."
rfree v. *Leeper*, 1 Overton (Tenn.), 1, (1791) has noth-
nore than what is to be found in that part of the opinion
x *parte Mayor of Albany*, already cited. A case from
reports of Tennessee, much more in point, is *Wade* v.
rry, 2 Sneed, 50, (1854). This was a proceeding to con-
t the election of Murry to the office of attorney-general for

the fourth judicial circuit of Tennessee. The legislature provided a special tribunal for the trial of contested elect before which a contest for the office of attorney-general had, and the election declared void. Murry then applie a *certiorari* to review the decision. Under the act of legislature, as construed by the court, the decision was and conclusive. The election had been declared void, bec "the sheriff of Smith county had failed to open and hol election in the ninth civil district of said county; and sheriff of DeKalb had, in like manner, failed to open hold an election in the thirteenth civil district of the named county." So that the facts being admitted, the sion of the inferior tribunal, alleged to be erroneous, was a question of law. The case presented to the court, there was precisely the case now before this court. The court that the writ would not lie, and say: "It is true that tribunal, created by the act of 1854, is an *inferior* jurisdi in the meaning of our constitution and laws, and it is eq true that the *certiorari* is the appropriate method by w the circuit court, as a court of general jurisdiction, exer control over all inferior tribunals. But it would be co dictory to hold that a writ of error proper would not lie, yet the *certiorari*, as a substitute for the writ of error, n be maintained; and it would be no less contradictory or ab to hold that a decision intended to be final and conclu could be reviewed in any mode whatever." (See also *parte Childs*, 12 S. C., 111.)

The writ of *certiorari* has no peculiar virtue that exe or tends to exempt it from statutory control. It was nature of its office, not any inherent power in the writ i that created the apparent exception. When the operatio the writ was extended to an examination into errors of it fell at once within the operation of statutes making decisions of the inferior tribunal final and conclusive. because the common council is an inferior tribunal, exerc judicial powers, whose procedure is not according to the c

of the common law, that the right to review its determination is claimed. Concede this, and, also, that the appellant has no other remedy. This gives to the application for the writ all the strength that it is possible to give it. But the decision of the council, as we have seen, is final and conclusive by the statute. Under such circumstances, the court are unanimously of the opinion that the law is settled beyond doubt or controversy, against the power of the circuit court to issue the writ in a case like that for which it is demanded.

Counsel for the appellant in their brief say: "Suppose that the council had found, from the evidence before it, and entered of record, that plaintiff had received 2,000 votes, and that defendant had received 1,500 votes, and then the council could, upon this finding, determine and decide that defendant was duly elected, and award him the office; will counsel for the respondent assert that this could not be corrected on review? Would the courts be powerless to set aside this glaring abuse of authority?" Probably not; because in the case supposed, there would be an abuse of authority—not an erroneous exercise of it—an excess, not an erroneous exercise of power.

The case before us is different. The decision complained of was one which the council had a strict, legal right to make. Their decision, at the most, is but erroneous on the merits—not void—a question of which the council, not ourselves, are the final judges.

That section 9 of article 7 of the constitution of the state, gives power to the legislature to make the decision of the council final and conclusive, is a position taken by counsel for the appellant, but which is not supported by any authority and, or which it is believed possible to cite. A statutory right may be restricted to a statutory remedy. A legislature may abolish the office of mayor at any time it sees fit. How much more may they put restrictions upon the right to the office. And, too, if such a construction could be put on the constitution, it would leave the remedy by *quo warranto* open

to the appellant, which must have the effect to defeat t
proceeding.

The case has been erroneously entitled by counsel as agai
D. P. Thompson, instead, as it should have been, against
common council of the city of Portland. (*W. & N. R.*
Co. v. *Railroad Commissioners*, 118 Mass., 563; *Crawfo*
v. *Township Board*, 22 Mich., 405.)

The judgment of the circuit court should be affirmed, and
is so ordered.

Judgment affirmed.

HALL v. HALL.

DIVORCE—CRUEL AND INHUMAN TREATMENT.

A husband, who, in disregard of his wife's remonstrances, continues
keep at the family domicil other persons for whose support he is
legally or morally bound to make provision, who habitually t
her with disrespect, apply coarse and degrading epithets to her,
so conduct themselves toward her as to justify a reasonable ap
hension on her part of danger to her person from their viole
while endeavoring to perform her duties, and exercising only
proper and legitimate authority in the affairs of her househ
adopts such misconduct as his own, and must be held respons
for it to the same extent as if it were his own, in a suit for divo
brought against him by his wife, on the ground of cruel and
human treatment and personal indignities, rendering her life bur
some.

Bamford v. *Bamford* followed in respect to decree affecting real prope

APPEAL from Marion.

Bonham & Ramsey, and Rufus Mallory, for appellant.

Contend that acts or words, to constitute cruelty, must p
duce bodily pain or ill-health. To a sensitive person, wo
may constitute legal cruelty, but to an expert in the use
billingsgate, words have no terror. (*Powelson* v. *Powels*
22 Cal., 359; *Johnson* v. *Johnson*, 14 Cal., 460.)

The facts do not constitute either cruelty or personal indignities. If the parties are in *pari delicto,* equity will not relieve. (*Wood* v. *Wood,* 2 Paige Ch., 111; *Mattox* v. *Mattox,* 2 Ohio, 234.)

It is not alleged in the pleadings that Mr. Hall has any property, and the prayer of the complaint does not ask for any. (*Bamford* v. *Bamford,* 4 Oregon, 36; *Kershaw* v. *Kershaw,* 3 Cal., 312.)

The complaint should allege the existence of common property in divorce suits, to enable the court to make a decree concerning the same. (*Howe* v. *Howe,* 4 Nevada, 469.)

C. A. Sehlbrede and Tilmon Ford, for respondent.

Submit, that to render the condition of a wife intolerable and her life burdensome, it is not necessary that there should be blows, or cruel and barbarous infliction of batteries that danger her life. There may, without that, be such indignities to her person as to render her life a burden. (*Elms* v. *Elms,* 9 Barr [Penn.], 166.)

"A husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life and health of his wife, although such conduct may be unaccompanied by violence, positive or threatened." (*Butler* v. *Butler,* Parsons, 329.)

As to the respondent's right to a decree for an undivided third of the real estate owned by the appellant at the date of the decree, the following authorities are cited: Civil code, section 495; *Wetmore* v. *Wetmore,* 5 Oregon, 469; 48 Texas, 9; 9 Maine, 140; 39 Cal., 161.

By the Court, WATSON, J.:

The respondent commenced this suit in the circuit court for Marion county, on February 3, 1881. On the 5th of the same month, the appellant also commenced a suit for divorce in the same court. The ground in each was "cruel and inhuman treatment, and personal indignities, rendering life bur-

densome." The two cases were consolidated and tried together in the court below, and the respondent had a decree in her favor. The appellant's suit was dismissed. From both decrees he has taken an appeal to this court.

The evidence is quite voluminous, but we deem it unnecessary to discuss it here at any great length. We should hesitate long before affirming the decree of divorce on the ground of direct misconduct on the part of the husband alone. He was inattentive to the wants and comforts of his wife, and in his conversation with her, and in her presence, coarse and profane. But such seem to have been his general character and habits. It does not appear from the evidence, however, that he was intentionally unkind, as a general rule, or wanting in a proper degree of affection for her.

But the appellant had one son and two daughters, by a former wife, who were grown up, and who seem to have possessed the unfavorable characteristics and offensive habits of their paternal relative, without the sentiments of affection and regard for their step-mother which he entertained, and which, though not excusing, did unquestionably mitigate the harshness of his conduct, and render it more easily to be endured.

It appears from the testimony, that apprehending difficulty if she should attempt to live with the appellant, in the same house with these children, she made it a condition of her intermarriage with him, that he should provide for them elsewhere, and to which he agreed. He did not keep his promise, and although it nowhere satisfactorily appears in the evidence that Mrs. Hall was lacking in kindness and proper regard for the comfort and welfare of her step-daughters, it does appear, plainly enough, that they not only failed to render a due measure of assistance in discharging the duties of the common household, but were habitually disobedient and disrespectful toward her, and did not hesitate, without any provocation or excuse, to apply to her insulting epithets, of a character so coarse and vulgar as would have shocked the sensibilities of a woman of ordinary refinement beyond the point of endurance.

only this, but the younger of the two, on one occasion, lly assaulted and beat her step-mother, under such cir- ances as caused her conviction and punishment in a nal action, for the offense. And we are satisfied, from e evidence relating to the disposition and conduct of daughters towards her, that she might justly apprehend urrence of such events, while endeavoring to discharge roper and legitimate duties, in her husband's household. ere can be no question, we think, upon the evidence, he left her husband's house, and sought this divorce, on nt of this ill-treatment by her step-daughters, and only she had learned from sore experience that she could not n peace and safety under the same roof with them; and the actual and definite refusal of her husband to send away, or provide for them elsewhere. All these facts within his knowledge, and he either could not, or would ontrol his daughters, or comply with his wife's request d them away, or make other provision for them.

our judgment, the appellant by this course, adopted the nsibility of their misconduct towards his wife, and made cruel and humiliating treatment his own. And we in connection with his own defaults in the discharge of al duties, it was sufficient to render the respondent's life nsome, and that there is sufficient ground to believe that was its effect. At least, we are not satisfied to disturb ecree of the court below in the matter.

e witnesses were examined orally in the presence of that and a better opportunity afforded it to judge correctly eir credibility than we can have, with only their written ony before us. We are also satisfied that the custody alter Wade Hall, the minor child of said marriage, was rly awarded to the respondent.

e circuit court, after granting the divorce to the respond- ogether with the custody of the said minor child, pro- d to enter a decree in her favor, in general terms, for the ided one-third of all the real property then owned by

the appellant, under section 498 of the code. There w
allegation in the complaint, or in any of the pleadings,
the existence of such property, nor any claim for such r
Nor does the decree find that appellant owned any such
erty, or describe any such. The appellant claims that thi
error.

That it is in conflict with the views of this court in
ford v. *Bamford,* 4 Oregon, 30, there can be no doubt
it is supported by the opinion of Judge Deady, in *Barr*
Failing, decided June 27, 1880, in the U. S. Circuit
for Oregon. He did not decide the point, however; no
it decided in *Wetmore* v. *Wetmore,* determined in this
subsequent to the decision in *Bamford* v. *Bamford, s*
and reported in 5 Oregon, 469, which was cited as susta
the same view.

After as thorough an examination as we have been al
give the subject, we are not satisfied that the principles
ciated in *Bamford* v. *Bamford* are incorrect, and we feel
strained to acknowledge its authority as decisive upo
question before us.

The decree, so far as it attempts to affect the real pro
of the appellant, is reversed, but in all else affirmed;
party to pay his or her own costs on appeal.

The decree of the court below, dismissing the suit o
appellant, is affirmed, with costs to the respondent.

Chief Justice Lord, not being satisfied of the sufficien
the evidence to justify the decree, expresses no opinion.

STATE v. JACKSON.

WITNESSES—COMPETENCY OF CHILDREN.

is no precise age within which children are excluded from giving timony. Their competency is to be determined not by their age, by the degree of their understanding and knowledge.

ble them to testify, it is essential that they should have sufficient elligence to observe and narrate, and possess a due sense of the ure and obligations of an oath.

r the court to decide the question of their competency when they offered as witnesses, and its decision cannot be reviewed, unless re is clear abuse of its discretion, or a violation of some legal ciple in admitting or rejecting such witnesses.

ever in such case it is proposed by a bill of exceptions, to show t the conclusion reached by the court was an erroneous exercise or an abuse of, its discretion, it must contain all the evidence n which such conclusion was founded, and unless this is made to pear in the bill of exceptions, either expressly or by necessary im- cation, the presumption of other and sufficient evidence to support s finding or decision of the court will be presumed by the appellate urt.

PEAL from Multnomah. The facts are stated in the ion.

C. A. *Ball, and Gregory & Williams,* for appellant.

Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, are not admissible as witnesses. (Civ. Code, section 701.) To be capable of relating them truly, it is necessary that they have sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath. (*People* v. *Bernal,* 10 Cal., 66; *Rex* v. *Williams,* 7 C. and P., 320; Best on Evidence, vol. 1, page 281; 1 Phil. Ev., 19; *People* v. *McNair,* 21 Wend., 607.)

John F. Caples, District Attorney, and M. F. Mulkey and W. H. Adams, for the State.

It is for the court to decide the question of the competency of children when offered as witnesses. No hardship neces-

sarily results, for if the judge should chance to err in hi
clusion, the jury hold a powerful corrective in their ri
pass upon the credibility of the witness as tested on the
by the usual appliances. (*State* v. *Scanlan*, 58 Mo.,
State v. *Whittier*, 21 Me., 347; *People* v. *McNair*, 21 V
608; *State* v. *Davidson*, 39 Texas, 139; *State* v. *Wa*
Ala., 164; *Fuller* v. *Fuller*, 17 Cal., 605; *State* v. *T*
Or., 181.)

By the Court, LORD, C. J.:

The appellant was tried and convicted, at the June
1881, of the circuit court of Multnomah county, for the
of an assault with intent to commit rape upon the per
———, a female child under the age of fourteen years
the trial, for the purpose of identifying the appellan
prosecutrix was called as a witness by the state, and the
mony having shown that she was not quite seven years o
counsel for the appellant objected to her being swor
account of her tender years, and because she was too
to understand the nature and obligations of an oath.

By direction of the court, the district attorney made
liminary examination of the witness as to her compete
testify. After asking several questions as to her age, f
place of residence, father's business, and place of busine
of which, it is stated in the record, she appeared to a
correctly, the bill of exceptions discloses some other inq
of this purport: "Do you know what it is to testi
court—what it is to be a witness in court—what it me
take an oath to tell the truth here in court?" To es
these questions the witness made an answer in the neg
but whether these were all the questions propounded, or
further inquiry was made to satisfy the court of the c
tency of the witness, the bill of exceptions does not di
The court decided the witness to be competent, and adm
her to be sworn.

Our code provides that the following persons are n

missible as witnesses: "Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." (Civil Code, sec. 701, sub. 2.)

There is no precise age within which children are absolutely excluded from testifying. Under a statute, it is thought to be identical with ours, at the time the opinion was delivered, in the *People* v. *Bernal*, 10 Cal., 66, Mr. Justice Field said: "Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge. It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath."

An examination of the authorities satisfies us that the rule considered to be well settled, as well in criminal as in civil es, that whenever there is sufficient intelligence to observe ts and narrate them correctly, and a due sense of the nature l obligations of an oath, then children of any age may be mitted to testify. (Wharton's Law of Evidence, vol. 1, 398, and notes; 1 Phillips on Evidence, 11; 1 Greenleaf Evidence, sec. 367.)

is for the court, by means of a preliminary examination, decide the question of their competency when they are red as witnesses. (1 Wharton's Law of Evidence, sec. and cases cited.) When, then, as in this case, a witness ojected to as incompetent, on the ground that he does not ess a sufficient degree of intelligence to observe and narfacts correctly, and to understand the nature and obligas of an oath, it becomes the duty of the court to determine competency of the witness; and the authorities are uni- n in holding that its decision cannot be reviewed, unless a r abuse of discretion is made manifest, or that the court lated some legal principle in the admission or rejection of s witness. (*Wade* v. *State*, 50 Ala., 166; *Commonwealth*

v. *Mullins,* 2 Allen, 295; *State* v. *Levy,* 23 Minn., 10
Gallin v. *State,* 39 Texas, 130; *Brown* v. *State,* 2 Tex. C
App., 122; *State* v. *Scanlan,* 58 Mo., 205; *State* v. *Rich*
28 La. An., 328; 1 Wharton's Law of Evidence, sec. 400, a
cases cited.)

The reason of this rule is apparent. Where the witness
a mere child, and, as in this case, a female, and introduc
under unaccustomed and embarrassing circumstances, the p
siding judge enjoys peculiarly favorable opportunities
decide the question of her competency correctly, and no pos
ble hardship can result from the large discretion with whi
the law has invested him; for, as was said in the *State*
Scanlan, supra, "if the judge should chance to err in
conclusion, the jury hold a powerful corrective in their rig
to pass upon the credibility of the witness as tested on t
stand by the usual appliances."

On the other hand, under the direction and instruction
the court, an intelligent jury is not apt to err in giving
proper force and effect to the testimony of such a witne
but even if error should happen here, it is always within
power of the judge to correct it by a new trial.

From all this it becomes manifest that whenever it is p
posed, by a bill of exceptions, to show that the conclusi
reached by the presiding judge at the trial is an erroneo
exercise of, or an abuse of, his discretion, it must contain
the evidence, pertinent at least, upon which such conclusi
was founded, otherwise the presumption of other and sufficie
evidence to support the opinion of the judge will prevail.
must be embodied in the bill of exceptions, or in some ma
ner so made a part of it, that there can be no doubt that t
supreme court has precisely the same evidence before it whi
was before the court below. And unless this is done, and
is made to appear expressly, or by implication, in the bill
exceptions, that all the evidence is before us which w
adduced, and upon which the finding of the judge was base

we will presume that he had sufficient evidence to support his findings.

As applicable to this case, and in our judgment with much stronger reason, we adopt the principle laid down in the *State v. Tom*, 8 Or., 179, wherein the court say: "It does not appear, from the bill of exceptions, whether or not all the evidence that was before the circuit court had been reported to this court. We cannot, therefore, try the challenge here. This court will not review any questions of fact unless all the evidence is reported on which the circuit court based its decision or finding. If all the evidence adduced in the court below, in the trial of these challenges, is in the bill of exceptions, *that fact should be stated*, and as it is not stated, we must presume that the circuit court had sufficient evidence to support its finding."

But independent of this objection, if the questions stated, to which negative answers were given, were the only questions addressed to the witness on that particular subject, taken in connection with what had preceded, and the instruction and admonition of the judge, they by no means, in our judgment, establish a clear case of abuse of discretion, or the violation of any legal principle, in allowing the witness to testify. Older and wiser persons might have failed to answer these same questions, without creating such imputation upon their intelligence, or proper application of the nature and obligations of an oath, as would exclude them as witnesses. Neither in form nor substance are they calculated to probe the conscience of such a witness, and to ascertain her competency in reference to the nature of an oath as a religious obligation and solemn appeal to God, that is the principal subject of inquiry when an examination of this character is made. (1 Phillips Evidence, 12; 1 Wharton on Law of Evidence, sec. 400. and cases cited in note 6.) The judgment of the circuit court is affirmed.

Judgment affirmed.

HASS v. SEDLAK.

PRACTICE—SERVICE OF SUMMONS.

In 1867, R. and wife mortgaged the real estate of the wife, to s
the payment of a promissory note. In 1868, a suit to foreclos
mortgage was commenced in the circuit court for Multnomah cou
service of summons was made upon the wife, and upon R., by d
ering a copy to the wife of said R., a white person, over the
of 14 years, at his usual place of abode. R. and wife made def
and a decree was entered, under which the property was sold
ultimately conveyed to defendant. In 1879 R. and wife, by a
claim deed, conveyed the property to B., and B. to the plai
After the conveyance to B. the sheriff's certificate of service
R. was amended. *Held:*

1. That the record must affirmatively show that R. could not be fo
to authorize the substituted service; that service upon the wife
was a nullity.
2. That if the defendant would take advantage of the form of con
ance to B. by quit-claim deed, to affect B. with notice of outstan
equities, if any, in favor of the defendant, he must resort to a
of equity.
3. That the amendment of the sheriff's certificate could not affect r
previously vested in B.

APPEAL from Multnomah. The facts are stated in
opinion.

O. P. Mason, and Shattuck & Killin, for appellant.

The property in controversy being the separate propert
Mary Jane Rickards, her husband had no interest in it,
he was not a necessary party to the suit. (*Ackley* v. *Tar*
29 Barb., 512; *Newberry* v. *Garland,* 31 Barb., 121; *I*
v. *Marques,* 46 Mo., 48; Bishop on Married Women, sect
824, 1828, 839.)

The case of *Kennard* v. *Saxe,* 3 Or., 263, recognizes
same principle. The plaintiff could proceed against
parties served.

Unless the return clearly contradicts the recital in
decree, the decree will be presumed regular. (*State* v.

l, 5 Or., 226; *Strong* v. *Barnhart*, 6 Or., 93; *Arrington* *iscom*, 34 Cal., 390; *Quivey* v. *Porter*, 37 Cal., 463.)

espondent is not a *bona fide* purchaser in good faith, be-
e he claims under a quit-claim deed, and there is no
ence of good faith other than the deed. (*Rodgers* v.
chard, 7 Am. Rep., 283; *Marshall* v. *Roberts*, 10 Am. Rep.
; *Dorris* v. *Smith*, 7 Or., 267; Washb. on Real Property,
)

. *S. Beebe*, for respondent.

ppellant claims title under the foreclosure proceedings in
case of *Carney* v. *Rickards, et al.* The record in that
shows, that Mary Jane Rickards was a married woman,
that her husband, William Rickards, was not joined with
in the suit. He was named in the complaint and sum-
s with her, but was not served with process, and therefore
a party. (*Craft, et al.*, v. *Tuttle*, 37 Ind., 333; *Don-*
y v. *Graham*, 77 Penn. St., 274; *McArthur* v. *Franklin*,
hio St., 493.)

he wife was sued alone, which could not be done at com-
law, or under our statute. (Code, 110, sec. 30; *Swayne*
Lyon, 67 Penn. St., 439; *Cowing* v. *Manly*, 49 N. Y., 193;
rish v. *Eager*, 15 Wis., 594; 2 Kent's Com., 161; Code,
. 5, p. 663.)

An attempted service upon the husband, by delivering the
ocess to the wife for him, cannot be construed into a service
on her. (*Helms, et al.*, v. *Chadbourne*, 45 Wis., 60; *Bug-*
e v. *Thompson*, 41 N. H., 183.)

By the Court, WALDO, J.:

This is an action of ejectment for lot 9, in block B, in
aruthers' addition to Caruthers' addition to the city of Port-
nd. This lot, on the 9th day of September, 1867, was the
roperty of Mary Jane Rickards, a married woman, and on
at day was mortgaged by her and her husband, William
ickards, to secure the payment of a promissory note. On
e 14th day of November, 1868, while Mary Jane Rickards

was still a married woman, the mortgage was foreclosed,
the defendant in this suit deraigns title through mesne
veyances from the purchaser at the foreclosure sale.
plaintiff deraigns title from said Mary Jane and Wil
Rickards, through a deed from them to W. S. Beebe, d
May 13, 1879, and a deed from said Beebe to the plainti

The plaintiff's title rests upon the invalidity of the d
of foreclosure to divest the title of Mary Jane Rickards.
suit to foreclose the mortgage was entitled as against Wil
Rickards and Mary Jane Rickards, but no process was se
upon the husband, unless the certificate of the sheriff tha
served a copy of the summons on William Rickards,
delivering a copy thereof to Mary Jane Rickards, wife o
said William Rickards, a white person, over the age of
teen years, at his usual place of abode," be deemed a ser

Sullivan v. *Settlemier,* 97 U. S. 444, is an authorit
decision on the question. It was held in that case, as the
had been affirmed in an earlier case in this court (*Trulli*
v. *Todd,* 5 Or., 86), that such a certificate of service w
nullity. It follows that no service of process was had
the husband, and that in legal effect the wife was sued a
(*C. S. M. Co.* v. *Water Co.,* 1 Sawyer, 170.)

According to the common law, service of process upo
wife, without the husband, had no legal validity; for, in
templation of law, she had no legal individual person
Her person was legally merged in that of her husband. B
she could not be sued alone, for this would imply a
existence separate from her husband, and for the fu
reason that she had no power to employ an attorney to ap
for her.

The authority of an attorney rests upon contract, and
not be conferred by a party incapable of making a cont
This unity of person was represented by the husband,
had to be joined in all civil actions in which the wife w
party, and who had power to employ an attorney for
Where the fact of coverture was shown on the face o

record, service upon the wife alone was necessarily void. Bigelow on Estoppel [2d ed.], 47, and authorities cited; Higgins v. *Peltzer*, 49 Mo., 152; *Kowing* v. *Manly*, 49 N. Y., 201; *Norton* v. *Meader*, 4 Sawyer, 603; *Griffin* v. *Ragan*, 52 Miss., 78.)

No service, then, having been made on the husband, in the suit in which the decree of foreclosure was pronounced, the court acquired no jurisdiction over the person of the wife, or to decree the foreclosure of the mortgage, unless there is something in the law of the state changing the rule of the common law.

In 1868, when the proceedings were had, there had been no change in the law, except that by the constitution of the state, exempting certain property of the wife from being subjected to the debts or contracts of the husband, and by section 40 of the civil code, providing that where a married woman is a party her husband shall be joined with her, except that:

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next of kin.

Thus, while her rights of property were enlarged, disabilities of coverture largely continued. The wife could not be sued alone in any case, except the action was between herself and her husband. Her power to dispose of her real estate was not enlarged. Her sole deed was still absolutely void. Neither the constitution nor the statute gave her power expressly to contract, and such power as she may have had resulted as a consequence of the rights conferred. These rights were given her for her security and protection, and did not extend to the making of the mortgage in question, or the proceeding to foreclose it. As to this transaction the legal unity of husband and wife was not dissolved, nor her power to contract enlarged. (*Pitman* v. *Pitman*, 4 Or., 298; *Frary* v. *Wheeler*, 4 Or., 190; *Snyder* v. *Webb*, 3 Cal., 83; *Reese* v.

Cochrane, 10 Ind., 195; *Tillinghast* v. *Holbrook*, 7 R. I., *Defries* v. *Conklin*, 22 Mich., 259.)

It follows that the rule that she could not be sued a reaffirmed by the statute, as well as much, at least, of reason of it, remained in full force. Hence the decree ent against her in the foreclosure suit was void.

The appellant also claims that the plaintiff is not a *fide* purchaser, because his title is evidenced by a quit-c deed. That is, that a purchaser by a quit-claim deed t with notice of outstanding equities—a question for a cou equity, not of law. (*Mann* v. *Bert*, 62 Mo., 491.)

The amendment of the return having been made afte acquisition of title by the plaintiff's grantor, cannot affe plaintiff's right to recover. (*Ohio Life Ins. Co.* v. *Ur Ins. Co.*, 13 Ohio, 227; *Glidden* v. *Philbrick*, 56 Maine, 2

Judgment affirmed.

STATE v. CLARK.

SEDUCTION—GENERAL REPUTATION.

The regular mode of examining into the general reputation is to i of the witness, first, whether he knows the *general* reputation person in question among his neighbors, and if his answer is affirmative, then he may be asked what that reputation is.

STARE DECISIS.

Stare decisis is the policy of the courts, and the principle upon rests the authority of judicial decisions as precedents in subse litigation; and this doctrine is not to be departed from, except subsequent examination shows the case to have been decided trary to principle.

L from Marion.

e 17th of June, 1881, the appellant, William P. as indicted by the grand jury of Marion county for "one Mary M. Musser, an unmarried female of chaste character, of the age of 16 years." He was ds tried, and the jury brought in a verdict of guilty ed in the indictment. A motion for a new trial was d overruled by the circuit court. The defendant was tenced to four years imprisonment in the penitentiary. is judgment defendant appeals, assigning various of error, the principal of which will be found in the of the court.

Knight and Ben. Hayden, and Bonham & Ramsey, llant.

nd that character for chastity can only be shown in s: First, by showing actual general deportment of on. Second, by evidence of her *general* reputation tity among her neighbors.

tness can *know* that a woman is actually chaste. He ow that she demeans herself generally as a chaste or that she is generally reputed to possess purity of r among her associates. (*Page* v. *Finley,* 8 Oregon, *enich* v. *Fraud,* 6 Oregon, 212; *Eschbach* v. *Apple-* Md., 61; 1 Wharton on Evidence, section 54; *People er,* 27 Mich., 134; *White* v. *Muitland,* 71 Ill., 250; 1 f on Evidence, section 54.)

. *Piper, District Attorney, and C. B. Moores and 'Arcy,* for respondent.

aw will presume there was evidence to support the unless the contrary affirmatively appears. (*Fulton art,* 4 Oregon, 64; *State* v. *Wilson,* 6 Oregon, 428; v. *City of Portland,* 8 Oregon, 29; *State* v. *Lyon,* 10 0.)

the exception of appellant's counsel to the calling of s by the state to support and sustain the character of

the prosecutrix, after the defense had sought to impeach testimony by introducing witnesses to prove that she wa unchaste female, we think there was no error on part of court below in allowing the state to corroborate her testim and sustain her character, especially when counsel for defense attempted to prove specific acts of unchastity. general rule that where a witness' character for truth veracity is sought to be impeached, that the party calling witness will be allowed to sustain the witness' character think, will not be questioned by the appellant's counsel. this case, one of the essential ingredients of the indictm was that the prosecutrix must be of previous chaste chara When the defense attacked the character of the prosecu we certainly had a right, under the law, to support her c acter. (*State* v. *Shean*, 32 Iowa, 38; 2 Wharton's Crim Law [18 ed.], section 177.)

By the Court, LORD, C. J.:

The first assignment of error in the bill of exceptio to the following question in rebuttal, asked a witness fo prosecution: "If he knew what her (Musser's) characte chastity was in the neighborhood where she resided?" argument conceded that the word character, as used in question, was intended to be and is synonymous with rep tion; but it is contended that the word *general* should be fixed to it, as it is only the general reputation for cha which is proposed to be inquired about by the question.

Mr. Greenleaf says that the impeaching witness "mus able to state what is generally said of the person by among whom he dwells, or with whom he is chiefly co sant, for it is this that constitutes his general reputatio character." (1 Greenleaf's Evidence, 577.)

According to this statement of the text, it is the op generally entertained of a person in the neighborhoo which he resides that constitutes his general reputatio character. Now, the objection here is to the form of

on, in that it does not ask for the *general* reputation for y. If the question as put would elicit an answer for an general reputation, it is bad beyond doubt.

may it not be argued, that when the question is asked itness: "If he knew what her reputation for chastity n the neighborhood where she resided?" that reputation re used, not in a limited but in an unqualified sense, and s *general* reputation, and that the question would be monly so understood. When it is said of a person that as a good or bad reputation, it is only meant to convey opinion generally entertained of such person.

eputation being then what is generally said of a person in community, does not the question as above suggested, ire and call for an answer which will reflect what is gen- y said of such person, and is this not the general reputa- ? It is true this argument admits that the inquiry must irected to her general reputation for chastity, but it claims the form of the inquiry is immaterial, provided by its s it calls for the general reputation, and is not objection- in other respects.

Any question," says Judge Thurman, "not leading, that for the general reputation of the witness for truth is cient; and if the word reputation, when unqualified, does *i termini*, or in common parlance, mean general reputa- , as we think it does, it is unnecessary to prefix the word *ral*." (*French* v. *Millard*, 2 Ohio St., 50.)

ut it is claimed by the appellant, that to avoid the many arrassing questions which would arise for construction and y the administration of justice, our court has definitely ed the form of the inquiry in cases of this character, and ired the word *general* to be prefixed to "reputation." In *ly* v. *Page*, 8 Oregon, 46, the witness was asked what the tation of the party for chastity was—omitting the word eral—and the court held the question objectionable, be- e the witness was asked as to "her reputation instead of

her *general* reputation among her neighbors," and reve
the judgment and ordered a new trial.

In our judgment this is decisive of the case before us,
less *Finly* v. *Page, supra,* is to be overruled. We ima
it would be difficult to find a case overruled to maintai
conviction. *Stare decisis* is the policy of the courts, and
principle upon which rests the authority of judicial decis
as precedents in subsequent litigation, and this doctrine ou
not to be departed from, except when subsequent examina
shows the case to have been decided contrary to principle.

The court having erred in admitting the witness to tes
as alleged in the first assignment of error, it becomes un
essary to consider the other questions presented. The ju
ment is reversed, and this case will be remanded to the c
below for a new trial.

WEISS *v.* JACKSON COUNTY.

INJUNCTION—TRESPASS—PUBLIC OFFICERS—PRACTICE.

It is not in ordinary but in peculiar cases, where the mischief sougl
be prevented would be irremediable, and for which damages c
not compensate, or would reach to the very substance and valu
the estate and go to its destruction in the character in which it
enjoyed, that an injunction will be granted to prevent it.

Before a court of equity will grant an injunction to restrain a
trespass, the facts and circumstances alleged must be such
which it may be seen that irreparable injury will be the result o
acts complained of, and the law can afford the party no adeq
remedy.

Courts of equity have jurisdiction to interpose by injunction, where
lic officers, under a claim of right, *are proceeding* illegally to in
the rights or injure the property of individuals, or to prevent a
tiplicity of suits.

Section 871, Oregon civil code, requires all actions, suits or proceed
by or against a county, to be brought in the name of such county

PEAL from Douglas. The facts are stated in the opinion.

F. Dowell, for appellant.

S. Strahan, for respondent.

the Court, LORD, C. J.:

his is a suit in equity for an injunction. It comes to this t upon an appeal from a decree rendered upon the over- ng of a demurrer which admits the facts alleged to be true. hese facts, the only material ones are, for the purpose of case, that on the 5th day of August, 1870, the board of ty commissioners made an order pretending to establish unty road through certain lands of the plaintiff; that rding to the survey said road runs close to the dwelling e of the plaintiff, and cuts off his present front yard, in- ing part of his grapevines and flowers; that said road was partially opened in 1870, and that no part of the road opened more than thirty feet, and that his said grape- s and flowers remained unmolested; that afterwards, on 3d day of April, 1878, the said board of county commis- ers, without any petition to establish a public road, ordered supervisor to remove all obstructions in said road, and to the same through said tract of land of the complainant; the supervisor has notified the complainant to remove all ructions to said road; that the same will be opened sixty to the damage of complainant, and prays that the de- ants may be restrained.

he granting of an injunction is an equitable proceeding, the party seeking this peculiar equitable relief should that he has a right, under all the circumstances, to this aordinary writ. Where a matter is clearly, or *prima e,* one of legal cognizance, a party must, in order to main- an equitable action upon it, state facts sufficient to entitle to equitable relief, and to show that a perfect remedy ot be obtained at law. (*Hegwood* v. *City of Buffalo,* 14 ., 543.)

ut in respect to trespass, there is no doubt that the ancient

doctrine of courts of equity was not to interfere by injur tion, but to leave the party to his legal remedy. (Willarc Eq. Jur., 383.) In the progress of society, however, cou of equity have yielded to the pressure of public necessi and have accorded a much more liberal and energetic prot tion or relief by injunction, in cases of destructive damage property, than was formerly given in cases of an analogo character. All that courts of equity now require when tl extraordinary writ is invoked, is that "a strong case destruction or irreparable mischief should be presented." is not, therefore, in ordinary, but in peculiar, cases, where t mischief sought to be prevented would be irremediable, a for which damages could not compensate, or would reach the very substance and value of the estate, and go to destruction in the character in which it was enjoyed, that injunction will be granted to prevent it. (*Jerome* v. *Ross* Johns. Ch. R., 314; *Trustees Germ. Ev. Cong.* v. *Hesseli, al.*, 13 Wis., 348.)

This brings us to enquire whether the facts and circu stances alleged, and assumed to be true by the demurrer, a such from which it may be seen that irreparable injury w be the result of the acts complained of, and that the law c afford the party no adequate remedy. For the court must satisfied, from a statement of the grievances, that the inju would be irreparable, and it is enough if the court can d cover this from the allegation of facts. (*Davis* v. *Reed,* Md., 152; Hilliard on Injunctions, sec. 32.)

In cases like the one under consideration, the gravam then, of the action must be a threatened trespass, which, u less restrained, will result in irreparable injury. Now it alleged that the board of county commissioners ordered t supervisor to remove all obstructions and to open the roa but it nowhere appears that in pursuance of such order, proceeded or threatened to tear down the fences or enclosu or to dig up or destroy the grapevines or flowers of the co plainant, or to do any act, or threatened to do any act, wh

to his estate, which would deprive him of a part of the ance of his inheritance, which could not be specifically ced. From the allegations of the complaint the only it seems, that was taken by the supervisor in the prem- was to notify the plaintiff to remove all obstructions upon road, but it does not appear that in case the plaintiff ed or neglected to comply with the notice, the supervisor l proceed to remove the obstructions, or open the road. do, or threatened to do, any act or acts by virtue of such , or otherwise, which would go to the destruction of his itance and produce irremediable mischief. All that ap- from the allegation is, that the supervisor was ordered e board of commissioners to open the road and remove structions, and that he notified the plaintiff to remove bstructions. It does not appear that a trespass is about committed by the supervisor, by taking down fences and ng a road through the land of the complainant under rder of the board of commissioners. (*Wilson* v. *City of ral Point*, 39 Wis., 160.)

r the purposes of this case, it was conceded at the argu- that the order made by the board of commissioners in was illegal and void. The allegations in respect to this r are not sufficiently set out for the court to pass upon question, nor is it material to the decision of this case. n admitting the same, the respondents' counsel claimed nothing had been attempted or threatened to be done r the order, and for aught that appears in the complaint the suit was nothing more than an attempt to enjoin a ass that had not been even threatened by the parties. e is no doubt, however, that courts of equity have juris- n to interpose by injunction, where public officers, under m of right, are proceeding illegally to impair the rights jure the property of individuals, or where it is necessary revent a multiplicity of suits. (*Mohawk and Hudson . Co.* v. *Artcher*, 6 Paige, 88; *Belknap* v. *Belknap*, 2 s. Ch. Rep., 463, 6 idem., 497.)

But in all such cases, it will be seen that "the public offi under a claim of right, are proceeding illegally and imp erly" to do some act, or about to commit some trespass the land of the party, which will result in irreparable in unless restrained, where the jurisdiction of equity is i posed. Granting, then, that the order of the board of missioners was illegal, the facts alleged ought to show tha supervisor, in obedience to such order, was about to com or threatened to commit, a trespass, by tearing down enclosure and digging up the grapevines and flowers, in o ing the road through the land of the plaintiff, which if restrained or prevented would result in the destruction o estate in the character in which it was enjoyed. In *Gri* v. *Burnell,* 31 Cal., 406, it was a trespass about to be mitted, by taking down the fence and opening a road thr plaintiff's land in pursuance of an order of the board of missioners prematurely made, that caused the court to equitable cognizance of the matter. "The road-master his employes were proceeding professedly under the orde the board of supervisors, to remove plaintiff's fence an open the road," which is a different case from that prese by the facts under consideration.

It was also conceded by counsel for appellant, that the no person or body corporate in this state whose name is board of county commissioners, and that there were no pa defendant except Young. Our code provides, that "all act suits or proceedings by or against a county, are in the of such county." (Civil code, section 871.) Nor is it all that defendant, Henry G. Young, is supervisor within jurisdiction of the county commissioners, or anything i spect to his being a duly qualified officer or otherwise, ex that he has the word "supervisor" following his name i caption of the complaint; or that he threatens, intends, about to do any injury to the property or rights of the p tiff.

But aside from this, the reasons are too obvious that demurrer to the complaint was well taken, and the bill be dismissed.

SMITH v. COX.

PRACTICE—IMMATERIAL ERROR NOT GROUND FOR REVERSAL OF JUDGMENT.

Where the plaintiff claimed $2,500 damages, the defendant admitted $2,000, and the plaintiff obtained a verdict and judgment for the latter sum only, an error of the court below, in rejecting certain testimony offered by the defendant to reduce the amount of damages claimed, did not prejudice the defendant's rights, and is no ground for reversal.

FRAUD AND MISREPRESENTATION.

G. C. and son, on a bond given by them to secure a conveyance of title to land, and to recover damages for a breach of its conditions, defended on the grounds that the bond described a different tract than he intended, and also bound him for the conveyance of a different interest in the land than he intended and understood he was binding himself to convey. That he believed, when he executed the bond, only covered a certain tract previously sold to plaintiff by the son, W. Cox, for his own benefit, and only bound him to convey his interest therein; that this belief was induced, and his signature to bond obtained, by the false and fraudulent representations of the plaintiff's agent, made in his presence and hearing, without correction; that the bond only bound him to the extent indicated: *Held*, that testimony, showing that G. W. Cox, at the time he sold the land to plaintiff, went with him and pointed out the boundaries, and that the tract so sold was not the tract described in the bond, was admissible upon the question of fraud. It was a fact tending, at least, to prove that plaintiff knew, at the time the alleged misrepresentations were made, that they were false, and thereby establishing their fraudulent character, which was essential to the defense in law.

APPEAL from Marion. The facts are sufficiently stated in the opinion.

Mr. *Knight*, for appellant, Gideon S. Cox.

It omits that in the investigation of fraud, courts are, and should be, very liberal in the receipt of evidence. Any and all circumstances, however slight, which tend in the least to disclose the true character of the transaction, should be permitted to go to the jury. (Bigelow on Frauds, section 4, p. 476.)

A person dealing with an unlettered man, who can neither

read nor write, and taking from him a promissory n the payment of money, and a deed for property in t secure its payment, is bound to show, when he seeks to e them, that they, or the material parts of them, were re fully explained to the party before they were execute that he fully understood their meaning and effect. (v. *Myers*, 20 How., 506.)

Bonham & Ramsey, for respondent.

The contract being in writing, it is the best evidenc what land the witness contracted to sell and convey. not competent, *in law*, to show any mistake in the bond. (*Webb* v. *Rice*, 6 Hill, 219; *Patchin* v. *Pie* Wend., 61; 8 Johnson, 375; *Pierson* v. *Cahill*, 21 Cal *Taylor* v. *Baldwin*, 10 Barb., 582; *Hoxie* v. *Hodges*, 1 O 251; 1 Greenleaf on Evidence, section 275; Willard Jur., p. 73.)

By the Court, WATSON, J.:

This is an action for damages for a breach of the co of a title bond, executed by the appellant and his son, Cox, in favor of the respondent, in the sum of $4,000 condition alleged to have been broken was, that G. W should, on or before the 2d day of January, 1880, e according to law, to the respondent, and his heirs and a a good and sufficient deed of conveyance of the S. E. ¼ donation land claim of Gideon S. Cox and wife, in T R., 1 W., Will. Mer., containing 160 acres, conveying respondent the title, in fee simple, of said land, free all incumbrances, containing a general warranty and the full covenants. The damages were laid at $2,500, a spondent recovered a verdict and judgment for $2,000 appeal is from this judgment.

Appellant assigned various errors in the rulings be the trial, in reference to the admission of evidence a structions to the jury, as grounds for a reversal. W confine our attention to the points relied upon by his c

ring. The first of these is, that the court erred in
certain testimony offered by the appellant to reduce
t of damages claimed by the respondent. As the
admitted, in his answer to the complaint, that the
t paid G. W. Cox $2,000 for the premises, and the
s for that amount only, he was not injured by the
wever erroneous. As the respondent himself admits,
timony embodied in the bill of exceptions, that he
$2,000 for the land, and does not charge G. W. Cox
fraud or misconduct in the transaction, we conceive
ry, in any event, could not exceed the amount so
legal interest.

not question the correctness of the general principle
for by appellant's counsel, that in an action of this
here there is an issue in the pleadings as to the
the consideration paid, parol evidence is admissi-
w the amount actually paid, to fix the measure of
e damages. (Sedgwick on Damages, 193 and 194.)
e ruling could not have prejudiced the appellant, it
nd for a reversal.

ond point is upon the refusal of the court to allow
ant to propound either of the three following ques-
G. W. Cox, a witness produced and sworn on his
the trial. First: "What land did you contract to
onvey to the plaintiff?" Second: "State whether at
you sold your land to the plaintiff, you went with
the place and showed him the boundaries of the
Third: "Does this bond, sued on, describe the land
to the plaintiff?" Each of these questions was ob-
by the respondent as incompetent, immaterial and
, and the objections sustained and exceptions duly

pellant's defense to the action rested upon the alle-
his answer, showing that he had been induced, by
audulent representations chargeable to the respond-
ecute the bond sued on. He claimed that by reason

of certain family arrangements, G. W. Cox had become
ally entitled to a certain tract of land, and that he had
in the actual possession and enjoyment of it since Octo
1866. That this tract was composed of 142.21 acres
S. E. ¼, and 17.77 acres, adjoining, from the S. W. ¼ o
donation claim. In the former—which was a portion
deceased wife's half of said claim—he held a life est
tenant by the curtesy, and in the latter—which was a p
of his half of the claim—he owned the fee. That G. W
sold the respondent this tract so composed, and he was w
to quit-claim his interest therein, without any consider
to the respondent, as the vendee of G. W. Cox. That
time after the sale, at the request of G. W. Cox, he w
Silverton for this purpose. That he was there inform
the respondent's agent that the deed could not be ex
until the 1st of January, 1880, and was also informed,
same time by said agent, in the presence and hearing
respondent, that the bond sued upon, which had bee
pared by said agent, and was then presented to him f
signature, was only to secure a deed of his interest i
land, on said 1st day of January, 1880, and that relying
and induced by these representations, which were both
and fraudulent, he executed such bond, and that he wou
otherwise have done so. The appellant was about se
five years old at the time, and could neither read nor w

We think the testimony of the appellant at the tr
shown by the bill of exceptions, taken in connection
the other evidence given on his behalf, does show that
was his intention and understanding, and that the bon
not correctly describe either the premises or the inter
believed he was binding himself to convey, or cause
conveyed to the respondent, and that the represent
alleged to have been made by the respondent's agent
which he testified were made, if made, were false. His
mony, then, tending to prove that the representations
made, and if made, being false, in order to make out a

e defense, at law, as we held when this case was before us a previous occasion, it was incumbent on him to show by m petent and satisfactory evidence, that the respondent knew ey were false, at the time, to establish their fraudulent char- ter.

Now, it does seem quite clear to us, that, if it could have en shown by competent and satisfactory evidence that W. Cox, when he made the sale to respondent, went with m and pointed out the boundaries of the premises intended be conveyed, and that the tract so sold and pointed out iffered materially from the tract described in the bond, as as claimed by the appellant, these facts would afford some grounds for inferring that when he stood by and heard the false representations alleged to have been made by his agent, without objection or correction, that he knew they were false, and only remained silent that he might reap the benefit from the imposition and fraud which he knew was being practiced upon the appellant in his interest. These would be circumstances, not only proper to go to the jury upon the question of fraud, but, as we conceive, of the highest importance to the appellant in maintaining his defense, resting, as it did, solely upon that ground. Such testimony, it was the plain purpose of the questions, which were ruled out, to elicit; and in our judgment, this exclusion was error, which renders a reversal of the judgment unavoidable.

There is no ground for the suggestion, on behalf of the respondent, that the discrepancy, if satisfactorily made out, would show a benefit rather than an injury to the appellant. If he was fraudulently induced by the respondent, or his agent, to bind himself for the conveyance of different premises than he intended, it matters not which would reap an advantage from the alteration; it was not his agreement, and he was not bound by it. The question propounded by the appellant to T. W. Davenport and J. T. Cox, which was as follows:—"Was it not generally understood by all the business men of Silverton that Gideon S. Cox, the appellant,

would not become responsible for any of Geo. W. Cox's
or contracts, if he knew it?"—was clearly irrelevant and
missible. General notoriety, in respect to a matter of
character, could hardly be allowed to charge the respon
with notice; but if it could be shown, by competent
mony, that these matters were known to him, it could
affect any issue in this action. There is no question but
the appellant, in this particular instance, whatever may
been his general course, executed the bond sued on; and
only question to be determined is whether he was impose
and induced to execute it by the fraud he alleges to have
practiced upon him.

The last assignment we are called upon to consider r
to the refusal of the court below to give the following ins
tion to the jury, as asked by the appellant: "If the
believe, from the testimony, that the defendant was a
and unlettered man, could neither read nor write, at the
he signed the bond; then, before the plaintiff is entitl
recover, you must be satisfied from the evidence that
plaintiff, or his agent, read over the bond to the defen
explained it to him, and that the defendant fully under
its meaning and import."

The appellant's counsel has cited us to the case of *Seld*
Meyers, et al., as supporting his position. An examin
of the whole decision will, we think, justify a different
The syllabus goes to that extent, or nearly so, but the dec
itself does not. The court say upon this point, "It is
that Selden is an unlettered man and can neither read
write. He makes his mark to the instrument he exec
and dealing with such a person, it is incumbent on M
& Co. to show, past doubt, that he fully understood the o
and import of the writing upon which they are proceedi
charge him." It is true the facts set out in the syllabu
ing established by the evidence, were held sufficient in
case; but the court did not undertake to declare them to
stitute an essential formula in every other case of the

kind. And we think no particular mode of informing a person of this class of the contents of a written instrument which he is about to execute, need be observed. If he does, in fact, now and comprehend what it contains, no matter how he quires his knowledge, it is sufficient.

There was, in our judgment, no error in refusing to give instruction. But, upon the ground above stated, the ment must be reversed, and a new trial awarded.

rd, C. J., did not sit in this case.

HOXTER v. POPPLETON.

ACTION FOR MONEY HAD AND RECEIVED.

tion for money had and received, in general, will lie for money hich *ex aequo et bono* the defendant ought to refund as for money id by mistake, or upon a consideration which happens to fail, or for oney obtained by imposition or extortion or oppression, or taking undue advantage of a party's situation, contrary to laws made for e protection of persons under these circumstances, and a sale made th such knowledge on the part of the party who causes it to take ce, renders him liable in an action for money had and received. is action, therefore, has been denominated an equitable action and ess restricted by technical rules than most others, as it aims at the re justice of the case and looks entirely to the question whether defendant holds the money which in equity and good conscience ongs to the plaintiff.

SHERIFF'S SALE—CAVEAT EMPTOR.

neral doctrine is that the purchaser at a sheriff's sale is bound to w that those facts exist which give the officer power to sell, and general, these are the judgment of a competent court and a valid cution. It is based on the principle that the officer who sells un- a judgment and execution exercises a statutory power, by virtue which alone his deed can operate upon the title to the land sold. the judgment is void, or has been paid, the officer's power is at an nd, and the purchaser takes nothing, The rule of *caveat emptor* pplies to every purchaser at a sheriff's sale of real or personal property by virtue of an execution. This rule of constructive notice was adopted to determine questions of superior equities and to protect innocent persons from being defrauded.

NOTICE NOT IMPUTED—WHEN.

Where the defendant procured an execution to be issued wi any judgment whatever to sustain it, and the plaintiff, in faith, without actual knowledge, has paid his money t defendant upon a sale made under such void execution, an defendant claims the benefit of the rule of constructive to prevent the plaintiff from recovering back his money, he knew the plaintiff could acquire no title to the pro sold under such execution: *Held,* That in such case, know will not be imputed to the purchaser to make out that the ment was voluntary.

APPEAL from Yamhill. The facts are stated in the opi

B. Killin, for appellant.

Submits that this appeal raises but one question, th whether one who purchases land at what appears to be a iff's sale, can recover back his money when it turns out there was no judgment, and cites: *Chapman* v. *Cit Brooklyn,* 40 N. Y., 372; *Colville* v. *Besty,* 2 Denio, *Whealdon* v. *Olds,* 20 Wend., 174; *Bank* v. *Bank,* 3 Co 230; *Wait* v. *Leggitt,* 8 Cowan, 195; *Schwinger* v. *Hi* 53 N. Y., 258; Freeman on Executions, Sec. 301; He on Executions, Secs. 320, 322, 330, 340, 507. What the bi buys is the interest of the judgment debtor in the prop If he does not get it there is a failure of consideration.

James McCain and H. Hurley, for respondent.

Maintain that *caveat emptor* applies in all its force in case. The purchaser must take notice, not only of the he buys, but of the proceedings upon which the sale is n and cite: Freeman on Judicial Sales, Sec. 47; Freema Executions, p. 352; Rorer on Judicial Sales, Sec. 902; man on Executions, Sec. 190; *Burns* v. *Hamilton,* 33 310; *Laws* v. *Thompson,* 4 Jones, 104; *Dean* v. *Morr* G. Green, 312; *Dunn* v. *Frazier,* 8 Blackford, 432; *Sa* v. *Price,* 13 Ohio, 368; *Smith* v. *Painter,* 9 Am. Dec., Rawle on Covenants, 618.

Money can be recovered back only when it has been under a mistake of fact. This payment, if made by mis was one of law and not of fact. (Freeman on Judicial S

Sec. 47; Rorer on Judicial Sales, Sec. 902; 2 Greenleaf on Evidence, Sec. 123; 2 Chitty on Contracts, page 934, and authorities cited.)

By the Court, LORD, C. J.:

This is an action for money had and received by the defendant to the plaintiff's use. It is said, in general, to lie for money which, *ex aequo et bono*, the defendant ought to refund as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained by imposition or extortion, or oppression, or taking an undue advantage of a party's situation, contrary to laws made for the protection of persons under these circumstances, and a sale made with such knowledge on the part of the party who causes it to take place, renders him liable in an action for money had and received. (Herman on Executions, Sec. 340, and authorities cited in the note.)

Lord Mansfield calls the action of assumpsit for money had and received, "a liberal action founded upon large principles of equity," and applicable wherever the debtor, having received money, cannot conscientiously retain it. (*Moses* v. *McFarlone*, 2 Burr, 1005.)

In conformity with this principle it is said, in *Henderson* v. *Overton*, 10 Tenn., 398, that if A obtains money from B without consideration, through fraud or mistake, B can recover it back; that in such case the action of assumpsit was substituted for a bill in equity as late as the days of Lord Mansfield. This action, therefore, has been denominated an equitable action, and is less restricted by technical rules than most others, as it aims at the mere justice of the case, and looks entirely to the question whether the defendant holds the money which in equity and good conscience belongs to the plaintiff. (Chitty on Contracts, 11 Am. Ed., 898, and authorities cited in the note; *Schwinger* v. *Hickok*, 53 New York, 286.)

In respect to the case in hand there can be no doubt that

the money received by the defendant was the plaintiff's money. It came to him through the sheriff as proceeds arising from a sale of real estate upon an execution issued at his instance, but without any judgment whatever, in fact or law, to support it. It is not the case of money received upon a judgment which turned out to be void, but the case of an execution sued out without a judgment, and the defendant's appropriating the avails of the sale under it. It is undeniably true that the purchaser at a sheriff's sale is bound to know that those facts exist which give the officer power to sell, and in general these are a judgment of a competent court and a valid execution. This is right on principle, as the officer who sells under a judgment and execution exercises a statutory power, by virtue of which alone his deed can operate upon the title of the land sold.

"If the judgment is void, or has been paid, the purchaser takes nothing. The rule of *caveat emptor* applies to every purchaser at a sheriff's sale of real or personal property by virtue of an execution." (*Frost* v. *Yonker's Saving Bank*. 70 N. Y., 560.) He buys at his peril, because the law requires him to ascertain whether the officer has a valid writ issued upon a valid and subsisting judgment, and if these do not exist, the officer is without power to sell, and as a consequence, the purchaser can acquire no title to the property sold. (Herman on Executions, Sec. 255, and authorities cited in the note.)

When, then, property is sold on execution issued without any judgment to support it, the officer is without power to sell, and the purchaser can acquire no title under such sale. The judgment is the sole foundation of the officer's power to sell and convey property, and if there was no judgment, he was without power to sell, and all his acts under an execution issued in such case was without authority and void. Upon the facts of this case, the plaintiff could acquire no title to the property sold, and the question now is, can he recover back the money paid on such sale, and which the defendant,

y his demurrer, concedes he has received. Money arising rom the property of a judgment debtor, when sold upon xecution, is required by law to be paid to the judgment reditor upon whose execution the property is sold. By this neans the judgment and execution are satisfied and dis-harged. But how does the case stand when there is no judg-nent to be satisfied? Do the proceeds arising from a sale in uch case, belong to the party who procured the execution to e issued and the property to be sold? He has no judgment o be satisfied and therefore no lien on the property of any ne. He is not a judgment creditor, nor does any one sus-ain the relation of judgment debtor to him.

The proceeds of such sale satisfies no judgment, extinguishes o lien, discharges no execution. As we have seen, a pur-haser at such sale can acquire no title; in what, then, consists he right of the defendant to retain the money paid on such ale? A party may mistake the legal effect of proceedings ad at law or in equity, and being a mistake of law, be with-ut remedy. So, too, he may be bound to take notice of the act of a judgment or other matter of record, but the query vas put at the argument, if there were no proceedings had at aw and no judgment whatever rendered, or of record, can it e said he mistook the legal effect of proceedings when there vas no case, and failed to take notice of the existence of a udgment when there was none? The view we take renders : necessary to answer these suggestions.

The ground assumed against the recovery of the plaintiff , that he had constructive notice of the non-existence of the udgment, and consequently the payment of his bid was vol-ntary. Or, in other words, if he had examined the records e would have found that there were no proceedings, nor udgment upon which the execution was issued, and his pay-nent therefor, under such execution sale, was voluntary. As efore stated, it is no doubt true that the sheriff, in the sale f real estate, is but the agent or officer of the law, with lim-ted powers conferred by the statute, and that purchasers are

bound to know that those facts exist which give the o
power to sell; and it is also true, that the purchaser of p
erty from a private special agent is bound to take noti
the extent of his power, and that the purchase from
agent, when he is not authorized to sell, is invalid.

As was said in *Schwinger* v. *Hickok, et al.*, 53 N. Y.,
"a person claiming a right or title under a conveyanc
instrument in execution of a power, is in general charg
with notice of any informality in his title disclosed by
instrument under which he claims, or of which, by reason
diligence he would have become acquainted." This rule
adopted to determine questions of superior equities, an
protect innocent persons from being defrauded, and can
no proper application to the facts of this case. It ha
relevancy between these parties, because in such case, kn
edge will not be imputed to the purchaser in order to
out that the payment was voluntary. The defendant
cured an execution to be issued without a judgment to su
it, and the plaintiff, in good faith, without actual knowl
has paid his money to the defendant upon a sale made u
such void execution, and the defendant now claims the be
of the rule of constructive notice to prevent the plaintiff
recovering back his money, when he knew the plaintiff c
acquire no title to the property. It seems to us, to pe
the defendant to invoke the rule of constructive notice in
case, is to give him the benefit or advantage of his own wr
and to be in violation of the spirit and purpose for which
rule was established. (Story's Eq. Jur., sec. 367.)

In *Schwinger* v. *Hickok, supra*, the right of the plai
to recover was denied, on the ground that he had constru
notice of the invalidity of the proceedings and judgm
and that the payment of his bid was therefore volun
But the court say: "To make out a voluntary payn
knowledge that the execution was void is imputed to the
chaser, although there was none in fact, and this for the
fit of persons having actual knowledge, and took the plain

money." The facts in this case are not as strong as the one under consideration, and yet the application of this principle makes the remedy of the plaintiff clear and undeniable. Nor do we think the result which we have reached in this case is at variance with the equity which is said peculiarly to characterize this form of action.

In *Henderson* v. *Overton, supra,* where it was held that the purchaser of land at execution sale, where the judgment on which the execution issued is void, and consequently the sale itself void, may recover from the judgment creditor the purchase money paid at the sale, the court, in illustrating its argument, puts a case identical with the facts under consideration: "'Suppose," say the court, "that Overton had obtained from the clerk of some court other than Sumner an execution not authorized by any judgment, the writ had been fair on its face, the sheriff had levied it and obtained $240 by virtue thereof from the complainants, which sum he had paid over to Overton; will any one doubt that it could not have been recovered from him because obtained by a false token?" And the court plainly indicate in the case they were deciding, as well as the one supposed, that an action for money had and received would lie. From these views it follows that the judgment must be reversed.

Judgment reversed.

SALMON v. OLDS & KING.

PRACTICE—NONSUIT.

A defendant is not entitled to a nonsuit where, upon the pleadin and evidence introduced, a *prima facie* case has been made o against him.

PLEADINGS—EVIDENCE.

An irrelevant or erroneous instruction, upon an abstract question law, and wholly inapplicable to any issue upon the pleadings evidence in the case, will not render a reversal of the judgme necessary, unless the record justifies the inference that it d mislead the jury to the prejudice of appellant's rights.

DAMAGES—MEASURE OF.

The plaintiff only claiming, in her complaint, the value of the pro erty converted, as the measure of her damages arising from t act of conversion, the regularity of the proceedings at the co stable's sale was immaterial, and any instructions as to t steps necessary to a valid sale, could not injure the appellant

APPEAL from Multnomah. The facts are stated in t opinion.

Thayer & Williams, and O. F. Paxton, for appellants.

O. P. Mason, for respondent.

By the Court, WATSON, J.:

The complaint in this action charges the defendants wit having "wrongfully, unlawfully, maliciously and with forc taken and detained certain personal property, a portion o which belonged to plaintiff, and the balance of which was i her possession as special bailee of a third party, to her dam age in the sum of $500.00." It further charges the defend ants with "wrongfully, maliciously and unlawfully" convert ing a specified portion of such property, to her damage in th sum of $338.50, the value thereof.

The answer denies the ownership and bailment, and denie the wrongful taking, detention and conversion, the damag and value, and sets up, by way of justification, that the prop erty belonged to one H. McLennon, and that it was seized an

ınder legal process against the property, at the suit of efendants, Olds and King, and that O'Connor merely as their attorney in such proceedings.

e replication denies the allegations of new matter in the er, except as to O'Connor's participation in the matter. cause was tried by a jury, and a verdict returned for tiff for $300.00 damages. During the trial, and after laintiff had introduced evidence of her ownership in a on of the property, and the bailment to her of the bal- as alleged in her complaint, and of the value thereof, that O'Connor pointed out the property to the constable ng the levy, and rested her case before the jury, the de- nts, Olds and King, moved for a nonsuit, on the ground here had been no evidence connecting them with the tak- f the property. The court refused to grant the order, Olds and King excepted. This is the first error assigned by the appellants.

eems to us that there can be no doubt as to the correct- of this ruling, in view of the condition of the pleadings vidence at the time the motion for a nonsuit was made. acts of taking, detaining and converting the property, admitted by the form of the denials. (*Busenius, et al., ffee, et al.*, 14 Cal., 91; *Richardson* v. *Smith*, 29 Cal., *Lay* v. *Neville*, 25 Cal., 549.)

e denials in the answer only go to the character of the g, detention and conversion, and not to the acts them- . This alone, in connection with the evidence offered aintiff of the ownership and possession, would have justi- he ruling excepted to. But this was not all. The r, in which all the defendants joined, alleged that nor acted as the attorney for Olds and King in the pro- gs, and the plaintiff, before resting her case, had intro- evidence that O'Connor pointed out the property to ficer who made the levy; in effect, directed the seizure. y the court could not have done otherwise than it did, using to direct a nonsuit. After the motion for a non-

suit had been overruled, other evidence was introduced by both the plaintiff and defendants. At the close of the trial the court gave the jury the following instructions, which were excepted to by the defendants, and which they claim were erroneous and justified a reversal of the judgment:

1. "That the measure of damages for property detained from the plaintiff, and returned, was the value of the use of such property, together with necessary expenses incurred in recovering the same."

2. "That in justifying under a sale by the constable, the defendants must show that the sale was regular, and the property advertised for ten days, as required in sales of personal property, and that there was no evidence tending to show that this had been done."

The defendants then asked the court to instruct the jury as follows:

1. "That where an officer makes a sale under an execution in his hands, which is admitted to be regular upon its face, and was issued on a judgment, the presumption of law is that he performs his duty according to law"; which the court refused, and the defendants excepted and assigned such refusal as error.

There was no allegation in the complaint as to the use of the property or expenses incurred in its recovery. The plaintiff testified that the use of the same during the time it was detained was worth nothing to her, and there was no evidence whatever as to any expenses incurred in recovering possession of the same. So far as can be ascertained from the bill of exceptions, which professes expressly to give all the evidence introduced on both sides, there does not seem to have been any claim made for damages on account of the loss of its use, or expenses incurred in its recovery. Upon the assumption that this was the true state of the case, the appellants contend that the first instruction given by the court, as set forth above, was both erroneous in its application and irrelevant, and tended to mislead the jury, to their injury.

claim that while there was no issue and no evidence to
y the instruction, it assumed the existence of both, and
fore might reasonably have had an influence on the ver-
of the jury.

must be admitted that loss of use, and expenses incurred
covering the possession of the property seized, would
been special damages, and must have been specially
d in the complaint to entitle the plaintiff to introduce
nce to prove them, or justify their recovery. (Sedgwick
amages, 575; 2 Greenleaf on Evidence, Sec. 254; *Ben-
v. Lockwood,* 20 Wend., 223.) The application of the
al rule embodied in the instruction, by the court below,
case before it, was therefore, so far as it related to the
ery of special damages, erroneous and irrelevant. As
e effect of giving such instructions, counsel for appel-
have cited *Hopkins* v. *Fowler,* 30 Me., 568; *Wright* v.
, *et al.,* 34 Wis., 116. To these may be added *Ward* v.
y, 19 Wis., 76; *McGregor* v. *Armill,* 2 Iowa, 30; *Ken-
v. R. R. Co.,* 36 Mo., 351.

t none of these cases hold that every erroneous or irrele-
instruction affords sufficient ground for a reversal of
nent. There must be some issue in the case, of law or
arising upon the pleadings or evidence; some claim or
oversy to which the jury might apply such instruction,
nreasonably, under the presumption that, coming from
ourt, it must have been intended to have some bearing
eir decision; or its being merely irrelevant, should not
llowed by a result so disastrous. The court must be
o see that under the circumstances disclosed by the rec-
he jury may have been, and probably were, misled, to
jury of the complaining party. This principle is well
in the case of *McGregor* v. *Armill,* 2 Iowa, 30, cited
. The court say: "It may be regarded as settled, that
iving or refusing an instruction upon a mere abstract
sition of law, which does not refer in any way to the
nce in the case or issues made, would not be such an

error as will warrant a reversal, unless it may be fai inferred that the jury was thereby misled to the prejudice the party complaining." In the case of *Ward* v. *Her* 19 Wis., *supra*, the court advanced the same view: "' mere irrelevancy of instructions given by the court to the j is said, in itself, independent of all other considerations, to be a sufficient ground to authorize a new trial; but wi injustice has been done by the verdict, and it is probable jury were misled by the instructions, then we think a n trial should be granted."

If the instructions complained of were erroneous as well irrelevant, as an abstract proposition of law, which is however, claimed in this instance, the rule would be same. Tested by this principle, the giving of instruct under examination affords no ground for a reversal of judgment appealed from. The record exhibits no basis its application, and the nature and amount of the verdict tify no inference that the jury were misled by it. And cannot presume that it had any influence.

The question presented by the remaining instruction giv and that raised by the one asked by the appellants, refused by the court, are the same. But if we concede t the ruling in each instance was erroneous, as claimed by appellants, we cannot perceive that any injury could h resulted to them in consequence. Grant that the facts mitted and proven, conclusively established the regula of the proceedings on the sale by the constable, still respondent was entitled to recover the value of the goods s if they belonged to her, and that was all she claimed in pleadings and proof in reference to such goods, and their c version by the sale, and is evidently all that was found her by the verdict. The rule is firmly established, and unquestionable soundness, that error, which does not pr dice substantial rights, is no ground for reversal of judgm The judgment of the court below is affirmed.

Judgment affirmed.

FOX, BAUM & CO. v. McKINNEY & SMITH.

LEASE—CROP MAY BE HELD FOR RENT.

Where a lease contained a stipulation as follows: "And the said party of the second part, in consideration of the said lease, binds himself to pay unto the party of the first part, the sum of $700, in U. S. gold coin, on or before the first day of October, 1880, and for security of said rental of $700, the party of the second part binds himself, his executors or administrators, to *store the entire crop* of wheat, oats, or other cereals, in the warehouse at Turner or Salem, *in the name of the party of the first part, it to be and remain his sole property until the said $700 has been paid:*" *Held*, That it was competent for the owner of land to provide in the lease that the produce or crops grown on the land were to be and remain the property of the lessor until the rent should be paid, and that such stipulation did not make the instrument a chattel mortgage.

LANDLORD AND TENANT.

The principle upon which this doctrine is maintained is, that the owner of the land, being also the owner of the fruits or the products of it, in parting with the use of it to another, may make such conditions and reservations in relation to the land itself, or the products grown from it, as he chooses, instead of parting with the full right. In such case the property in the products of the farm is in the landlord, and not in the tenant, until the performance of the condition upon which the ownership of the crop shall be changed.

Where the parties intend by their agreement that the landlord should be the owner, and have control of the crop, until the rent is paid, like all stipulations of that character, the intention of the parties is the rule of construction.

APPEAL from Marion. The facts are stated in the opinion.

Strahan & Bilyeu, and Bonham & Ramsey, for appellants.

Is the instrument in question a chattel mortgage? We maintain that it is, if it is not void. No particular form is necessary to constitute a mortgage. (Jones on Chattel Mortgages, sec. 60.) Whatever language may be used, if it shows that the parties intended a sale of chattels as *security*, the instrument will be construed to be a mortgage. (*Johnson* v. *Crofort*, 53 Barb., 574; *Thompson* v. *Blanchard*, 4 N. Y., 303; Edwards on Bailments, sec. 73.) The instrument comes

clearly within these authorities, and is a chattel mortgag
but we submit that the lien would not attach to the grain
to *bona fide* purchasers from Lane, without notice, *until*
was stored in the warehouse at Turner or Salem, in the nan
of Thompson. (*Butterfield* v. *Baker*, 5 Pick., 522; *Munse*
v. *Carew*, 2 Cush., 50.)

W. H. Holmes, for respondent.

The contract is in the nature of a reservation for ren
The landlord, as owner of the soil, is primarily entitled to t
proceeds thereof. A reservation for rent may as well be f
money to be paid out of the crop as for a part of the cro
itself. (Taylor's Landlord and Tenant, sec. 152; Benjamin
Sales, secs. 78, 381; *Cooper* v. *McGrew*, 8 Or., 327; *Lewis*
Lyman, 22 Pick., 437; 18 Ver., 461; 78 Ill., 309.) The cro
which was the subject of the contract, had a potential exis
ence, and by the terms of such contract, Thompson nev
parted with his property, except upon conditions which we
not complied with by the lessee.

By the Court, LORD, C. J.:

The main, and in fact only question to be decided in th
case, is the construction of the lease admitted in eviden
against the objection of the appellants. Nearly every oth
question presented by the bill of exceptions, and discusse
grows out of what is claimed to be the proper construction
the lease, and the legal effect thereof. That portion of t
lease to which objection is directed reads as follows: "A
the said party of the second part, in consideration of the sa
lease, binds himself to pay unto the party of the first part t
sum of $700 in United States gold coin, on or before the fir
day of October, 1880, and *for security of said rental* of $70
the party of the second part binds himself, his executors,
administrators to store the entire crop of wheat, oats or oth
cereals in the warehouse at Turner or Salem, in the name
the party of the first part, *it to be and remain his sole pro*
erty until the said $700 has been paid."

It is contended by the appellants that the effect of these ords is to make the instrument a chattel mortgage, and not lease; and as a chattel mortgage, it can only operate on operty in actual existence at the time of the execution, and nnot be given, as was attempted to be done in this case, on a crop before it can be said to be *in esse;* and also, as ainst the lessee's creditors, it would not be effectual unless ed as a chattel mortgage. Properly, then, the first question be decided, is the instrument under consideration a chattel ortgage? If this question shall be answered in the nega- ve, it becomes unnecessary to examine the remaining ques- ons in connection therewith and out of which grow several the objections assigned as errors.

In support of the position that the instrument in question a chattel mortgage, the appellants cite, and seem prin- pally to rely upon the case of *Johnson* v. *Crofort,* 53 Barb., 4, in which it is held that a provision in a lease of a dairy rm, that the lessor shall have full title, with the privilege of king possession of all the products of the farm, in payment r the rent, amounts to a mortgage of such products, and as ch, it would not be effectual against the lessee's creditors less filed, or recorded as a chattel mortgage. An examina- on of that case will show that the facts and the ground oon which it is predicated are not exactly on all fours with e case under consideration.

The lease, in that case, to Tefft, the lessee, was absolute. d with the exception of the proceeds of three-fifths of the ilk to be sold to the cheese factory, he was the *owner,* and titled to the possession of it, and the court held that the ovision of the lease above referred to, was a mere security r money, and necessarily in the nature of a mortgage. But different state of facts prevails in the case here. The lease not absolute, but encumbered with a reservation in which e idea of ownership of the products of the lessee is expressly ncluded. The products are to be and remain the sole prop- ty of the lessor until the rent is paid. This is a contract

which provides in whom the ownership of the products sh
vest as soon as they come into existence, and the condit
upon which that ownership shall change. It is not the c
where the property, or products, as soon as they come i
existence, vest in the lessee and become his property, wh
he may hypothecate as a security for the payment of mon

Two other cases, not cited in the brief, but to the sa
effect as *Johnson* v. *Crofort, supra,* are to be found in *W*
v. *Stanley,* 12 Fla., 167, and *Mitchell, et al.,* v. *Batgett,*
Ark., 394.

In the former, *Werd* v. *Stanley, supra,* it was held that
agreement in writing properly executed, and stipulating t
the amount due for rent of land should be paid before
crops are removed, was a security for the payment of mon
and under the statute operated as a mortgage. But it
be observed, in this case, that the owner, by his agreeme
has parted with the absolute use of his land, and the produ
to be grown out of it—he has neither retained nor reser
any right of property in the products. These, under
agreement, belong to the tenant, only it is stipulated that
amount due for rent of land should be paid before the c
is removed. This the court held was a "security for
payment of money," and *brought the agreement within*
very words of the statute.

In the latter, *Mitchell, et al.,* v. *Batgett, supra,* it was h
that the lease executed by lessor and lessee, reserving a l
to the lessor on the crop produced on the land, is a cha
mortgage, and a written agreement properly executed, sti
lating that the amount due for rent of the land should be p
before the removal of the crop, is a chattel mortgage of
crop. The authority of this case rests upon *Johnson* v. *C*
fort, supra, and falls distinctly within the principle announ
in this case. The lease was absolute. A promissory note
$900 was given for the rent, and secured by a clause that
lien is hereby given and retained upon the crops grown
said land," and also further stipulating not to dispose of

remove any part of the crops, until the note had been paid. Here the right of property in the tenant to the products is expressly recognized by the creation of a lien to secure the rent, which is not parallel with the case in hand. Thus, we think, it will appear in all these cases, the provision that it should be security for rent, shows that the property was in the tenant, and not in the landlord. Mr. Herman says, "any condition in a lease giving the lessor a lien upon the *tenant's property* as a security for rent, is a chattel mortgage." (Herman on Chattel Mortgages, 68.)

Cases where by the terms of the agreement the products are not to become the property of the tenant, do not fall within the principle, and certainly cannot be considered to be within the power of the tenant to chattel mortgage, either by stipulations in a lease, or otherwise. From this review of the cases, it will be seen that none of them controvert the right of the lessor of land to provide in the lease that produce, or crops grown on the lands, were to be and remain the property of the lessor until the rent should be paid. It has been repeatedly decided in Vermont that the lessor of the land may stipulate in the lease that the crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid, and that such a provision is valid, not only between the parties, but as to third persons. (*Smith* v. *Atkens*, 18 Vt., 461; *Paris* v. *Vail*, 18 Vt., 277; *Briggs* v. *Oaks*, 26 Vt., 138; *Gray* v. *Stevens, et al.*, 28 Vt., 1; *Edson* v. *Colburn*, 28 Vt., 637; *Baxter* v. *Bush*, 29 Vt., 465; *Bellows* v. *Wells*, 36 Vt., 599; *Cooper* v. *Cole, et al.*, 38 Vt., 191. The same principle is in effect held in *Lewis* v. *Lyman*, 22 Pick., 437.)

In *Bellows* v. *Wells, supra*, Chief Justice Poland said that "the reasoning upon which these decisions rest is, that the owner of the land, being also the owner of the fruits or products of it, in parting with the use of it to another, may make such conditions and reservations in relation to the land itself, or the products grown from it, as he chooses, instead of

parting with the full right. The principle is the same as upon which conditional sales of personal property are held."

In New York, the right of the landlord to make such ulations in his lease as shall provide for his ownership o crops until the rent is paid, has been quite often decided, the distinction made between these cases and *Johnson* v. *fort* explained.

In *McCombs* v. *Beeker*, 3 Hun, 343, the court say: was entirely competent for the defendant and his landlo agree that the hay to be raised on the demised pre should be and remain the property of the defendant unti rent should be paid, and the conditions of the case be fied by the tenant. Instead of the tenant mortgaging crops to be grown as security for the rent, he may agree the crop shall be the landlord's until the rent be paid. I one case the agreement is that the crop shall be the landl if the tenant does not pay the rent, in the other case, it not be the tenant's property until he does pay it. The of *Johnson* v. *Crofort*, *supra*, does not hold otherwise, does hold that the terms of the contract in that case gav landlord only a chattel mortgage interest, which was defe for want of filing." (*Andrews* v. *Newcomb*, 32 N. Y., *Van Hoover* v. *Cary*, 34 Barb., 9.)

In the lease under consideration it is not only prov and expressly stipulated that the entire crop is to be st in the warehouse, in the name of the landlord, but the was to be and remain his sole property until the rent paid. The property is in the landlord and not in the te until the performance of the conditions upon which the ership of the crop shall be changed.

Nothing, it seems to us, can be clearer than that the ties intended by their agreement that the landlord shoul the owner and have control of the crop until the rent paid, and in all stipulations of this character, the intentio the parties is the rule of construction. "Taking the w

ract together," says Allen, J., in *Van Hoover* v. *Cary*, was evidently the design that the property in the pro-ts of the farm should be in the plaintiff, and not in the ee, until the payment of the rent. The contract as thus erpreted is not illegal nor unreasonable." To the same ect is the language of Judge Boise, in *Cooper* v. *McGrew*, Or., 330, in which he says, "the policy of the law is to e such effect to the contract of the parties as will carry out ir intentions, whenever it can be done without hazard to rights of others."

n contracts of this character the subject matter of the eement does exist, potentially, and as was said, "though lessor had it not actually, nor certain, yet he had it poten-ly—for the land is the mother of all roots and fruits, and, our judgment, the owner of the land may, as in the instance ore us, make such conditions or reservations in his contract the cultivation of his land, as shall retain the ownership he crops, grown on his premises, in himself, until the rent be paid. Nor do we apprehend that the operation of s principle can work any injustice, as it secures the rights of both the landlord and tenant, and does not justly affect the rights of third parties, for the creditors of the tenant can have no greater claim upon the crop than his ownership in it."

But it is claimed, further, that the conduct of the respon-dents in issuing wheat checks to Lane, in his name, after they had been notified by Thompson, his landlord, that the wheat being hauled and stored by Lane in their warehouse, belonged to him, renders them liable to the appellants to whom these checks had been transferred, through their agent, Harris, by Lane, when the respondents refused to deliver to them the wheat, or store it, in their name, in the warehouse upon the presentation of the checks and the request so to do. The wheat checks only indicate by whom, and the amount of the wheat, deposited. The evidence, however, shows that on the same day that these checks were transferred by Lane to the appellants, through their agent, Harris, that he was noti-

fied, by the respondents, of Thompson's claim and owner
of the wheat for which the checks so transferred called,
this, too, before any money was paid for the wheat on s
transfer. We see no application of the doctrine of estop
as discussed, nor do we think the court erred in striking
the new matter in the reply. It follows from these vi
that the judgment of the court below is affirmed.

Judgment affirmed.

SHIVELY v. PARKER.

FRAUD—EQUITABLE RELIEF.

In the consideration of fraud, whether actual or constructive, co
of equity have adopted principles exceedingly broad and
prehensive in the application of their remedial justice;
especially where there is fraud concerning property, they
often interfere and administer a wholesome and sometim
strict justice, in favor of innocent persons, who are themse
without fault in the transaction.

BREACH OF DUTY—UNDUE INFLUENCE.

The cases to which this doctrine has been held applicable are
erally cases where there is some breach of duty, or wan
good faith and fair dealing on the part of the person acqui
the property, or of him from whom, or under whom, he has
ten it, of which he has actual or constructive notice, or w
the property has been acquired, or the possession of it ta
on the assumption of a trust character, or under the belief
those with whom the transaction is had, or by reason of w
it was acquired or possessed, that it was taken or acquire
trust, or where it had been gotten by some undue influence.

APPEAL from Clatsop.

William Strong & Sons, for appellant.

Dolph, Bronaugh, Dolph & Simon, for respondent.

By the Court, LORD, C. J.:

This is an appeal from a decree in equity, sustainin
demurrer to the complaint, and dismissing the same for w
of equity.

'he object of the suit is to have the defendants decreed to d the legal title of certain lots and blocks purchased by m from the state, in trust for plaintiff. The lands in ques- ı are alleged to be tide lands, lying between ordinary low ter mark and ordinary high water mark in the Columbia er.

t is admitted that Nancy Welch was the owner of the lands on the shore, in front of which these tide lands are situated, l that the water lots were purchased from the state by her, those claiming under her, by virtue of this ownership of shore, under the provisions of the act of the legislature of state of Oregon, approved October 28, 1872, known as e tide land law."

'he material allegations of the complaint upon which the yer for relief is based, are briefly, in substance: That in rch, 1844, plaintiff settled upon a tract of 640 acres of d, which includes the said shore lots, in front of which the lands in controversy lie, and that in said month, plaintiff l out a portion of the tract into blocks, numbered 1 to 121, l made a map of the same, known as "Plan of Astoria, l off in March, 1844," and called "Shively's Astoria." at on April 18, 1845, he sold and conveyed an undivided -half interest in the entire tract to James Welch. That or to March 13, 1850, plaintiff, with the knowledge and sent of said Welch, added to said plat other blocks, num- ed from 122 to 150, "located almost exclusively upon the re of the Columbia river, between ordinary high and low ter mark;" and that on March 13, 1850, plaintiff and lch, "believing themselves to be each the owner of an un- ided half of said lands," proceeded to divide the lots and cks between them by each executing to the other a quit- m deed to the blocks thus described and set apart to the er.

'hat after the passage of the donation law, plaintiff, with knowledge of Welch, was recognized as the proper claim- of the entire tract by the officers of the land department,

and that plaintiff was thereafter "the only person entitl claim said donation land claim," but that Welch conti wrongfully to claim rights therein, "and contested the ap tion of plaintiff for a patent;" to settle which contest other disputes about the effect of said agreement of Apr 1845, and March 13, 1850, plaintiff and Welch, on Febr 18, 1860, entered into an agreement by which said land to be divided between them, etc., and that plaintiff and should convey to Welch, or to such person as he should d nate, the lots, blocks and lands coming to him, and th February 18, 1860, plaintiff and wife conveyed to Welc warranty deed of that date, the west half of 200 acres of etc., and by another warranty deed of same date, pla and wife conveyed to Nancy Welch the east half of sai acres of land and a number of said blocks, among whic blocks 5 and 9, in front of which the tide lands, or bloc controversy are located.

"That said warranty deeds were intended to be and w full settlement of all the respective parties' claims to said claim, and were so accepted by the said Welch, who, in sequence thereof, withdrew the opposition which he had viously made to the claim of plaintiff to the patent for land." That Nancy Welch paid no consideration fo property conveyed to her, but the same was a gift fron said husband; that at the time of the division so made, i intended by the parties to make a full and final divisi said land claim, together with its appurtenances, inclu riparian rights on the Columbia river, and that on Jan 24, 1866, patents issued to plaintiff and wife for said lan

That on March 29, 1876, defendants, being the owne said block 9, and the east half of block 5, by deed from N Welch, purchased as tide lands from the state, block 14 front of block 9, and the east half of blocks 145, 41 an in front of said east half of block 5, and that at that plaintiff was also an applicant to purchase said block 141 the east half of blocks 145, 41 and 46, from the state, a

and was the equitable owner thereof, which was well to Nancy Welch, and the title of defendants to said ds is fraudulent and void as to plaintiff, for the reason hen they procured their deed from her to block 5 and well knew and were fully informed of the premises, at defendant should be declared to hold said title in or him, and decreed to convey, etc.

this state of facts, conceded to be true by the de-, the question in this case is, has Shively the superior as against the legal title? If he has, then it is the the court to regard the defendants as the trustees of le for the benefit of Shively, and to decree it out of or Shively's benefit.

e consideration of fraud, whether actual or construc-urts of equity have, as stated by Judge Story, adopted les exceedingly broad and comprehensive in the appli-of their remedial justice, and especially where there is concerning property, they will often interfere and ad-r a wholesome and sometimes even a strict justice or of innocent persons, who are themselves without the transaction. (Story's Equity Jurisprudence, sec-265.)

in the application of these principles of remedial jus-ill courts of equity hesitate to fasten upon the con-of a party the duty of trustee in regard to property has been acquired by artifice or fraud, or where either he character of the property, or the circumstances which it is acquired or held, it would be against equity hit such party to hold it except as trustee.

oubtless would be an impossible task to lay down any rule which would be applicable to, or embrace every able case in which a party would be held to be a con-ve trustee. It is said, however, that the cases to which ctrine of remedial justice of courts of equity has been pplicable, are generally cases "where there is some of duty, or want of good faith and fair dealing on the

part of the person acquiring the property, or of him whom, or under whom, he has gotten it, of which he actual or constructive notice; or when the property has acquired, or the possession of it taken on the assumption trust character, or under the belief of those with whom transaction is had, or by reason of which it was acquir possessed, that it was taken or acquired in trust; or wh had been gotten by some undue influence." (Leading in Equity, vol. 2, part 1, 549; Story's Eq. Jur., sec. 1 *et seq.;* Hill on Trustees, 242 and 246; 2 Wash. on Real P 447.)

It now becomes our duty to enquire whether the alleged come within the range of these principles of rem justice, and, in fact, are such that the court can see equity and justice require that it should impose upon the science of the defendants the performance of the duty is prayed for in the complaint.

The argument of the appellant is, that it is imma whether the plaintiff be considered as the original own the adjacent lands, having made a reservation of the lands in controversy, or as owner in equity of the tide in the division made March 13, 1850, between plaintiff Welch, he is entitled to the state deed. Or, in other w that the effect of this division, by quit-claim deeds in was equivalent to a reservation of the tide lands in co versy in favor of the plaintiff, or to make him the equi owner thereof, which in either case, gave plaintiff a right, or superior equity, to the lands in question, as ag Welch, or those claiming under him with notice.

Now, prior to the interchange of these quit-claim dee 1850, plaintiff had deeded to Welch an undivided half est in the entire tract of land which he claimed, with ce exceptions, enumerated in the deed, not pertinent to matter under consideration. But this did not includ tide lands adjacent, nor was any claim to them made or sidered in that contract, which quite clearly indicates

f did not consider the tide lands any part or parcel of
d claim. The fact that subsequently plaintiff, with the
dge and consent of Welch, laid off blocks out of these
ds adjacent, to which neither had any title, and which,
be presumed, both knew belonged to the United States,
oceeded to interchange quit-claim deeds with respect to
de lands, and also their other lands, certainly did not
e effect to create any equities or reserve any rights in
f one or the other in these tide lands. Nor were they
his by reason of any mistake, or under any misappre-
of their rights or interests in the tide lands. They
harged with a knowledge of the law, and it must be
ed that they knew the tide lands belonged to the
States, and under the general policy pursued by the
ment, would revert to or belong to the state of Oregon
he then existing territory should be admitted into the
as a sovereign state. To this point there certainly is
in the circumstances of the transaction, as alleged,
indicates as between the plaintiff and Welch "any
of duty, or want of good faith and fair dealing on the
the person acquiring the property, etc.," to which the
e of remedial justice as applied by courts of equity
be invoked. Both enjoyed equal opportunities of
dge; both were in the undoubted and full possession of
ental faculties, and both knew the tide lands in con-
y, which had been platted, and which they had appro-
in the quit-claim division of 1850, did not belong to
and, according to the facts alleged, did not constitute
rt of the consideration for the undivided half interest
original tract claimed by plaintiff and conveyed by him
ch.

he case of *Parker* v. *Rogers,* 8 Oregon R., 183, the
f McClure, subsequently the donation patentee, con-
a "full reservation of all and every privilege around
," and the deed of Olney, to whom McClure and wife
nveyed all their interest in their donation claim and all

the riparian rights appurtenant thereto, contained a reser tion: "Exclusive of any wharfing privileges," and these press reservations in the conveyances formed the ground wo upon which the case was decided. The original conveyan between plaintiff and Welch contained no reservation of t character, and from the facts alleged we must presume Wel succeeded to whatever riparian rights were appurtenant his interest in the claim, and we can see nothing in the qu claim transaction of 1850 analogous to or of equivalent fo or effect to the fact in the case above cited.

But if we may suppose that the plaintiff and Welch anti pated that they would in some way acquire title from United States to the lands in controversy at the time wh they were contracting with regard to them, it must be observ that no understanding or agreement is alleged by which eitl party agreed that even if title were acquired from the Uni States by one party, that such title should be held in trust the other, according to the map designations, or otherw and even if such agreement had existed and was alleged connection with the other facts, it would not bring the c within the terms of such agreement. But be this as it m there is still another view presented by the facts of this ca which we regard as decisive.

It appears that in 1860, upon the facts alleged, that d culties and misunderstandings still existed between plain and Welch, in respect to their land claim. The donation la law had passed in 1850, and plaintiff claimed that "he the only person entitled to claim said donation land clair but that Welch continued to claim rights therein and to c test the application of plaintiff for a patent; and to se which contest and other disputes about the effect of th previous agreements, the plaintiff and Welch entered into agreement, the result of which was that plaintiff and his w conveyed by warranty deeds, on February 18, 1860, to We the west half of 200 acres of land in the southeast corner said land claim, and a large number of blocks, and to Na

Welch, his wife, the east half of said 200 acres of land, and a large number of blocks, among which are blocks 9 and 5, in front of which the tide lands, or blocks in controversy, are located; and it further appears by the allegations, that their warranty deeds were intended to be and were a full settlement of all the "*respective parties*" claims to said land claim, and were so accepted and received by Welch, "who, in consequence thereof, *withdrew the opposition* which he had previously made to the claim of plaintiff to the patent for said land," and as a consequence thereof, on the 24th day of January, 1866, patent issued to plaintiff and his wife for said land claim—the east half to plaintiff, and the west half to his wife. Here was a transaction, as appears upon the face of the complaint, intended by the parties to put an end to all their disputes, and to make a full and final division of all said land claim, the plaintiff and his wife conveying by warranty deeds rectly to Welch and Nancy Welch, his wife, specific property thout qualification or reservation, and Welch, in pursuance their agreement abandoning his contest and permitting intiff and wife to secure a patent to the same, the bound- of which, on the Columbia river, they were bound to w was the line of ordinary high water. But the appel- claims that the fair presumption in regard to the settle- t of 1860 is, that Welch was dealing with his contract ts, and that the deed to Mrs. Welch was without consid- ion from her, but a gift from her husband, and that as it comes to her in equity and good conscience transmitted their contract rights. But it seems to us the presump- is much stronger upon the facts and circumstances under ch these deeds are alleged to have been executed—the ntity of land conveyed to Mrs. Welch, as compared with t conveyed to her husband—that Mrs. Welch took what s so conveyed to her in lieu of what her husband might ve obtained for her under the donation law, had he not, in nsideration of the warranty deeds of 1860, abandoned his aim and contest to have the same conveyed to him by the

government. And in such case, it seems to us, that equ
and justice would require that Mrs. Welch should hold
shares unaffected by her husband's contracts, in like man
as if the same had been granted to her by the United Sta
It is not questioned but that the tide lands belong to
state, and that she has the undoubted right to sell or to ref
to sell them, as she may deem best; or, if so disposed,
right and authority to designate the persons, or classes of p
sons, "*authorized to purchase*" the same. In the act
1872, the owner of property fronting or abutting upon
shore in front of which the tide lands lie, have such right
purchase, and Mrs. Welch, or those claiming under her,
longing to this class, have obtained the deed of the state
the lands in controversy, and we see nothing in the facts
presented by the complaint, which would require a court
equity to fasten upon the conscience of the defendants
convert them into trustees for the benefit of plaintiff.
decree of the court below is affirmed.

Decree affirmed.

WALDO, J., did not sit in this case.

STACKPOLE v. SCHOOL DISTRICT NO. 5.

SCHOOL DISTRICTS—CLAIM AND ACTION AGAINST.

Claims against a school district should be presented to the board
school directors before the commencement of an action ther
and the omission of such allegation in the complaint ren
the same demurrable.

Such requirement imposes no hardship on the claimant, and aff
the school district an opportunity to pay without suit.

PEAL from Union. The facts are stated in the opinion.

A. *Stratton*, for appellant.

Ham & Ramsey, for respondent.

The Court, LORD, C. J.:

is is an action for a breach of contract to render services teacher, and the claim is for damages. The objection is the complaint does not state facts sufficient to constitute use of action in this, that it is not averred that the plaintiff never presented his claim to the school directors before bringing his action. Under our statute the directors, in making a contract with a teacher, act officially and on behalf of district, and their powers as such officers are limited by ute; and they can only exercise such as are expressly conferred, or are implied from the nature of the duties imposed the law. (Sec. 37, sub. 5 and sec. 40, Gen. Laws, 510.) conceding, then, the validity of the contract, and the breach of, will an action lie against a school district without leging in the complaint a due presentation of the claim? Sub. 6 of sec. 37, Gen. Laws, among other things, provides that the duties of directors of school districts shall be "To audit all claims against the school district, and to draw orders on the clerk for the same;" and under the subdivision of sec. 40, the clerk is made the treasurer or custodian of the funds of the school district, and required to keep a correct account "of all moneys coming into his hands, and all paid out belonging to the school district," etc. It will thus be seen by the mode provided by statute that there can be no payment of any claim by the clerk out of any funds in his possession except upon an order from the board of school directors. The board of directors can not pay claims, as their duty in the premises is first "to audit," and then draw an order on the clerk for the amount of the claim. But before the board of directors can audit a claim and draw their order on the clerk for the amount, the claim must have been presented to them. They are not supposed to know the nature and

exact amount of every claim against the school district, a
even if they did, this does not relieve them of the du
which the law imposes upon them to audit the claim bef
drawing an order on the clerk for the amount of the sam
and how can they perform this duty unless the claimant fi
presents his claim to them? We are not to presume th
these provisions of the law were not intended to serve so
worthy purpose, and to be observed; but if every claima
against the district may sue on his claim without regard
them, it is possible to render them absolutely nugatory.
certainly imposes no hardship on the claimant to require h
to present his claim to the board of directors to be audi
before suing thereon, and to afford the school district an
portunity to pay without suit. If he is dissatisfied with
determination of the board of directors, after they have p
ceeded to act upon his claim, and have disallowed it whc
or in part, he may then commence his action against
school district; but until he has presented his claim to
board to be audited, and they have failed or refused, af
consideration thereof, to allow the same, or some part of
he should not be permitted to maintain an action against
school district. (*Forbes* v. *School District,* 10 Wis., 118.)

We think the policy of the law in not allowing eve
claimant against a school district to annoy and harass
with a law suit, before submitting his claim to the board, i
wise and salutary one, and calculated to avoid much unnec
sary litigation and expense to the school district.

This complaint contains no averment that the claim in qu
tion was ever presented to the board before the commen
ment of this action, and it follows from the foregoing vi
that the judgment must be reversed.

Judgment reversed.

SLOPER AND KELSO v. CAREY.

NOTICE OF APPEAL—SERVICE BY CONSTABLE.

ificate of a constable that he served a notice of appeal from the gment of a justice's court in the county, but did not designate precinct, was not sufficient proof of service to give the circuit rt jurisdiction on appeal.

EAL from Polk. The facts are stated in the opinion.

nes & Thayer, for appellant.

ham & Ramsey, for respondent.

he Court, WATSON, J.:

appellant attempted to take an appeal from the judg- of the justice's court for Monmouth precinct, to the court of Polk county. The service of the notice of was made by the constable of Monmouth precinct. ly proof of service was his certificate that he served spondents personally, in Polk county, Oregon. The court dismissed the appeal on account of the insuffi- of this proof of service. Sec. 517 of the code gives stable in such cases the same right to serve the notice does the sheriff. Such we conceive to be the correct ction of that section. But neither the constable nor can make such service in his official character outside territorial jurisdiction, unless expressly or impliedly ized so to do by statute, and a return of service by under his official certificate alone, at a place outside bailiwick, is no proof of service. (17 How. Pr., 477; 9 r., 61.) This case is distinguishable from that of ser- f a summons or other process issuing from justice which may be served, under some circumstances, in precincts than the one in which the court is held. Be- pressly authorized by statute to make the service in stances, without any limitation, we think the power to

serve co-extensive with the scope of the process itself. I
there is such implied authority.

But it is insisted by appellant that it will be presumed
the service was made within the territorial limits of the
stable's authority. Such seems to be the rule, supporte
many authorities, where no place of service is specifie
the return. (4 G. Greene [Iowa] 468; 12 Mo. 143.)
here the place of service is specified and there is no plac
such presumption. It is true the precinct is within
county, but with such a return before us, we cannot say
the constable intends to be understood as certifying that
service was made in that particular precinct, which we n
under the authorities cited do, if no place had been d
nated. If he actually made the service in any part of
county he could not be made liable for a false return, bec
of not having made the service in his own precinct.

The judgment of the circuit court is affirmed with c

Judgment affirmed.

GRAY v. HOLLAND.

MARRIED WOMEN—LIABILITY AS SURETY.

While a married woman cannot usually become personally b
for the debts of her husband, she may ordinarily pledge or
gage her separate property for his debt, and if she do
such property occupies the position of a surety or guar
and will be discharged by anything that would dischar
surety or guarantor who was personally liable.

HUSBAND'S DEBT—PRINCIPAL AND SURETY.

Nor is her character as surety affected by the fact that the
secured is the debt of her husband. As surety for his deb
is entitled to all the rights and privileges of that charact

Mere forbearance or delay of the creditor toward the principa
not discharge the surety.

PPEAL from Multnomah. The facts are stated in the ion.

illiam Strong & Sons, and Bellinger & Gearin, for appel-.

married woman, at the time this mortgage was made, not bound by any covenant in a mortgage. (Code, page)

e property of the wife is not subject to the debts of the and. (Constitution of Oregon, page 95 of Code.)

ence, if she binds her separate property as security only, her husband's debt, and all parties have knowledge of fact, her liability and the liability of her property ceases n, by either the active or passive act of the creditor, the for which she becomes security becomes barred or in- ble of enforcement.

his is the reasoning upon which is based the rule, that extension of time will release a surety—a rule now thor- ly well established. (17 Johns., 384, in Am. Dec., 415, notes; *Walker* v. *Goldsmith,* 7 Or., 161.)

hat Mrs. Holland could show by parol that she was surety as against all those who had knowledge that such was relation to the contract. (See 4 New Hampshire, 22, in Am. Dec., p. 414, and notes.)

. *Killin,* for respondent.

n action on a sealed contract can be maintained within years. (Code, page 106, sec. 3.) And the same statute lies to suits. (Civil code, secs. 378, 743.)

suit to foreclose a mortgage may be maintained in this e *even* where there is in it no promise to pay and the ute has run on the note. (*Myer* v. *Beal,* 5 Or., 130, and s there cited; 31 Am. Rep., 38; 15 N. Y., 505; 14 N. Y., 2 Jones' Mortgages, sec. 1,204; 7 Paige, 469; 2 Wood- y & Minot, 403.)

t may be claimed that Margaret will have no recourse if lands are now sold to pay the debt, but this is a mistake,

as the cause of action does not accrue to the surety until has paid the debt. (Brandt on Suretyship, secs. 176, 1 *Dennison* v. *Soper*, 33 Iowa, 183.)

By the Court, LORD, C. J.:

This is a suit to foreclose a mortgage executed to Ja Morris, in September, 1872, by the defendants, Patrick H land and Margaret, his wife, upon the separate property the wife, to secure the note of the husband and wife, of same date. By an assignment duly made the plaintiff is owner and holder of the mortgage. As a defense to the f closure the defendant, Margaret Holland, answered and tends, substantially, as follows: That the debt for which note was given, and to secure which the mortgage was cuted, was the debt of her husband, and that by the execu of the mortgage upon her separate property she bec merely surety for him, and that Morris, and those clain under him, knew that said promissory note was the sole gation of Patrick Holland, and that the land described in mortgage was her separate property. The answer of Pat Holland is to the same effect.

To each of these answers demurrers were sustained, court deciding that the matter set up did not constitute defense to the suit.

A decree was entered against Patrick Holland for amount of the note, and against both defendants, foreclo the mortgage, and directing the sale of the lands to pay debt, but rendering no decree against Margaret Holland sonally for the money.

There are two questions to which reference is made in brief of appellants, although little discussed at the argum which may be disposed of at the outset: First, that it been decided in this state that premises which are mortga can be subjected to the payment of the debt secured by mortgage after the statute of limitations has run against note. (*Myer* v. *Beal*, 5 Or., 131.) And, second, that a r

oman has a right to sell or mortgage her separate prop-
or the payment of her husband's debts. (*Moore* v.
6 Oregon, 274.)

conceded by the demurrer that Mrs. Holland mort-
her separate property to secure the payment of a note
husband's individual benefit, and that the plaintiff,
ose under whom he claims, had actual knowledge of
acts. But the only result of this was to establish the
n of principal and surety between Patrick Holland, the
and his wife, the mortgagor of her individual prop-
nd charge the plaintiff with notice of her attitude of
to her husband, so that any act done, or suffered to be
which would operate to discharge a surety personally
the wife might avail herself of to secure the discharge
mortgage upon her separate property.

Brandt, in his work on suretyship, says: "While a
d woman cannot usually become personally bound for
ts of her husband, she may ordinarily pledge or mort-
er separate property for his debts, and if she does so,
roperty occupies the position of a surety or guarantor,
ill be discharged by anything that would discharge a
or guarantor who was personally liable." (Brandt on
ship and Guaranty, section 22, and authorities cited in
)

pear v. *Ward*, 20 Cal., 674, Mr. Chief Justice Field
'And her character as surety is not affected by the fact
e debt secured is the debt of her husband. With
to such debt she holds her property as absolutely free
ugh she were a *feme sole*. As surety for the debt of
sband she is entitled to all the rights and privileges of
aracter."

in *Banning, et al.*, v. *Wolf and wife*, 3 Minn., 207,
urt say: "A married woman may pledge her separate
to secure the debt of her husband, and become his
y, and she is entitled to the same rights and immu-
s attach to the relation of principal and surety between

strangers." Indeed, the authorities indicate the principle law to be well settled, that when such a relationship is est lished—and it is here conceded—the wife, and those claimi under her, are entitled to all the beneficial rights and pri leges, legal and equitable, incident to that relation, as mu so as any other surety whatever. (See, also, *Agnew* v. *M rill,* 10 Minn., 310; *The Bank of Albion* v. *Burns, et* 46 N. Y., 207; Story's Eq. Jur., sec. 1,373; *Wilcox* v. *To* 64 Mo., 388; *Gahn* v. *Mincourutz,* 11 Wend. R., 312.)

Mrs. Holland, then, upon the facts alleged by way of fense, simply occupied the position of a surety, and as su may avail herself of any right or remedy incident to th relation for a defense. But facts which merely allege su relationship are not sufficient alone to constitute a defen unless accompanied by such other facts and circumstances would operate to discharge a surety; as, for instance, that t creditor and principal debtor made a valid agreement for t extension of time for the payment of the debt without t consent of the surety. But no fact or circumstance of t character, or of any other, is alleged. The defense stops sh off with the bare statement of facts which establish the re tionship of principal and surety, without the addition of a other facts whatever, much less such facts as would oper to destroy that relation and discharge the surety. It is pretended, nor alleged, that there is any fraud or misrep sentation, or any illegality in the principal contract, and it conceded that mere forbearance, or delay of the credi toward the principal, will not discharge the surety. T facts alleged were clearly insufficient to constitute a defen and the court below committed no error in sustaining t demurrer.

Decree affirmed.

WARDWELL, et al., v. PAIGE, et al.

8th section of the act of Congress, approved September 4, 1841, entitled, "An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," operated as a present grant to the State of Oregon, upon her admission into the Union, of the 500,000 acres of land for purposes of internal improvements therein specified, requiring only a selection by the state, in pursuance of the requirements of said section, to subject the particular tracts selected to the operation of the grant.

act of the state legislature, approved October 19, 1860, entitled, "An Act to provide for the possessory and pre-emption rights of 500,000 acres of land donated to the State of Oregon," and making provision for locations upon the public lands of the United States, within the limits of the state, by private individuals, with the right of pre-emption, in advance of any selection of such lands by the state, was valid, and a locator under the same, or his successor in interest, upon complying with the provisions of the subsequent acts of the legislature of October 15, 1862, and October 26, 1868, in regard to payment for the lands so located, became, as soon as such lands were selected by the state in conformity with the act of Congress, entitled to a deed from the state therefor.

e who subsequently applied for and obtained a deed from the proper board in the name of the state, will be held in equity as a trustee of the legal title for such locator, even though he had no notice of the latter's claim. The doctrine of notice has no application in such cases. The state board had no power, after a valid disposal of state lands had been made to one person, in accordance with law, to make another disposal of the same lands to a different person, and want of notice is no defense for the latter in the suit of the former for a conveyance of title to himself. The rule caveat emptor applies.

valid law operates according to the intention of the law-maker. The several acts of the legislature upon the subject in controversy, show unmistakably that the legislature intended that the locator under the act of October 19, 1860, should have the exclusive right to procure the title of the state under the act of Congress, in the lands located and paid for in conformity with their requirements, and where lands so located and paid for were afterwards selected by the state, in due form, the right of the locator to a state deed therefor became perfect and indefeasible, according to such intention.

APPEAL from Umatilla. The facts are stated in the opinion.

By the Court, WATSON, J.:

This suit was brought by the appellants in the circuit court r Umatilla county, to quiet their title to certain tracts of

land situated in Umatilla city, in said county, and for a c
veyance to them of any title appellants might have acqui
therein. The circuit court rendered a decree, *pro forma,*
the respondents, as it is understood, to facilitate an app
and the final determination of the cause in this court.

Appellants claim through intermediate conveyances fr
Jesse S. Lurchin, who, they allege, obtained title to the pr
ises, as a pre-emptor, under certain acts of the state legi
ture. The first of these acts, entitled, "An act to provide
the possessory and pre-emptory rights of 500,000 acres
land donated to the state," was approved October 19, 18
and, in substance, provided, that any citizen, or person hav
duly declared his intention to become a citizen of the Uni
States, might, in conformity with its requirements, locat
tract of land, containing not less than 40 nor more than
acres, upon any lands of the United States, whether survey
or unsurveyed, subject to location as part of the 500,000 ac
accruing to the state of Oregon, on her admission into
union, by virtue of the 8th section of the act of Congr
entitled, "An act to appropriate the proceeds of the sales
the public lands, and to grant pre-emption rights," appro
September 4, 1841, and by making the prescribed applicat
therefor to the governor, and obtaining his approval there
become entitled to possess, control and pre-empt the sa
upon certain other conditions therein specified as to paym
of interest, the time and manner of making payment of
principal being expressly reserved as a subject for fut
legislation. (Sess. Laws, 1860, p. 55.)

A subsequent act, entitled, "An act to provide for the lo
tion of the public lands donated to the state of Oregon
approved October 15, 1862, recognizes the validity of lo
tions made under the previous act, designed evidently
render such locations effectual, requires all persons havi
made such locations to pay the state for the lands embrac
therein, at the rate specified in the previous act, viz.: one d
lar and twenty-five cents per acre. (Gen. Laws, 1862, p. 10

next and last act of the legislature upon the subject
proved October 26, 1868, and contained this provision;
person who had a valid right of pre-emption on any
embraced in the 500,000 acre tract, granted to the state
act of Congress of September 4, 1841, prior to June
4, or who shall be a successor in interest to such pre-
n right, shall be allowed, upon complying with the
ions of this act, to purchase the same at one dollar and
-five cents per acre, in currency."

shown, we think, beyond question, that Lurchin made
ation, including the land in litigation here, under the
October 19, 1860, and presented his application there-
nformably to its requirements, to the governor, by whom
duly approved on September 19, 1862. The original
ation, with the governor's approval endorsed thereon, is
f the evidence in the case. But these facts are hardly
verted by respondents, and may safely be assumed as
established. And there is just as little ground to con-
e fact of Lurchin's payment for the land covered by his
n.

C. Gibbs testifies that the money was received from
n and paid into the state treasury. Mr. Gibbs was
or of the state at the time of this transaction, and act-
land commissioner for the state, under the act of Octo-
, 1862. A certificate, dated May 20, 1863, signed by
governor, appears in the evidence, which recites pay-
by Lurchin for said lands. An entry upon the record
y the state treasurer at the time, a certified copy of
is also in evidence, shows that this money was paid
e state treasury by Mr. Gibbs, as money received from
n, on the 6th day of June, 1863. In a special message
legislature in 1864, Governor Gibbs mentions the loca-
nd payment of Jesse S. Lurchin, among others, under
evious acts of October 19, 1860, and October 15, 1862,
fers to "a list of lands sold, hereunto attached." This
ublished in connection with the special message, and

verified by the official certificate of the state treasurer, the names of locators and number of acres located, amount of payment by each, but does not show any loc or payment by Lurchin. Upon this discrepancy alon spondents rely to rebut the evidence of payment afforde the testimony and certificate of Mr. Gibbs, and the ent the state treasurer's record. That entry shows paymen June 6, 1863, and the first payment mentioned in the cer list accompanying the special message bears date Septe 24, 1863, over three months afterwards, and the list its certified to under date of September 7, 1864. (House nal, 1864, appendix, 194.)

It is certainly much more reasonable and just to conc under all these circumstances, that Lurchin's location payment were omitted from this list through the oversig the state treasurer, in making up the list, than that Gov Gibbs made an incorrect or false statement concerning it, in his certificate and message, and subsequently in his s testimony, and also that the entry of payment, on the of the same state treasurer, was either a mistake or a for We regard the fact of payment by Lurchin to the sta conclusively established by the proof.

The lands embracing the Lurchin location were selecte the state, in conformity with the requirements of the a Congress of September 4, 1841, on June 26, 1868, an selection was finally approved by the proper departme the general government on February 12, 1870. By joint olution, adopted February 9, 1871, Congress assented t application of the proceeds of the 500,000 acres grant the state by the act of 1841, for internal improvement the support of common schools, as provided in section article 8 of the state constitution. On September 26, the respondent, Paige, under whom the other respon claim, obtained a deed from the board of commissioner the sale of school lands, for the portion of the land emb in the Lurchin location, which is in litigation in this s

re clearly of the opinion that Lurchin, or his succes-
interest, were entitled to the deed from the state in-
f Paige. The 8th section of the act of Congress of
ber 4, 1841, operated as a present grant to the new
hereafter admitted into the union, of which Oregon
e. The words of the section in respect to such new
re: "And there shall be and *hereby is* granted to each
ate that shall be hereafter admitted into the union,
uch admission," etc. (*Dall* v. *Meador*, 16 Cal., 295;
burg v. *Harriman*, 21 Wall., 44.) The selection by
e, in such manner as might be prescribed by its legis-
was only necessary to identify the subject of the grant.
to the tracts so selected related back to its admission
e union. (*Leavenworth R. R. Co.* v. *United States*, 2
33.)

we conceive Lurchin's rights would have been the same
e state selection on June 26, 1868, if the title of the
ad not commenced until that time. "A legislative
perates as a law, as well as a transfer of the property,
such force as the intent of the legislature requires."
enburg v. *Harriman, supra.*)

egislature may as well provide by law for the disposal
erty to be acquired by the state, as for the disposal of
already belongs to it. And if the intention is clear,
will operate upon the future acquisition. This propo-
vill hardly be questioned. It is an inevitable deduc-
om the very notice of law.

the manifest purpose of the several acts of the state
ure, before referred to, was to enable the class of per-
ovided for, complying with their provisions as to lands
g to the state under the act of September 4, 1841.
ght to obtain such title by such persons, upon such
nce, was designed to be exclusive, or, in the language
acts themselves, the "right to pre-empt." Upon the
n by the state of the tract covered by Lurchin's loca-
part of the 500,000 acres granted to the state by said

act of Congress, his right to pre-empt the same became
fect, and upon his making payment for the same he be
fully entitled to a deed from the state therefor. (*Shipl
Cowan,* 1 Otto, 330.)

It is claimed, however, on behalf of the respondents,
his payment was not sufficient in amount. It was at the
of only one dollar and twenty-five cents per acre for the
located. It is insisted that he should have paid an addit
sum, equal to the difference between the amount paid an
full price of 320 acres, at the same rate per acre, unde
requirements of an act of the legislature approved Oc
22, 1864. There are two answers to this objection, eith
which is sufficient. In the first place, the provision cited
this act refers expressly to "settlers" under the act itself
in the second place, the official list in evidence shows
was no deficiency in quantity in the state selection, inclu
the tract covered by Lurchin's location. And besides
the act of October 26, 1868, contains an express prov
as we have already seen, for payment in such cases a
present, at the rate of one dollar and twenty-five cent
acre in currency for the quantity actually located.

It seems to us quite unimportant whether Lurchin's
tion, under the act of October 19, 1860, was intended by
act to operate as a state selection, or whether, if so inte
there was a sufficient compliance with the requiremen
such act on the part of the state authorities to render it
as such selection; or, indeed, whether or not these provi
themselves were valid. He claimed under the law o
state, which gave him the right to locate and pre-empt u
the right of the state to such lands, and its subsequent
tion, in the same right, could not but have enured t
benefit.

The respondent, Paige, applied for and obtained his
from the state board of commissioners for the sale of s
lands, for the land in controversy, after its selection b
state as part of the 500,000 acres granted by the 8th se

act of Congress of September 4, 1841, and after the pproval of such selection by the proper department of neral government, Lurchin's right to a deed for the ad already become perfect, and nothing remained for te to do but to make him the deed.

ondents insist, however, that Paige was a *bona fide* ser for a valuable consideration, and that equity will sturb his legal title. Section 6 of the act of October 0, provided for recording the application of the locator pproval of the governor in the office of the county clerk county in which the lands covered by the location be situated, and declared such record should "be deemed art notice to all persons of the existence of such claim, he date of presentation for record." Lurchin's appli- with the governor's approval endorsed thereon, was ed in the proper office, November 29, 1862. But the thorizing such record, and declaring its effect as notice, been repealed expressly by the subsequent act of r 15, 1862, containing an exigency clause operating to the act take effect upon its approval by the governor, s a question whether such record ever had any effect as uctive notice.

if this record was inoperative, we think Paige and his ondents, under all the facts and circumstances appear- the evidence, should be held affected with actual notice. is not essential, in our view of the law, whether re- ents had notice or not. After Lurchin's right attached particular land covered by his location, the board of ssioners had no power to dispose of it to any one else, after Lurchin's right had attached, Paige did, through e or otherwise, acquire the dry legal title, which, after in's payment, was all the title remaining in the state, k it as trustee for Lurchin, or his successors in interest. annot retain it from them on the ground of want of . The doctrine of notice has no application in such but the rule *caveat emptor* applies. (*Arnold* v. *Grimes*,

2 Iowa, 1; *Taylor* v. *Brown*, 5 Cranch, 234; *Moran* v. *Palmer*, 13 Mich., 367; *Mayer* v. *McCulloch*, 1 Ind., 339.)

Respondents' counsel further claim that the act of the board of commissioners, in making the deed to Paige, operated as a final adjudication of the right to the land in controversy in his favor, and is conclusive of the whole question here. In *Cospe* v. *Brooks*, 8 Or., 222, this court held, that the decisions of this board could not be reviewed by writ of review in the courts. But Judge Boise, in delivering the opinion of the court in that case, takes occasion to say: "The board is the land department of this state, and their decisions as to who shall receive a patent to land is conclusive in the courts. But the courts may, on a proper showing, decree that the patentee holds the land as the trustee of one having a better right in equity." The right to resort to a court of equity, in a case of this nature, is here distinctly asserted, and the necessity for adopting such a course clearly shown. No relief could be had from a court of law against a party wrongfully obtaining a state deed. The decree of the circuit court must be reversed, and a decree entered for appellants, as prayed for in their complaint, for conveyance of title, with costs.

LORD, C. J., concurring.

McMAHAN v. McMAHAN.

DIVORCE—SUFFICIENT GROUNDS FOR.

e a husband falsely accuses his wife with familiarity with other nen, and infidelity to her marital vows, and accuses her with having he venereal disease, which she had communicated to him, such ac-usations are a sufficient ground for divorce.

PPEAL from Linn.

rahan & Bilyeu, and N. B. Knight, for appellant.

nham & Ramsey, for respondent.

the Court, LORD, C. J.:

is is a suit for divorce. The facts necessary to be con-ed, and substantially alleged, are that soon after the mar-the complainant charges that the defendant began to fest toward her a suspicious and jealous disposition, and arge her, by hints and innuendo, with improper familiar-vith gentlemen of her acquaintance, and of her neighbor-; that he continued, from day to day, to be more explicit s charges, and to charge her with infidelity to her mar-vows; that on or about the 11th day of November, 1879, defendant, in a violent, abusive and brutal manner, ged complainant to her face with being afflicted with a some venereal disease, and with having communicated the to him, and repeated the charge to Thomas Brandon, a hbor, and to other neighbors of complainant, to her great dal and shame; that each and all of such accusations so erred by the defendant against the complainant are ut-false and grossly slanderous, etc. These facts being ifically controverted, and issue thus joined, upon the hear-the court granted a divorce to the complainant. Do these , if proven, constitute a sufficient ground for divorce?

Smith v. *Smith*, 8 Or., 101, it was held, that if a hus-or wife, either, falsely accuse the other of an unchastity, accusation is a sufficient cause for divorce. The court

say: "Such an accusation, by either the husband or w
against the other, has often been held sufficient cause fo
divorce, and many divorces have been granted for such cau
and it is now the settled law of this state that such accusa
is sufficient cause for a divorce. But while counsel for
appellant concede that this accusation may be sufficient
some cases, they still claim that it is not sufficient in this c
because these accusations were made after the parties w
separated and had ceased to live together as husband and w
We think this makes no difference, for neither a husband
wife can claim a right to continue the marriage relation w
falsely charging the other with unchastity. No dome
happiness or peace can be expected to exist between par
thus falsely criminating each other."

Now the complaint in this case does allege, in direct te
that the defendant charged the complainant not only w
familiarity with gentlemen of her acquaintance, but with
chastity—with infidelity to her marriage vows—and by
son thereof, with being afflicted with a loathsome vene
disease, which the complainant had communicated to h
and which fact he had repeated to their neighbors, to
great shame and scandal. Certainly no more cruel nor br
method could have been selected to wound the feelings o
chaste wife, and cause her the most poignant grief, than
cusations thus made by her husband. For they involved
only the charge of adultery, but of that vile and miscell
ous sort which bore him the twin fruits of dishonor
disease. And if these accusations were false, as allege
be—if his wife had kept a stainless purity of life, and a
faith to her marriage vows—then the uttering of such f
and slanderous accusations against her fair name and fa
was cruel treatment which furnished her a just ground
the dissolution of the marriage tie, and the court below
not err in granting her prayer for a divorce.

The next and only question is, does the evidence sustain
facts alleged in the complaint? It appears that soon a

rriage, for some reason not made manifest by the evi-
the defendant indulged in much unjust and groundless
ons and accusations against the marital integrity of his
It would be generous to him to suppose that much of
s due to the peculiarity of his disposition, which seems
have been on the alert to discover something which
be construed into an adulterous inclination, or an act
ital infidelity in his wife; but, certainly none of the
charged directly, or even hinted at by him, find any
t whatever in the evidence. In his own testimony, he
to circumstances and relates conversations indulged in
wife—much of which is too filthy and disgusting to
n—in which he makes her impeach her own chastity,
clare herself wedded to the doctrine of Free Love by
and inclination, that finds no support outside of his
ce, is contradicted by her, by her life and reputation, as
and testified to by many highly respectable citizens,
his own acts and some declarations.

eems that prior to and at the marriage, his wife had
nd was a member and officer of the Good Templars'
and as such it became her duty, soon after the mar-
to attend the lodge for the purpose of paying over
in her possession belonging to the lodge. She went, and
er return she found him cross and surly at her absence,
gh he knew she was going and made no objections; but
ring then that he was strongly opposed to her attend-
e lodge, to please him, and to avoid domestic trouble
fficulty, she told him she would not attend any more,
er did afterwards, according to the evidence, while they
ued to live together. Notwithstanding this concession
wishes, he intimated that her object in attending the
was for purposes of doubtful propriety; in effect, that
the rendezvous of persons of doubtful character, and
charged that the lodge was a "house of ill-fame."
t accusations thus involving the purity of her woman-
and her chastity as a wife, she protested, and he, it

would seem, to fasten more firmly the truth of his cha
against the lodge, and evidently to wound more deeply
already lacerated feelings, undertook to name the gentle
from whom he professed to derive this information, and w
he declared would confirm the truth of his statements.
sufficient to say that the gentlemen referred to, when s
in this case, denied any such conversation or statements.

This was the beginning of their troubles, and from
time until their final separation, several months afterw
occur a series of circumstances which it is unnecessar
detail, but in which her conduct is suspected and impu
for trifling and often imaginary causes, and charges of r
tal infidelity, either directly or indirectly, reiterated
repeated, which, judged by the evidence, were untrue,
even the explanations of the defendant's testimony fa
furnish the slightest ground of justification. The resu
all this was, that she became miserable and unhappy, and
health impaired, under the accumulated weight of these
eusations and grievances; and doubtless, conscious tha
domestic peace or happiness could exist in the absenc
respect and confidence, she finally told the defendant that
must separate; in brief, that it was impossible for the
live longer together while he continued to suspect and r
accusations against her chastity. And just here his con
seems to indicate that he had compassed his end, and inte
to force a separation, then and there, which should be f
for to insults and injuries already inflicted, he deliber
made a charge which, to a sensitive, refined and virt
woman, must have inflicted pain not less intense and
than brutal blows. He declared that she had the ven
disease, and had communicated it to him, and that he w
swear to it on a stack of bibles as high as he could reach;
not content with making this accusation to her face, h
peated it to Mr. Brandon, a neighbor, all of which he ad
in his testimony, and says: "Mr. Brandon said 'if my
would serve me in that way I would leave her right o

Moreover, when interrogated in respect to this disease, for the purpose of ascertaining the facts or truth about it, the evidence discloses that he had consulted no physician, that he had "treated it himself, from what he had heard others say who were afflicted with it"; and finally, when asked whether "he ever had any personal experience with the disease himself," he sought to stop the investigation by declining to answer the question.

Some argument was made to the effect that this disease might exist and be communicated to a husband by a virtuous wife; that such might be the facts in this case, and that the accusation did not therefore necessarily include a charge of adultery. The record in this case forbids any such inference or conclusion. What he intended and meant by this accusation, and how it was understood by his wife, and by Mr. Brandon, when repeated to him, in the light of what had preceded it, is a matter too plain for construction, argument or comment. It is true he went to see her after the separation, and requested her to return to his home, but there were other consequences growing out of the separation, the record discloses, which might have induced this, independent of the inconsistencies of his own conduct, if he believed in the truth of what he had sworn to. It must be observed that both of these parties had been previously married, and were near the meridian of life. The defendant admits that his wife always associated with the best people in the community. Indeed, their neighbors are unanimous in their testimony—some of whom had known the plaintiff for thirty years—in bearing testimony to her worth and high standing as a chaste, refined and estimable lady. From the record before us we discover no error, and the decree of the court below is affirmed.

Decree affirmed.

KNOTT BROS. v. JEFFERSON STREET FERRY CO.

FERRIES—APPLICATION FOR LICENSE—ADVERSARY PARTIES.

The owners of a ferry, without exclusive privileges, are not thereby e titled to appear as adversary parties in a proceeding in the coun court on the application of another for license to keep a ferry at different point on the same stream. Nor can they question the re ularity of such proceeding by writ of review.

The owner of a tract of land, conveyed by metes and bounds, witho reference to any street, acquires no title to the soil in any adjoini street subsequently dedicated by his grantor.

The preference to keep a ferry, given by statute to the owner of the la adjoining or embracing the lake or stream where such ferry is pr posed to be kept, does not belong to the grantees of such owner an exclusive right merely to use his land for landing places for particular ferry, other than the one proposed.

APPEAL from Multnomah.

This was a writ of review, issued from the circuit court fo Multnomah county, upon the petition of the appellants, fo the purpose of examining the record of the county court o that county in a proceeding for granting a ferry license, o the application of the respondent. The line of the propose ferry was across the Willamette river, between the foot o Jefferson street, in Portland, and the foot of U street, in Ea Portland. Upon the return of the writ, with certified tran script annexed, the cause was heard in the circuit court, an the decision of the county court affirmed, with costs to th respondent; and from this decision an appeal has been take to this court.

The record discloses the following facts: Jefferson and streets terminate on the opposite sides of the Willamett river, which forms the boundary between the two citie They are both public streets. The intersection of each wit the river has been designated as a "ferry landing" by th proper city authority. The Jefferson Street Ferry Company having been duly incorporated for the purpose, applied to th county court for a license to keep a public ferry between sai

points. Proof of posting notices of intention to apply, as required by section 43, chapter 50, Miscellaneous Laws, was duly presented with such application. The necessity for the establishment of a public ferry at the place designated, was sufficiently shown by the facts set forth in the application.

The appellants were not served with a written notice of the respondent's intention to apply for such license, as was required by section 42 of the same chapter, in the case of adjoining owners, resident within the county; but they both appeared in the cause and opposed the application at every step in the proceeding. They claimed that a ferry was not necessary at that point, and its establishment would unnecessarily annoy and injure them in their business as proprietors of another ferry across the same stream, at a short distance below; but that if the county court should determine otherwise, then, as riparian owners on the east bank of the river, at the terminus of U street, they were entitled, under the statute, to have the license issued to them, in preference to the respondent, which did not own any land adjoining, or possess any riparian rights on either bank, and they asked accordingly, that if a ferry at that point should be deemed necessary, the license to keep it should be granted to them. The respondent made no claim as a riparian owner.

In support of their claim, appellants produced and offered in evidence, before the county court, three deeds from James B. Stephens and wife to Joseph Knott, and two deeds from the latter to themselves, conveying all the interests acquired from Stephens and wife by the three deeds first mentioned. The execution of these several instruments, and the appellants' ownership of whatever interests or rights passed under them from Stephens and wife, were not contradicted.

In 1852, the legislature of Oregon granted Stephens a charter for a ferry on the Willamette river, at a point about one-half mile below the location of the proposed ferry, with exclusive ferry privileges on the river for a distance of one mile each way, for the period of ten years. On March 25.

1861, Stephens being still the owner of such ferry and c
tered rights, and also the owner, in fee, of the land adjoi
the river, on the east side, for a distance of a mile and a
embracing both the landing of said ferry and the terminu
U street, joined with his wife in executing the first of
deeds in favor of Joseph Knott, for the consideratio
eighteen thousand dollars. On the 22d day of the follo
January, they executed the second of these instruments, f
nominal consideration, and for the avowed purpose of
fully expressing their intention in executing the first.

These deeds convey to Joseph Knott the ferry then c
ated by Stephens under said charter (which is the same
owned and operated by the appellant), the ferry boat,
then used in connection therewith, all his rights and privi
under said charter, some additional rights on the west b
and the exclusive right for the purpose of landing and ca
ing on said ferry along the entire river front of his said l
Knott to select such landings as he might desire to use
said ferry, the same to be at the terminus of some stre
public road created by law, and at no other place. The
deed from Stephens and wife to Joseph Knott, was exec
July 5, 1862, and conveyed the title, in fee, to a tract of
and 6-100 acres, by metes and bounds, which adjoins U s
on the north, and fronts 262 feet on the river below. A
time of this conveyance there was no street where U stre
now located, nor was there any until June 8, 1869, wh
was dedicated to the public by Stephens, who still rema
the owner of the soil, by his filing and causing to be reco
in the office of the county clerk of Multnomah county a
of his addition to the city of East Portland, with sa
street designated thereon as a public street.

W. S. Ladd was the owner of the block adjoining the
of U street on the south, and fronting on the river i
diately above. He was properly served with written n
appeared and objected to the grant of a license to respon
but neglected to apply for its issuance to himself.

Upon this state of facts, the county court, being satisfied that a ferry was necessary at the place proposed, granted a license to keep the same, for a term of five years, to the respondent, which appellants claim was erroneous, as was also the judgment of the circuit court affirming the same.

H. T. Bingham, C. B. Bellinger, N. B. Knight and Seneca Smith, for appellants.

J. G. Chapman and William R. Willis, for respondent.

By the Court, WATSON, J.:

The most important question to be determined here, arises upon the construction of the deeds from Stephens and wife to Joseph Knott, of March 25, 1861, and January 22, 1862. What interest did they convey? The arguments of appellants' counsel are predicated on the assumption that they conveyed all the rights which the grantors had, as riparian owners, to the use of their land for ferry landing purposes. In this, we think, they are clearly wrong. There is but one ferry mentioned in these deeds. The perpetual and exclusive right to the use of the river front for ferry landing places, attempted to be conveyed, is in connection with this particular ferry, and relates to none other. For the purpose of landing and carrying on said ferry, as aforesaid, such landing place or places "to be at the terminus of some street, or public road created by law, and at no other place."

This is the very language of these instruments, and leaves no doubt as to the intention of the parties. But it may be said, that, although limited by its connection with a particular ferry, the right was nevertheless intended to be exclusive. Conceding this, then if appellants could avail themselves of its exclusive character for the protection of their interests in that ferry, they must do so by preventing infringements, and not by claiming their benefits. It is quite clear that they derived through these deeds no rights to use any portion of the river front, for landing places, for other ferries than the one specified.

If for any reason they may not be able to enforce exclusive right intended to be conveyed, by preventing use of the river front for landings for other ferries wh competent authority may deem necessary for the public c venience to establish there, with what appearance of c sistency can they claim the distinct right to use it for landi for such other ferries? The legal right to so use it wo constitute an easement, separate and distinct from that c ferred by the deeds in question, and remained in the grant after the execution of such deeds. The appellants, theref were not the owners of this right, and their case does not co within the principle laid down in *Bowman's Devisee & Bur* v. *Walthen, et al.*, 2 McLean, 376, relied upon by them. T decision, as we understand it, is to the effect that a stat similar to ours, giving a preference to keep a ferry to adjoining owner, is based upon the right to use the bank landing purposes, and designed to protect and secure to s owner the benefit of such right, and that the owner ther though it be "separated from the fee in the soil," should deemed the adjoining owner "within the policy and langu of the statute."

In the case at bar, the appellants not being the owners any right to use the river bank for a ferry landing in con tion with the ferry about to be established, or any other fe except the one transferred by said deeds, they cannot, un this authority, be deemed adjoining owners, "within the icy and language" of our statute, which gives a preferenc keep a ferry to the owner of the land embracing or adjoin the lake or stream where the proposed ferry is to be es lished, if he make proper and reasonable application there (Sec. 42, chap. 50, Mis. Laws.)

We deem it useless to prolong the discussion of this po and will now briefly notice some others presented in the ar ment on behalf of the appellants.

The record discloses the fact that the appellants were owners of a ferry on the same river, and about half a

below the location of the proposed ferry, and that the establishment of the proposed ferry would materially diminish the profits of their business. As this ferry franchise, derived through the Stephens' charter of 1852, did not, at the date of respondent's application, have any exclusive privileges attached to it, we cannot perceive how the mere facts of their ownership in a rival ferry, and the consequential damage which would probably result from a diminution of its profits upon the establishment of another ferry across the same stream, and within such a distance, could give them any standing as parties to the proceeding before the county court, or any right to have the same reviewed for alleged errors by the circuit court. (*Price* v. *Knott*, 8 Oregon, 438; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 496; *Lawless* v. *Menefee*, 20 Ark., 567; *Wiswell* v. *Wandell*, 3 Barb. Ch., 312.)

Their franchise not being coupled with exclusive privileges, was no obstacle in the way of granting licenses by the county court for as many new ferries across the same stream as might become necessary for the public convenience. The grant of a license to keep another ferry, at a different point on the same stream, was no infringement of any right connected with or growing out of their franchise. If the establishment of such other ferry might have the effect, incidentally, of diminishing their profits, this fact could not be considered by the county court in such a proceeding. It would afford no legal ground for refusing the application. It would give them no particular interest in the controversy, recognized by law, to represent which they would be entitled to appear as adversary parties. In contemplation of law they had no particular right or interest which could be infringed by granting the license applied for in pursuance of the statute. Nor is there a single statutory provision which sanctions the idea of their being made parties, under any circumstances, simply on account of their proprietorship in such adjacent ferry. Having no individual right which could be adjudicated in the proceeding, they could not claim, as adversary parties, to

question its regularity, as they otherwise might by writ
review, when substantial rights are involved.

Their claim as adjoining owners, based on their title to
tract or block on the north side of U street, is not suppo
by the facts which appear in the record. This tract was
veyed by Stephens and wife to Joseph Knott, under wl
appellants claim title, by metes and bounds, seven years
fore U street was dedicated by Stephens, and at a time w
the dedication of that street could not have been in
templation of the parties to such conveyance. At least t
is nothing in the record to indicate that it was. It woul
absurd to conclude, under such circumstances, that it was
tended the grantor should take the title to the middle o
street, or that by such subsequent dedication, the title to
centre of the street enured to the owner of this block, v
ever he might be. (*Peck* v. *Smith*, 1 Conn., 127; *Wat*
v. *Southworth*, 4 Conn., 309.)

Upon every material point, the conclusion we have reac
is adverse to the claim of the appellants. We fail to disc
in the record any substantial rights belonging to them, wl
were involved in the proceeding in the county court, on
spondent's application for a ferry license which was awa
to it. They were therefore not entitled to the remedy by
of review.

Judgment affirmed.

WALDO, J., did not sit in this case.

STATE v. STURGESS.

SALMON FISHERIES.

The act of the Legislative Assembly, entitled "An Act to Protect Salmon," approved October 25, 1880, does not apply to the Columbia river.

APPEAL from Multnomah. The facts are stated in the opinion.

J. F. Caples, District Attorney, M. F. Mulkey and W. H. Adams, for appellant.

H. T. Bingham and James Gleason, for respondent.

By the Court, WATSON, J.:

On June 4, 1881, the respondent was indicted by the grand jury of Multnomah county for catching salmon fish in the Columbia river, contrary to the act of the legislative assembly entitled "An Act to Protect Salmon," approved October 25, 1880. He was tried on this indictment in the circuit court for said county, and found guilty as charged. The court, however, arrested judgment on motion of the respondent, and the state excepted and appealed.

The facts established at the trial, as appears by the bill of exceptions, were that the salmon were caught at eighteen minutes after seven o'clock, P. M., Sunday, May 29, 1881, in the Columbia river, beyond the middle channel, and on the Washington Territory side, within the extended north and south boundary lines of Multnomah county, and that by the laws of Washington Territory, of which territory respondent was a citizen, the act complained of was no offense.

The question presented at the outset is, whether the act, upon which the indictment was found, was intended to apply to the Columbia river. If it was not, a consideration of the other points is useless. This act makes no mention of any former act on the subject, and contains no words of repeal.

In terms it prohibits catching salmon "in any stream water, bay or inlet of the sea, or river of this state, with seine or trap, at any season of the year, between sunset Saturday and sunset on the Sunday following, of each every week." The penalty provided for any violation of act was a fine of not less than fifty, nor more than hundred and fifty dollars, and imprisonment in the cou jail not less than five nor more than ten days, and concur jurisdiction was conferred upon justices of the peace.

Substantially, this is the whole enactment. But at time this act was passed, there was an act in force contai provisions on the same subject, and applying expressly exclusively to the Columbia river and its tributaries. latter act was entitled "An Act to Regulate Salmon Fishe on the Waters of the Columbia River and its Tributari and was approved October 16, 1878. It contained the lowing preamble:

"Whereas, the Legislative Assembly of the Territory Washington, at the last session thereof, passed an act enti 'An Act Regulating Salmon Fisheries on the Waters of Columbia River,' approved November 8, 1877. And, wher the 8th and last section of said act is as follows, to-wit:

'Section 8. No section, proviso or part of this act s be considered as valid or operative until the legislatur the state of Oregon shall enact a similar section, provis act, in whole or in part, and from and after the passag such a law by the state of Oregon, such parts thereof as s be so enacted, shall immediately go into full force and ef and the governor of this territory is hereby requested transmit an attested copy of this act to the governor of state of Oregon, requesting him to submit it to the leg ture of that state.' Therefore, etc."

Another act, passed at the same session, and approved same day, entitled "An Act to Create the Office of Fish C missioner for the Columbia River and its Tributaries," contained a similar preamble. Like the former, its provis

applied only to the Columbia river and its tributaries. By the first mentioned act of October 16, 1878, catching salmon in the Columbia river or its tributaries, by any means whatever during the months of March, August and September, or during the weekly close times, in the months of April, May, June and July; that is, between the hours of six o'clock P. M., on Saturday, and six o'clock P. M., of the Sunday following, during said months, was prohibited under penalty of from five hundred to one thousand dollars for the first offense, and one thousand dollars for each subsequent offense, with imprisonment in the county jail not exceeding one year added, in the discretion of the court.

The act also contains many other particular provisions, devised evidently for the protection of salmon, for any violation of which the same penalty is denounced. The statute is comprehensive in scope, explicit in details, and seems to make ample provision on the subject of protection for salmon in the Columbia and its tributaries. Its provisions are, we believe, in substance, if not in form, the same as those contained in the act of the legislative assembly of Washington territory, referred to in the preamble. Upon these facts the respondent contends that the act of October 25, 1880, should not be held to apply to that river, or its tributaries.

While we have experienced no little difficulty in reaching a perfectly satisfactory conclusion upon the matter, it is our conviction that the position taken by respondent is the correct one, and should be sustained. The previous act of October 16, 1878, was local in its operation, and, as we have seen from its preamble, and the correspondence of its provisions with those enacted by the legislature of Washington Territory, by virtue of her concurrent jurisdiction upon the same subject, was unquestionably framed in view of peculiar circumstances and considerations, not affecting the other rivers or waters of the state. It was a local act and established such regulations for the protection of salmon in the particular locality embraced by it, as the legislature deemed

necessary and expedient, in view of the peculiar condition of the Columbia river, as being not only a common boundary between the state of Oregon and Washington Territory, but the common territory of both, and equally subject to the jurisdiction and laws of both. (*The Annie M. Small*, 2 Sawyer, 226.)

From the partial enumeration already given of the provisions of the two acts, it is quite apparent that if the one last enacted should be held to extend over the Columbia and its tributaries, a conflict in several particulars would be developed; repeals by implication in these respects would follow, symmetry would be lost, inconsistencies and incompatibilities introduced, and that uniformity and correspondence in legislation, which the legislatures both of this state and Washington Territory were so careful to secure in the only instances where they have professed to exercise their concurrent authority, would be destroyed to such a degree that the citizens of neither could find in the laws of their own sovereignty safe directions for their conduct upon the common domain. The case before us is but a fair example of the evil consequences of such an application. But it is claimed that the act under examination applies, in express terms, to "every river of this state," and that the Columbia and its tributaries are such; therefore there is left no room for construction.

Without attempting to pass upon the correctness of the premises here assumed, we think it may be conceded, and still the conclusion not follow. These several acts should be reviewed together as one enactment in determining their respective applications and effect, given to all the provisions of each, if possible, upon any rational construction. (Potter's Dwarris on Statutes and Constitutions, 189.) A general statute will not repeal a particular statute previously enacted, simply because it contains inconsistent provisions. (Potter's Dwarris on Statutes and Constitutions, 272, 273; *Fosdick* v. *Village of Perrysburg*, 14 Ohio St., 472; *Pearce* v. *Atwood*, 13 Mass., 342; *St. Martin* v. *New Orleans*, 14 La. Ann.,

113; *Nichols* v. *Bertram*, 3 Pick., 342; *Felt* v. *Felt*, 19 Wis., 208; *State* v. *Goetze*, 22 Wis., 363; *State* v. *Bishop*, 41 Mo., 16.)

It seems well settled by these authorities, that the particular subject covered by the previous statute, although embraced by the general description in the subsequent statute, will be excepted from its operation when necessary to prevent a repeal of the former by implication. This principle is decisive of the question under consideration, in our judgment, and virtually disposes of the whole case before us. The act proved against the respondent was not a crime under any provision of the particular statute of October 16, 1878, or any other statute in force on the Columbia river. The judgment of the court below must therefore be affirmed.

Judgment affirmed.

CRESSEY *v.* TATOM, ET AL.

MARRIAGE—EFFECT AT COMMON LAW.

At common law the giving of a woman in marriage operated as a gift of all her personal estate, actually or constructively in her possession, and of all personal estate which might be thereafter acquired by her during coverture, or reduced into her possession or that of her husband, unless protected by a settlement to her sole and separate use.

JURISPRUDENCE—SOURCE OF.

The common law is the source of jurisprudence of those states which were originally colonies of England, and also of those states which have been established in the territories, the government of which was formed by emigration from the original states.

PRESUMPTION AS TO COMMON LAW.

The rule is well established that the courts will presume that the common law prevails in other states, except so far as it is shown to be changed or repealed by statute. The courts cannot take judicial notice of the statutes of the different states which have changed the common law, but will presume that the common law is in force until this presumption is rebutted by proof.

APPEAL from Polk. The facts are stated in the opinion.

Kelsay & Burnett, for appellant.

Maintain that the property inherited by the plaintiff was not separate property. That which sustains the right of a married woman to separate property, must be averred and proved. (Bishop on Married Women, sec. 889; *Whitford* v. *Panama R. R. Co.*, 23 N. Y., 468; *Ryder* v. *Hulse*, 24 N. Y., 372; Story on Conflict of Laws, sec. 637.) The courts will presume that the general principles of the common law prevail in other states. (*Whitford* v. *Panama R. R. Co.*, 23 N. Y., 468; 1 Wharton on Evidence, sec. 314; *Jordan* v. *Jordan*, 52 Maine, 320.)

R. S. Strahan and W. G. Piper, for respondent.

The property in controversy was purchased by the plaintiff with her own money, which she received by inheritance from her father's estate. This brings the case within the settled doctrine of this court. (*Linville* v. *Smith*, 6 Oregon, 202; *Rugh* v. *Ottenheimer*, 6 Oregon, 231.) The court will presume that the law of Illinois is like our own. (*Rape* v. *Heaton*, 9 Wis., 338; *Bramhall* v. *Van Campen*, 8 Minn., 13; *Monroe* v. *Douglas*, 1 Selden, 447; *Shaw* v. *Wood*, 8 Ind., 518; *White* v. *Charles*, 15 Maine, 470; *Hall* v. *Pillow*, 31 Ark., 32; *Hill* v. *Gigsby*, 32 Cal., 55.)

By the Court, LORD, C. J.:

This is a suit in equity to enjoin the defendant Hall, as sheriff of Polk county, from selling the plaintiff's land on execution in favor of the defendant Tatom, and against the defendant, William E. Cressey. Substantially, the facts are that the plaintiff, Lucy J. Cressey, is one of five heirs-at-law of Stephen Marshall, who died on the 15th day of September, 1849, in Illinois. In 1869 the plaintiff married the defendant, William E. Cressey, and subsequently removed to California. While the plaintiff and her husband resided in the last named state, the estate of her father was sold, and her

proportion was paid, "and she received said money as such heir, and as her distributive share of said estate." About the 1st of January, 1877, the plaintiff loaned the sum of one thousand dollars to Robert Middleton, which was a part of said money received from her father's estate in Illinois, and for which Middleton executed his note to the plaintiff. In June, 1878, the plaintiff and her husband removed from California to Oregon, and shortly after she authorized her husband, as her agent, to purchase the property in question, and to pay for the same. The plaintiff collected the note on Middleton, and out of part of the money realized upon said note, paid for said property through her husband. By mistake the deed was executed to her husband, William E. Cressey, which in a short time thereafter he corrected by deeding the property to the plaintiff. Defendant Tatom recovered judgment against the defendant, William E. Cressey, execution issued, and the property in dispute was levied upon, and to enjoin the sale of the same this suit was instituted, and a decree rendered for the plaintiff, from which an appeal has been taken by the defendants, Tatom and Hall, to this court.

Upon this state of facts the particular question presented for our determination is, to whom did the property in dispute belong, to the plaintiff, as her separate property, or to her husband, the defendant, William E. Cressey? If to the former, the decree of the circuit court was not error; but if to the latter, it must be reversed. At the common law the giving of a woman in marriage operated as a gift of all her personal estate, actually or constructively in her possession, and of all personal estate which might be thereafter acquired by her during coverture, or reduced into her possession or that of her husband, unless protected by a settlement to her sole and separate use.

In the case of the *Commonwealth* v. *Manley*, 12 Pick., 175, the doctrine of the common law is thus clearly stated by Morton, J.: "By our law, marriage is an absolute gift to the husband of all the wife's personal chattels in possession,

and so it is of all choses in action, if he reduces them into possession by receiving them, or recovering them at law. Thus all the personal property of the wife's which comes into the possession of the husband during coverture, becomes absolutely his, may be disposed of by him, is liable for his debts, and goes to his executor or administrator." (2 Blackstone's Commentaries, 433; *Jordan* v. *Jordan*, 52 Maine, 320; *Ladd* v. *Prentice*, 14 Conn., 110; 1 Bishop on Married Women, sec. 64, and authorities cited.)

Unless, then, restricted by a settlement, or by force of some statute in derogation of the common law, securing the property of the wife to her sole and separate use, wherever the common law prevails by mere force of the marital act, so completely is the identity of the wife merged into the existence of the husband, that her personal property at the marriage, or acquired during coverture, vests immediately and absolutely in him; her possession becomes his possession, so that if she have money in her pocket, and this money never comes within his personal control, being under her control, it is his, and not hers, and the like principle applies to all other chattels. (1 Bishop on Married Women, sec. 64.)

There can be no doubt that the common law is the basis of the laws of those states which were originally colonies of England, or carved out of such colonies. Chancellor Kent says: "It is the common jurisprudence of the United States, and was brought with them as colonists from England, and established here so far as it was adapted to our institutions and circumstances. It was claimed by the Congress of the United Colonies, in 1774, as a branch of those 'indubitable rights and liberties to which the respective colonies were entitled.'"

"In all the states," says Judge Field, "thus having a common origin, formed from colonies which constituted the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists—it has been so held in repeated instances—

and it rests upon the parties who assert a different rule to show the matter by proof. (10 Ala., U. S., 895.) A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the revolution, where such territory was not, at the time of its acquisition, occupied by an organized and civilized community, where in fact the population of the new state, upon the establishment of government, was formed by emigration from the original states." (*Norris* v. *Harris*, 15 Cal., 252.)

The result is that the rule is so well established that in the absence of evidence to the contrary, the courts of a state will presume that the common law prevails in other states, except so far as it is shown to be changed or repealed by statute. The courts cannot take judicial notice of the statutes of the different states which have changed the common law, but will presume that the common law is in force until this presumption is rebutted by proof. (*Litchenberger* v. *Graham*, 50 *Ind.*, 290; *Whitford* v. *Panama R. R.*, 23 N. Y., 468; *Hydrick* v. *Burke*, 30 Ark., 125; Wharton's Law of Evidence, sec. 314, and authorities cited.)

If the principles of the common law have been modified or changed in any of the states, by statute, in respect to any matter under which a right or privilege is claimed or sought to be enforced, the courts of another state, presumed to be acquainted with their own laws, the statute of such state must be averred and proved like other facts of which the courts do not take judicial notice, to avoid the presumption that exists in favor of the common law. In many states of the Union there have been enacted statutes enabling married women to hold their property to their sole and separate use, and free from the debts and contracts of their husbands. Such statutes are said to be in derogation of the common law, and to make them available, and to secure the rights which they were intended to protect, outside of the jurisdiction of such states, such statutes must be averred and

proved, to enable the courts of another state to take judicial notice of them, and to apply them in judicial examination to the matter in controversy.

Now apply these principles to the facts under consideration. The money received by the plaintiff while she and her husband were residing in California, was her distributive share arising from the sale of her father's estate in Illinois. If it was her separate property it became so by force of some statute enlarging the marital rights. No statute upon which such right of separate property is founded, was pleaded or introduced in evidence, and in the absence of such evidence, the court could not take judicial notice of it, and must presume the common law in force in such state. By the common law, the personal property, the money, coming to the wife during coverture vested immediately and absolutely in the husband; the possession of the plaintiff became the possession of her husband, and their subsequent removal to Oregon did not divest his ownership. The fact that the husband did not assert her marital rights does not alter the case. In *Rider* v. *Hulse*, 24 N. Y., 372, Judge Wright said: "It cannot be that because a husband suffers his wife to manage and deal with his estate as though it were her own, that he divests himself of the ownership, and assumes the character of trustee to hold it to her use." Much less can the omission to assert his own marital rights to the property owned by his wife at the time of the marriage, or subsequently acquired, operate to the prejudice of his creditors.

In *Hydrick* v. *Burke*, 30 Ark., 126, this identical question was decided. The court say: "Conceding it to be true that the money used in the payment for the property was that received by the wife for land in Tennessee, which came to her by descent, still, in the absence of a statute of that State enlarging the marital rights, the husband, by virtue of his marriage, was entitled to the money, the proceeds of the sale of the land. The statute of Tennessee was not introduced as evidence of the laws then in force, and the court could not

take judicial notice of the statutes of Tennessee. (*Cox* v. *Morrow*, 14 Ark., 606.) In the absence of this evidence it is to be presumed that the common law is still in force in that state, and consequently the wife's claim to a separate property in the money must fail." It follows that the property in dispute was purchased by and belonged to the defendant, William E. Cressey, and not to the plaintiff, and that it is liable for his debts.

Decree reversed.

EXTRA ANNOTATION

TO

PRECEDING VOLUME

NOTES

ON THE

OREGON REPORTS.

CASES IN 9 OREGON.

9 Or. 41-52, DURHAM v. MONUMENTAL SILVER MIN. CO.

Mandamus.—Under Our Code the Office of the Writ is the same as it was under the common law, pp. 43, 44.

Cited in Habersham v. Sears, 11 Or. 434, 50 Am. Rep. 481, 5 Pac. 209, approvingly.

Corporations.—Party Entitled to Stock has an Action for damages against the corporation for refusal to transfer it to him on the company's books, p. 45.

Cited in Dooley v. Gladiator etc. Milling Co., 134 Iowa, 471, 109 N. W. 865, to point that assignee of stock may treat refusal of company to register its transfer as a conversion and sue for its value.

Corporations.—Mandamus will not Lie to Compel Transfer of stock on corporate books, there being an adequate legal remedy, pp. 45-52.

Cited in State v. Jumbo Extension Min. Co., 30 Nev. 204, 133 Am. St. Rep. 715, 94 Pac. 77, stating when mandamus will lie to compel issuance and delivery of corporate stock.

Distinguished in Slemmons v. Thompson, 23 Or. 218, 31 Pac. 515, where the corporate officers had conveyed its assets so that there was no adequate remedy at law. Cited in note to 133 Am. St. Rep. 726, on compelling issue of stock.

9 Or. 52-61, JACOBS v. ERVIN.

Assignments for Creditors.—Assignee is not a Purchaser in good faith, but he may resist the enforcement of a lien on the ground that it was fraudulent as to creditors, p. 59.

Cited in Helms v. Gilroy, 20 Or. 521, 26 Pac. 852, to point that assignee is in no better position than assignor was; In re Assignment of Bank of Oregon, 32 Or. 94, 51 Pac. 90, approving the rule; Mansfield v. First Nat. Bank of Whatcom, 5 Wash. 675, 32 Pac. 999, holding that assignee may assail conveyance of assignor executed in fraud of creditors; Hahn v. Salmon, 20 Fed. 807, holding that, in absence of statute, assignee cannot maintain a suit in relation to the assigned property which the debtor could not.

Chattel Mortgages.—Retention of Possession by Mortgagor, with power to sell generally, avoids the mortgage as to creditors, p. 60.

Cited in Bremer & Co. v. Fleckenstein, 9 Or. 273, Sabin v. Wilkins, 31 Or. 456, 48 Pac. 426, 37 L. R. A. 465, Fisher v. Kelly, 30 Or. 14, 46 Pac. 150, and Bank of Perry v. Cook, 3 Okl. 551, 41 Pac. 634, all approving and applying the rule. Cited in notes to 15 Am. St. Rep. 914, on permitting chattel mortgagor to retain possession and sell mortgaged property; 18 L. R. A. 609, 623, on effect upon validity of mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale.

9 Or. 62–66, STINGLE v. NEVEL.

Statutes.—If It be the Intention of the Legislature to make a statute the sole law which shall govern, it will operate to repeal by implication all other acts on the same subject, p. 63.

Cited in Hall v. Dunn, 52 Or. 488, 97 Pac. 816, 25 L. R. A., N. S., 193, stating when general law impliedly repeals special act.

Statutes.—Portions of Old Law Incorporated in amending act are not thereby re-enacted, p. 64.

Cited in Allison v. Hatton, 46 Or. 372, 80 Pac. 102, and Maxwell v. State, 89 Ala. 158, 7 South. 826, both approving the rule.

Statute.—Attempt to Amend a Statute Previously Repealed or amended by implication is of no effect, p. 65.

Cited in Lampkin v. Pike, 115 Ga. 829, 90 Am. St. Rep. 153, 42 S. E. 214, to point that amendatory act must relate to an existing statute.

Injunction.—All Persons Interested in the Subject Matter and in the relief demanded are proper parties plaintiff, p. 65.

Cited in Hough v. Porter, 51 Or. 372, 95 Pac. 749, applying the rule to suit to determine water rights.

Taxation.—The Collection of a Tax may be enjoined, p. 65.

Cited in Dalton v. City of East Portland, 11 Or. 431, 5 Pac. 196, granting injunction to restrain collection of excessive tax.

Distinguished in Oregon etc. Bank v. Jordan, 16 Or. 118, 17 Pac. 624, stating that the remedy of the tax-payer for error in assessment is to appeal to the board of equalization, thence to seek a writ of review.

9 Or. 66–73, 42 Am. Rep. 794, HUBLER v. GASTON.

Sales.—Title Does not Pass Until the Parties are agreed on the identical thing to be transferred, p. 69.

Cited in Hamilton v. Gordon, 22 Or. 560, 30 Pac. 496, holding that title does not pass until goods are weighed or measured; Backhaus v. Buells, 43 Or. 570, 73 Pac. 344, holding that title does not pass until segregation of quantity of hops to be delivered; Blackwood v. Cutting Packing Co., 76 Cal. 217, 9 Am. St. Rep. 199, 18 Pac. 251, holding that so long as anything remains to be done to ascertain the price title does not pass. Cited in notes to 52 Am. St. Rep. 521, 46

Am. Rep. 222, and 26 L. R. A., N. S., 11, 12, 35, 56, 65, on sufficiency of selection or designation of goods sold out of larger lot.

9 Or. 74-79, McKINNEY v. BAKER.

This case has not been cited.

9 Or. 79-81, TURNER v. CORBETT.

Pleading.—Defects in Complaint may be Cured by allegations in answer and reply, p. 80.

Cited in Catlin v. Jones, 48 Or. 163, 85 Pac. 516, approving and illustrating the rule.

9 Or. 81-87, FARRIS v. HAYES.

Partition.—Petition must Allege Possession of Plaintiff as tenant in common, pp. 85, 86.

Cited in Sterling v. Sterling, 43 Or. 206, 72 Pac. 743, approving the rule.

Public Lands.—Widow has No Right to Dower in lands held under donation law where the settler dies before the completion of residence and cultivation required by the act, p. 83.

Cited in Quinn v. Ladd, 37 Or. 269, 59 Pac. 459, holding that a settler under the donation law does not acquire an estate of inheritance until issue of patent. Cited in note to 39 Am. Dec. 432, on actions in which title to realty may be tried or questioned.

9 Or. 89-92, TEAL v. COLLINS.

Quieting Title.—It is Sufficient if the Party in Possession is discommoded or damnified by the assertion of an adverse claim, he can commence his suit and require the claim to be set up, p. 91.

Cited in Watson v. Glover, 21 Wash. 681, 59 Pac. 517, and Goldsmith v. Gilliland, 22 Fed. 867, 10 Saw. 606, approving the rule.

Quieting Title.—Requisites of Pleadings in Actions to quiet title and actions to remove cloud on title, p. 91.

Cited in McLeod v. Lloyd, 43 Or. 271, 71 Pac. 798, and Hughey v. Winborne, 44 Fla. 604, 33 South. 250, approving the rule; Moores v. Clackamas County, 40 Or. 539, 67 Pac. 663, and O'Hara v. Parker, 27 Or. 164, 39 Pac. 1005, stating the difference between a suit to remove a cloud and a suit to quiet title; Coolidge v. Forward, 11 Or. 120, 2 Pac. 293, to point that complaint must allege that plaintiff is in possession of the property.

9 Or. 93-108, CAPITAL LUMBERING CO. v. HALL.

Execution.—Verdict of Sheriff's Jury on Trial of Right to property levied on is conclusive, pp. 95, 108.

Cited in Vulcan Iron Works v. Edwards, 27 Or. 565, 571, 36 Pac. 22, 39 Pac. 403, approving and applying the rule. Cited in notes to 95 Am. St. Rep. 126, on liability of ministerial officers for nonperformance and misperformance of official duties; 93 Am. St. Rep. 463, on liability for malicious prosecution of civil action.

9 Or. 109–116, FRIENDLY v. McCULLOUGH.

Chattel Mortgages.—Mortgagee Who Takes Mortgaged Logs for the purpose of sawing them into lumber, selling it and applying the proceeds, less expenses, to the debt may charge the mortgagor with expense of keeping the mill in repair, pp. 111, 112.

Cited in Hill v. Bank of Seneca, 87 Mo. App. 604, holding that mortgagee may charge mortgagor with expense of preserving and selling the goods.

9 Or. 116–121, PAGE v. GRANT.

Creditor's Suit.—Return of Execution Unsatisfied is Sufficient Foundation for suit to set aside conveyance of debtor for fraud, p. 119.

Cited in Wyatt v. Wyatt, 31 Or. 537, 49 Pac. 857, and Breitkreutz v. National Bank, 70 Kan. 703, 79 Pac. 688, both approving the rule. Cited in note in 23 L. R. A., N. S., 70, on conditions precedent to equitable remedies of creditors.

Fraudulent Conveyances.—Where There is an Actual Fraudulent Intent, it makes no difference whether the debt was contracted before or after the conveyance, p. 120.

Cited in Crawford v. Beard, 12 Or. 453, 8 Pac. 540, defining intent which will make conveyance fraudulent; Morton v. Denham, 39 Or. 227, 231, 64 Pac. 385, holding that transfer made with intent to avoid debt not yet contracted is void as to subsequent creditor.

Distinguished in Marks v. Shoup, 181 U. S. 566, 21 Sup. Ct. Rep. 724, 45 L. ed. 1004, on the facts.

9 Or. 121–125, COYOTE G. & S. M. CO. v. RUBLE.

Courts.—Courts and Suitors are Bound by court rules until they are abrogated, p. 123.

Cited in Martin v. De Loge, 15 Mont. 344, 39 Pac. 312, approving the rule; State v. Birchard, 35 Or. 486, 59 Pac. 469, holding that a court is bound by its rules and cannot change them to suit the circumstances of a particular case; Bowden v. Wilson, 21 Fla. 171, holding that rule must control cases falling within it until rescinded; Magnuson v. Billings, 152 Ind. 180, 52 N. E. 804, holding that rules have the force of law and are obligatory upon the court as well as the parties; Cronkhite v. Bothwell, 3 Wyo. 743, 31 Pac. 402, holding that rule cannot be suspended except in case of overwhelming necessity. Cited in note to 41 Am. St. Rep. 644.

9 Or. 125–128, STATE v. TILLEY.

This case has not been cited.

9 Or. 128–148, CLARK'S HEIRS v. ELLIS.

Wills.—County Court has Jurisdiction to determine a will contest, p. 132.

Cited in Gatch v. Simpson, 40 Or. 96, 66 Pac. 691, holding that county court is proper forum to compel administrator to account.

Wills.—Attack on Probate of Will Ex Parte compels re-probate, p. 133.

Cited in Richardson v. Green, 61 Fed. 426, 9 C. C. A. 565, to point that in Oregon anyone can attack a probated will in a direct proceeding.

Wills.—Testamentary Power of One Having Capacity is unlimited and not affected by the reasonableness or fairness of the disposition of property, p. 145.

Cited in Re Holman's Estate, 42 Or. 357, 70 Pac. 913, quoting the rule with approval.

Wills.—Testamentary Capacity Defined, p. 147.

Cited in Skinner v. Lewis, 40 Or. 578, 67 Pac. 952, Ames v. Ames, 40 Or. 504, 67 Pac. 741, Estate of Scott, 1 Cof. Pro. Dec. 366, Chrisman v. Chrisman, 16 Or. 136, 137, 18 Pac. 10, 11, and Franke v. Shipley, 22 Or. 105, 29 Pac. 268, all approving the definition; Swank v. Swank, 37 Or. 445, 61 Pac. 848, holding that neither old age, sickness nor debility incapacitates. Cited in note in 35 L. R. A. 119, on presumption of continuance of insanity.

Wills.—Capacity of Testator is to be Tested as it was when the will was executed, p. 147.

Cited in Re Pickett's Will, 49 Or. 150, 89 Pac. 385, approving the rule; Carnagie v. Diven, 31 Or. 369, 49 Pac. 892, applying the rule to test capacity to convey. Cited in note in 27 L. R. A., N. S., 92, 97, on what is testamentary capacity.

Wills.—Testimony of Those Present When Will was Executed is the most reliable proof of testamentary capacity, p. 147.

Cited in Weber v. Della Mt. Min. Co., 14 Idaho, 414, 94 Pac. 444, to point that sanity or insanity may be proved by a nonexpert.

9 Or. 149, LUSE v. LUSE.

Appeal.—Notice must Describe Decree Appealed from sufficiently to identify it with the one disclosed in the transcript, p. 149.

Cited in State v. Preston, 30 Nev. 306, 95 Pac. 920, approving and applying the rule; Cameron v. Wasco County, 27 Or. 322, 41 Pac. 162, conceding but not applying the rule.

Distinguished in Lancaster v. McDonald, 14 Or. 266, 267, 12 Pac. 376, holding very informal notice sufficient on appeal from justice court.

9 Or. 150-152, CHENWETH v. LEWIS.

Trusts.—Parol Evidence is Admissible to establish a resulting trust, p. 152.

Cited in Snider v. Johnson, 25 Or. 332, 35 Pac. 847, reaffirming the rule.

9 Or. 153-165, STATE v. WINTZINGERODE.

Indictment in Form Provided by the Code is sufficient, pp. 156, 157.

Cited in State v. Eddy, 46 Or. 628, 81 Pac. 942, and State v. Woolridge, 45 Or. 394, 78 Pac. 385, reaffirming the rule.

Criminal Law.—Relevant Evidence is not Rendered Inadmissible because it tends to prove the commission of other offenses, p. 158.

Cited in State v. Lewis, 181 Mo. 260, 79 S. W. 678, applying the rule in proving motive for killing and the identity of the accused; State v. Rudolph, 187 Mo. 86, 85 S. W. 589, applying the rule to impeaching testimony; State v. Spaugh, 200 Mo. 595, 98 S. W. 61, admitting evidence of assault a few minutes before the killing.

Criminal Law.—Common-law Rule That Confession induced by hope or fear is inadmissible is not altered by the code, pp. 160, 161.

Cited in State v. Moran, 15 Or. 265, 14 Pac. 421, and State v. McDaniel, 39 Or. 172, 65 Pac. 524, approving the rule. Cited in notes to 6 Am. St. Rep. 250, on admissibility of confessions; 18 L. R. A., N. S., 826, 851, 864, as to when confession voluntary.

9 Or. 166-168, 42 Am. Rep. 799, HYLAND v. BLODGETT.

Cited in note in 44 Am. Rep. 58.

9 Or. 168-178, RICKARD v. RICKARD.

Cited in notes in 13 L. R. A., N. S., 224, on relations between one spouse and relatives of other as affecting question of desertion or cruelty; 2 L. R. A., N. S., 669, on bringing another woman into home as cruel and inhuman treatment.

9 Or. 178-180, PENCINSE v. BURTON.

Appeal.—Permission to File a New Undertaking can only be allowed when deficiency in one filed was due to mistake or accident, p. 180.

Cited in Northern Counties Inv. Trust v. Hender, 12 Wash. 564, 41 Pac. 915, holding appeal wholly ineffectual where bond is not accompanied by affidavit of sureties.

Modified in Mendenhall v. Elwert, 36 Or. 380, 52 Pac. 23, holding the rule applicable only to some patent omission and not to a difference of opinion as to what constitutes the performance of statutory requirements; Newberg Orchard Assn. v. Osborn, 39 Or. 371, 65 Pac. 82, holding that leave ought not be granted where there has been negligence in remedying the mistake after its discovery.

9 Or. 180-185, LADD v. FERGUSON.

Cited in note to 109 Am. St. Rep. 150, on setting off one judgment against another.

9 Or. 185-194, LAMBERT v. SMITH.

Deeds.—The Word "Convey" is Equivalent to "Grant," at common law, and passes the title, p. 193.

Cited in State v. Kelliher, 49 Or. 82, 88 Pac. 869, City of Leadville v. Coronado Min. Co., 29 Colo. 34, 67 Pac. 294, Blood v. Sielert, 38 Wash. 647, 80 Pac. 801, Cross v. Weare Commission Co., 153 Ill. 510, 46 Am. St. Rep. 902, 38 N. E. 1041, Evenson v. Webster, 3 S. D. 388, 44 Am. St. Rep. 802, 53 N. W. 749, Chapman v. Charter, 46 W. Va.

779, 34 S. E. 772, Uhl v. Ohio River R. Co., 51 W. Va. 114, 41 S. E. 344, and Vann v. Edwards, 135 N. C. 668, 47 S. E. 787, 67 L. R. A. 461, all approving the definition.

9 Or. 195-200, **YOUNG v. PATTON.**

This case has not been cited.

9 Or. 200-206, **HODGES & WILSON v. SILVER HILL MIN. CO.**

Corporations.—When Corporation has Become Insolvent, stockholder's liability may be enforced in equity without first obtaining a judgment against the corporation, p. 203.

Cited in Zang v. Wyant, 25 Colo. 557, 71 Am. St. Rep. 145, 56 Pac. 567, Knight etc. Co. v. Tampa etc. Brick Co., 55 Fla. 740, 46 South. 289, and Salt Lake Hardware Co. v. Tintic Mill Co., 13 Utah, 429, 430, 45 Pac. 201, all approving the rule; Dawson v. Sims, 14 Or. 563, 13 Pac. 507, holding that an attachment lien is sufficient foundation for suit to set aside fraudulent conveyance.

Distinguished in Dawson v. Downing, 12 Or. 519, 8 Pac. 841, holding that simple contract creditors cannot bring a bill to set aside a conveyance for fraud before exhausting their legal remedies. Cited in note in 24 L. R. A., N. S., 629, on bankruptcy, insolvency or dissolution of corporation as excusing creditor from exhausting remedies against it before enforcing stockholder's liability.

Corporations.—Nature and Extent of Stockholder's Liability, p. 205.

Cited in Leucke v. Tredway, 45 Mo. App. 519, approving the rule; Kelly v. Fourth of July Min. Co., 21 Mont. 339, 53 Pac. 971, applying the rule to mining corporations; Chilberg v. Siebenbaum, 41 Wash. 666, 84 Pac. 599, holding that on insolvency the amount of the unpaid subscription becomes immediately due; Hawkins v. Donnerberg, 40 Or. 103, 66 Pac. 693, holding that there is no privity of contract between creditor and stockholder; Aldrich v. Anchor Coal etc. Co., 24 Or. 39, 41 Am. St. Rep. 831, 32 Pac. 759, holding that remedy of creditor to enforce stockholder's liability is equitable; Brundage v. Monumental etc. Co., 12 Or. 324, 7 Pac. 315, holding that in suit to enforce individual liability neither the corporation nor all the stockholders need be joined. Cited in note to 3 Am. St. Rep. 838, 852, 853, 855, on liability of stockholders for corporate debts.

9 Or. 206-215, **MINARD v. DOUGLAS COUNTY.**

Review.—One Whose Lands are Taken for Use of a road may have the proceedings reviewed, p. 208.

Cited in Gaines v. Linn Co., 21 Or. 432, 28 Pac. 134, reaffirming the rule. Cited in note in 26 L. R. A. 828, on discontinuance or vacation of highway by acts of authorities.

Eminent Domain.—Private Property cannot be Taken for public use without notice, p. 208.

Distinguished in Ames v. Union County, 17 Or. 606, 22 Pac. 120, where the notice was sufficiently specific.

Process.—Notice is Essential Requisite to all proceedings affecting the rights of a citizen, p. 209.

Cited in Re Central Irr. Dist., 117 Cal. 391, 49 Pac. 357, approvingly.

Statutes.—That Which is Implied in a Statute is as much a part of it as that which is expressed, p. 210.

Cited in Paulson v. City of Portland, 16 Or. 465, 19 Pac. 459, 1 L. R. A. 673, and Paulsen v. City of Portland, 149 U. S. 39, 13 Sup. Ct. Rep. 750, 37 L. ed. 641, both reaffirming the rule.

Highways.—Notice of Application for the Laying Out of a highway must be signed by the petitioners, p. 214.

Cited in King v. Benton County, 10 Or. 513, and Burns v. Multnomah R. Co., 15 Fed. 183, 8 Saw. 543, approving the rule; Gaines v. Linn County, 21 Or. 428, 28 Pac. 133, holding that proof of notice may be made by petitioners; Bitting v. Douglas County, 24 Or. 409, 33 Pac. 982, holding undated notice insufficient; Williams v. Bergin, 108 Cal. 171, 41 Pac. 288, involving notice of appeal to supervisors from act of superintendent of streets.

Distinguished in Eastman v. County of Clackamas, 32 Fed. 27, 12 Saw. 613, holding that county cannot raise question of want of notice ten years after establishment of road.

Partially overruled in Vedder v. Marion County, 22 Or. 269, 29 Pac. 621, holding that copies of notices may be posted.

9 Or. 215–222, CREIGHTON v. LEEDS.

Judgment.—From the Date of Docketing Judgment is a lien on property of debtor then owned or afterward acquired, pp. 216, 217.

Cited in Hutchinson v. Gorham, 37 Or. 351, 61 Pac. 432, and Moore v. Jordan, 117 N. C. 90, 53 Am. St. Rep. 576, 23 S. E. 261, 42 L. R. A. 209, approving the rule; Western Loan etc. Co. v. Currey, 39 Or. 409, 87 Am. St. Rep. 660, 65 Pac. 360, holding that it is the docketing that gives the lien and fixes the time when it attaches; Dyke v. Currey, 39 Or. 609, 65 Pac. 1118, holding that judgment regularly docketed becomes a lien on after-acquired property. Cited in note to 117 Am. St. Rep. 784, on estates and interests to which judgment liens attach.

Judgment.—Lien of Judgments Ranks on after-acquired property in the order of dates of docketing, pp. 216, 218.

Denied in Ware v. Delahaye, 95 Iowa, 683, 64 N. W. 645, holding that liens operate on after-acquired property pari passu; Belknap v. Greene, 56 S. C. 123, 34 S. E. 27, to the same effect. Cited in note in 42 L. R. A. 210, on priority of judgment liens on after-acquired property.

9 Or. 222–225, McFADDEN v. FRIENDLY.

Trial.—Finding That Allegations Set Up in Complaint are true is sufficient, p. 224.

Overruled in Drainage Dist. No. 4 v. Crow, 20 Or. 537, 538, 26 Pac. 846, holding that findings of fact must pass upon all the material issues.

Contracts must be Construed Most Strongly against person using doubtful language, p. 225.

Cited in Loomis v. MacFarlane, 50 Or. 135, 91 Pac. 468, quoting the rule approvingly.

9 Or. 225-228, **LA FAYETTE v. CLARK.**

Appeal for the Purpose of Obtaining a Trial Anew was unknown at common law and can only be prosecuted when expressly authorized by statute, p. 228.

Cited in Fisk v. Henarie, 15 Or. 90, 13 Pac. 760, Barton v. City of La Grande, 17 Or. 580, 22 Pac. 112, and School Dist. No. 116 v. Irwin, 34 Or. 435, 56 Pac. 414, all approving and applying the rule; City of Corvallis v. Stock, 12 Or. 391, 7 Pac. 524, approving but not applying the rule; Paulson v. City of Portland, 16 Or. 457, 19 Pac. 455, 1 L. R. A. 673, and Harbert v. Monongahela River R. Co., 50 W. Va. 256, 40 S. E. 379, not in point.

9 Or. 231-243, **OREGON R. CO. v. PORTLAND.**

Levees.—Action to Condemn a Public Levee for depot grounds, p. 243.

Cited in Chicago R. I. & P. Ry. Co. v. People, 222 Ill. 438, 78 N. E. 793, to point that a levee is a landing.

9 Or. 244-249, **LADD v. SEARS.**

Appeal.—Grounds of Objection not Raised in Lower Court cannot be considered on appeal, p. 246.

Cited in Hildebrand v. United Artisans, 50 Or. 167, 91 Pac. 545, holding that the overruling of objection made on untenable grounds is not prejudicial error; Kolka v. Jones, 6 N. D. 480, 66 Am. St. Rep. 615, 71 N. W. 565, holding that objection should apprise adversary just what point is made against his evidence; Olson v. Burlington etc. R. Co., 12 S. D. 328, 81 N. W. 634, holding general objection insufficient when specific objection might have obviated it. Cited in notes in 52 L. R. A. 720, on resemblance as evidence of relationship; 52 L. R. A. 578, on party's books of account as evidence in own favor.

9 Or. 250-252, 42 Am. Rep. 801, **HUGILL v. KINNEY.**

Cited in Pickard v. Sears, Freeman v. Cooke, 11 Eng. Rul. Cas. 102, not accessible.

9 Or. 253-265, **RANKIN v. BUCKMAN.**

Municipal Corporations.—At Common Law the Political Divisions of a State are not liable to respond in damages for their neglect, p. 258.

Cited in Templeton v. Linn County, 22 Or. 314, 320, 29 Pac. 795, 15 L. R. A. 730, to point that, at common law, county is not liable for injury from defect in highway.

Denied in Batdorff v. Oregon City, 53 Or. 407, 100 Pac. 939, holding that a city invested with exclusive control over streets and authorized to maintain them is liable for injury resulting from failure

to do so; Eastman v. County of Clackamas, 32 Fed. 29, 12 Saw. 613, holding county liable for act of omission in construction or maintenance of highway.

Municipal Corporations.—City Officer is Liable for Injury resulting from a willful neglect of a duty enjoined upon him, p. 259.

Cited in Mattson v. City of Astoria, 39 Or. 579, 87 Am. St. Rep. 687, 65 Pac. 1067, holding officer liable in damages for injury resulting from neglect of ministerial duty; Balls v. Woodward, 51 Fed. 647, holding members of city council are liable for willful neglect to provide for repair of streets; Mayor etc. v. Ewing, 2 Penne. (Del.) 101, 43 Atl. 307, 45 L. R. A. 79, not accessible. Cited in note to 95 Am. St. Rep. 82, on liability of ministerial officers for nonperformance and misperformance of official duties.

9 Or. 266–274, BREMER v. FLECKENSTEIN.

Attachment.—Order of Sale must be Made when judgment is given or lien is liberated, p. 271.

Cited in Fisher v. Kelly, 30 Or. 14, 46 Pac. 150, approving the rule.

Chattel Mortgages.—Contemporaneous Oral Agreement Allowing Mortgagor to retain the goods and dispose of them avoids the mortgage as to third persons, p. 273.

Cited in Moore etc. Mfg. Co. v. Billings, 46 Or. 403, 80 Pac. 423, and Bank of Perry v. Cook, 3 Okl. 551, 41 Pac. 634, approving the rule. Cited in notes to 15 Am. St. Rep. 914, on permitting chattel mortgagor to retain possession and sell mortgaged property; 18 L. R. A. 611, 623, on effect upon validity of mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale.

9 Or. 275–277, BURSTON v. JACKSON.

Cited in Doe d. Christmas v. Oliver, 1 Eng. Rul. Cas. 497, not accessible.

9 Or. 278–287, SMITH v. CARO.

Bills and Notes.—The Contract Implied on Indorsement is the transfer of the note and the assumption of ordinary liabilities of indorsers, p. 281.

Distinguished in Carroll v. Nodine, 41 Or. 414, 93 Am. St. Rep. 743, 69 Pac. 52, stating the legal effect of an indorsement without recourse. Cited in note in 46 L. R. A. 771, 803, 804, on rights of transferee after maturity of negotiable paper.

Evidence.—Rule Excluding Parol Evidence to vary writing applies to all classes of contracts, p. 282.

Cited in Stoddard v. Nelson, 17 Or. 421, 21 Pac. 457, and Portland Nat. Bank v. Scott, 20 Or. 424, 26 Pac. 277, approving the rule; Smith v. Bayer, 46 Or. 147, 114 Am. St. Rep. 858, 79 Pac. 498, Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 751, 103 Pac. 940, extending the application of the rule to the legal effect of the instru-

ment. Cited in note to 7 Am. St. Rep. 367, on parol evidence to vary contract of indorsement.

9 Or. 288–297, NOWE v. TAYLOR.

Lost Instruments.—When Both the Original and Copy are lost, parol evidence of the contents of the copy is admissible, p. 293.

Cited in Williams v. Gallick, 11 Or. 342, 3 Pac. 472, holding that contents of lost instrument may be proved by parol.

9 Or. 298–310, ODELL v. CAMPBELL.

Courts.—Presumption in Favor of Courts of general jurisdiction ceases when they are exercising a special statutory power, pp. 300, 301.

Cited in Knapp v. Wallace, 50 Or. 354, 126 Am. St. Rep. 742, 92 Pac. 1057, and Fishburn v. Londershausen, 50 Or. 376, 92 Pac. 1064. 14 L. R. A., N. S., 1234, approving the rule; Willamette Real Estate Co. v. Hendrix, 28 Or. 495, 52 Am. St. Rep. 800, 42 Pac. 517, to point that mode of acquiring jurisdiction, not in accordance with course of common law, must be strictly followed.

Process.—Where Order for Publication Omits to Direct the mailing of a copy to defendant forthwith, no jurisdiction is acquired, p. 302.

Cited in Fishburn v. Londershausen, 50 Or. 374, 92 Pac. 1064, 14 L. R. A., N. S., 1234, approving the rule.

Process.—Diligence in Ascertaining Defendant's Residence must be shown in affidavit of service by publication, p. 304.

Cited in Fishburn v. Londershausen, 50 Or. 377, 92 Pac. 1065, 14 L. R. A., N. S., 1234, holding that the knowledge of defendant's whereabouts is not restricted to the state line.

Process.—Statutory Requirements as to Contents of summons must be strictly complied with, p. 305.

Cited in Goodale v. Coffee, 24 Or. 354, 33 Pac. 992, Swift v. Meyers, 37 Fed. 44, 45, 13 Saw. 583, and Cohen v. Portland Lodge No. 142, B. P. O. E., 144 Fed. 269, all approving and applying the rule; Sawyer v. Robertson, 11 Mont. 421, 28 Pac. 456, and Sweeney v. Schultes, 19 Nev. 55, 6 Pac. 45, holding that statute requiring different form of notice in summons in actions on contract and other actions must be complied with.

Judgment.—Averment of Due Publication in Judgment Entry not supported by the facts in the record must be disregarded, p. 307.

Cited in Lonkey v. Keyes Silver Min. Co., 21 Nev. 320, 31 Pac. 60, 17 L. R. A. 351, holding that when the return contradicts the finding in the judgment as to service the finding must be disregarded; Victor v. Davis, 11 Or. 447, 5 Pac. 750, affirming the decision generally.

9 Or. 310–317, BESSER v. JOYCE.

This case has not been cited.

9 Or. 318-321, PLYMALE v. COMSTOCK.

Statute of Frauds.—To Avoid Statute by Part Performance, the parol agreement must be certain and definite and the acts proved in part performance must be the identical contract set up, p. 321.

Cited in Kelly v. Ruble, 11 Or. 91, 4 Pac. 601, approving the rule; Cooper v. Thomason, 30 Or. 175, 45 Pac. 299, to point that part performance in good faith takes case out of operation of statute; Sprague v. Jessup, 48 Or. 217, 83 Pac. 148, 4 L. R. A., N. S., 410, holding that the certainty must be proved by evidence sufficient to satisfy equity court of truth of allegations of complaint.

9 Or. 322-325, GOODWIN v. MORRIS.

Limitation of Actions.—Bar of Statute Only Affects the remedy, it does not extinguish the right, p. 324.

Cited in Hickox v. Elliott, 22 Fed. 17, 10 Saw. 415, reaffirming the rule; Currier v. Studley, 159 Mass. 25, 33 N. E. 712, dissenting opinion, majority holding right to recover partnership interest in seat in stock exchange lost by lapse of time.

Distinguished in Parker v. Metzger, 12 Or. 409, 7 Pac. 519, holding that adverse possession of land for the statutory period vests complete title in the possessor. Cited in note to 95 Am. St. Rep. 671, on effect of bar of statute of limitations.

Limitation of Actions.—Bar Under Laws of This State cannot be pleaded in bar to action for possession of property in Washington where, in absence of proof to contrary, we must presume the common-law rule prevails, p. 324.

Cited in Scott v. Ford, 52 Or. 294, 97 Pac. 101, reaffirming the rule; Young v. Young, 53 Or. 367, 100 Pac. 657, refusing to consider issue based on provisions of statute of another state not pleaded. Cited in notes in 48 L. R. A. 637, as to when statute of limitations will govern action in another state or country; 67 L. R. A. 52, on how case determined when proper foreign law not proved.

9 Or. 325-327, HOUGHTON v. BECK.

Pleading.—Defects in Pleading, Whether in Substance or Form, are cured by verdict, if issue joined be such as to require proof of facts omitted or defectively stated, p. 327.

Cited in Gschwander v. Cort, 19 Or. 517, 26 Pac. 622, Chan Sing v. City of Portland, 37 Or. 71, 60 Pac. 719, Roseburg Ry. Co. v. Nosler, 37 Or. 303, 60 Pac. 905, and Creecy v. Joy, 40 Or. 32, 66 Pac. 297, all approving the rule; Madden v. Welch, 48 Or. 200, 86 Pac. 3, holding that a material allegation is not supplied by verdict; Ferguson v. Reiger, 43 Or. 509, 73 Pac. 1041, and Foste v. Standard Life etc. Co., 34 Or. 127, 54 Pac. 811, both to point that general verdict will supply every reasonable inference deducible from the pleadings; Johnson v. Sheridan L. Co., 51 Or. 42, 93 Pac. 473, Patterson v. Patterson, 40 Or. 564, 67 Pac. 666, W. W. Kimball Co. v. Redfield, 33 Or. 298, 54 Pac. 218, and Booth v. Moody, 30 Or. 225, 46 Pac. 886,

all holding that verdict will aid a defective statement but will not cure the omission of a material allegation.

9 Or. 327-332, SMITH v. COX.

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Cited in Wiseman v. Northern Pac. etc. Co., 20 Or. 430, 23 Am. St. Rep. 135, 26 Pac. 274, reaffirming the rule.

9 Or. 333-335, JOHNSON v. SHIVELY.

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Cited in Christenson v. Nelson, 38 Or. 479, 69 Pac. 651, and Baker County v. Huntington, 49 Or. 599, 87 Pac. 1039, approving the rule.

Appeal.—Erroneous Submission of Question of Law to the Jury is not ground for reversal where the issue is decided correctly, p. 335.

Cited in Baker County v. Huntington, 48 Or. 602, 87 Pac. 1040, approving the rule.

9 Or. 335-337, SIMISON v. SIMISON.

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Cited in Cook v. City of Ablina, 20 Or. 191, 25 Pac. 386, where the transcript was filed prematurely and no sufficient undertaking was given in time; Newberg Orchard Assn. v. Osborn, 39 Or. 372, 65 Pac. 82, holding that appellant applying for leave to file a new undertaking must show that he has exercised ordinary diligence.

9 Or. 338-342, BANK OF BRITISH COLUMBIA v. HARLOW.

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Distinguished in German Savings etc. Soc. v. Kern, 42 Or. 536, 70 Pac. 710, involving bond to pay value of use of land pending appeal.

9 Or. 343-348, GLEASON v. VAN AERNAM.

This case has not been cited.

9 Or. 348-356, ABRAHAM v. CHENOWETH.

This case has not been cited.

9 Or. 357-362, DUNN v. UNIVERSITY OF OREGON.

Colleges and Universities.—Directors of the University of Oregon are a corporation, p. 361.

Cited in Liggett v. Ladd, 23 Or. 45, 31 Pac. 87, holding that Corvalis Agricultural College had capacity to take title to land; In re Royer's Estate, 123 Cal. 623, 56 Pac. 464, 44 L. R. A. 364, holding the University of California a public corporation not clothed with

state sovereignty; State v. Irvine, 14 Wyo. 380, 84 Pac. 103, holding the Wyoming Agricultural College a public corporation.

Explained in Farrell v. Port of Columbia, 50 Or. 174, 91 Pac. 547, holding that regents of university are not a corporation in the ordinary meaning of that term. Cited in note in 29 L. R. A. 383, on nature of incorporated institutions belonging to state.

States.—A State Agent, Whether Incorporated or not, possesses no immunity from being sued, p. 362.

Cited in Salem Flouring Mills Co. v. Lord, 42 Or. 90, 69 Pac. 1036, holding state officers liable to suit for appropriating property not belonging to the state.

9 Or. 363-366, POMEROY v. LAPPEUR.

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Cited in Matson v. Swanson, 131 Ill. 265, 23 N. E. 596, holding that judge issuing writ has power to admit prisoner to bail pending its return.

9 Or. 366-367, HAZARD, IN RE.

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Cited in Moore v. Frasier, 15 Or. 638, 16 Pac. 870, to the point that mortgage of school lands may be foreclosed by the state or the commissioners.

9 Or. 367-373, MANNING v. KLIPPEL.

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Cited in Lane v. Coos County, 10 Or. 124, holding that sheriff is not entitled to extra compensation for acting as tax collector.

Statutes.—An Act to Assess Specific Taxes for public purposes is void if local, p. 373.

Cited in Crawford v. Linn Co., 11 Or. 498, 5 Pac. 746, distinguishing special and local laws; Dundee Mtg. etc. Co. v. School Dist. No. 1, 21 Fed. 158, and Dundee Mtg. etc. Co. v. School Dist. No. 1, 19 Fed. 371, to the same effect; Edmonds v. Herbrandson, 2 N. D. 280, 50 N. W. 974, 14 L. R. A. 725, defining general and special laws; People v. Central Pac. R. Co., 83 Cal. 405, 23 Pac. 307, holding that either a public or private act may be special.

Compared in Northern Counties Investment Trust v. Sears, 30 Or. 401, 41 Pac. 935, 35 L. R. A. 188, holding the law in question sufficiently designated its object in its title.

Distinguished in Northern Counties Investment Trust v. Sears, 30 Or. 392, 41 Pac. 932, 35 L. R. A. 188, holding the law in question general though one county was not provided for; State v. Frazier, 36 Or. 187, 59 Pac. 8, upholding clerk's and sheriff's fee bill of 1889;

State v. County Commrs., 19 Nev. 248, 9 Pac. 124, holding that the Nevada legislature has power to pass local or special laws regulating fees of county officers. Cited in note in 1 L. R. A., N. S., 154, on fees as taxes, within constitutional provisions relating to taxation.

9 Or. 377–387, OREGONIAN R. CO. v. HILL.

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Cited in Gaston v. City of Portland, 41 Or. 378, 69 Pac. 36, to point that payment into court of damages assessed is sufficient.

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Cited in Oregon Ry. Co. v. Birdwell, 11 Or. 283, 3 Pac. 685, reaffirming the rule.

Distinguished in County of Madera v. Raymond G. Co., 139 Cal. 132, 72 Pac. 917, where the form of the judgment was not as it should have been, but the defendant was not injured by it.

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Cited in Grande Ronde Electrical Co. v. Drake, 46 Or. 248, 78 Pac. 1033, reaffirming the rule; Florida etc. R. Co. v. Bear, 43 Fla. 323, 31 South. 288, holding that statute must be strictly construed and substantially complied with.

9 Or. 387–393, WEILL v. CLARK.

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9 Or. 393–405, JACKSON v. TRULLINGER.

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9 Or. 405–418, TENNY v. MULVANEY.

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9 Or. 418–424, WILLIS v. HOOVER.

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9 Or. 425–436, MANN v. FLANAGAN.

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9 Or. 437–452, SIMON v. PORTLAND COMMON COUNCIL.

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Cited in City of Portland v. Gaston, 38 Or. 533, 63 Pac. 1052, holding that litigation over streets, so far as question of damages to abutting owners is concerned, must terminate in the circuit court; Pittsburgh, Ft. W. & C. Ry. Co. v. Gillespie, 158 Ind. 459, 63 N. E. 847, denying right to appeal from decision of circuit court in a drainage case; Blanding v. Sayles, 23 R. I. 231, 49 Atl. 994, denying right to appeal where statute made decision of lower court final.

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Cited in Wood v. Riddle, 14 Or. 254, 12 Pac. 385, holding that the county must be made a defendant in a proceeding to review the action of the county court.

9 Or. 452–456, HALL v. HALL.

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9 Or. 457-461, STATE v. JACKSON.

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Cited in Wheeler v. United States, 159 U. S. 525, 16 Sup. Ct. Rep. 93, 40 L. ed. 247, and State v. Juneau, 88 Wis. 182, 43 Am. St. Rep. 877, 59 N. W. 581, 24 L. R. A. 857, both holding that the question of competency is not affected by age, it is one of intelligence; State v. Blythe, 20 Utah, 380, 58 Pac. 1108, holding that if the child appear to possess sufficient sense of the danger of false swearing or the wickedness of lying, it may be admitted as a witness regardless of age. Cited in notes in 124 Am. St. Rep. 297, 302, on competency of children as witnesses; 19 L. R. A. 610, on competency of children as witnesses.

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Cited in Breon v. Hinkle, 14 Or. 513, 13 Pac. 299, and Thomas v. Bowen, 29 Or. 262, 45 Pac. 769, both approvingly.

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9 Or. 466-470, STATE v. CLARK.

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9 Or. 475-481, SMITH v. COX.

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9 Or. 481-487, HOXTER v. POPPLETON.

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Cited in City of Philomath v. Ingle, 41 Or. 293, 68 Pac. 804, holding that statute requiring audit of claim against city before suit is mandatory; Richardson v. City of Salem, 51 Or. 127, 94 Pac. 35, holding that in suit against Salem the complaint must allege that the claim was itemized and verified when presented.

Distinguished in Sheridan v. City of Salem, 14 Or. 332, 12 Pac. 926, stating the reason of the rule and holding it inapplicable to claims arising in tort.

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Cited in Hermann v. Hutcheson, 38 Or. 241, 58 Pac. 490, approvingly.

Distinguished in Taylor v. Jenkins, 11 Or. 275, 3 Pac. 682, involving service of summons to which the rule is inapplicable.

9 Or. 512–516, GRAY v. HOLLAND.

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Cited in Cross v. Allen, 141 U. S. 538, 12 Sup. Ct. Rep. 67, 35 L. ed. 849, following the rule on the ground of stare decisis.

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9 Or. 525-529, McMAHAN v. McMAHAN.

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Cited in Crow v. Crow, 29 Or. 393, 45 Pac. 762, and Harberger v. Harberger, 16 Or. 329, 14 Pac. 70, both granting divorce where husband accused wife of adultery; Goodman v. Goodman, 80 Mo. App. 281, holding that indignities must amount to cruelty, not to the body but to the mind; Jones v. Jones, 62 N. H. 466, approving but not applying the rule; Robinson v. Robinson, 66 N. H. 609, 49 Am. St. Rep. 632, 23 Atl. 365, 15 L. R. A. 121, defining extreme cruelty. Cited in notes in 50 Am. Rep. 542, and 65 Am. St. Rep. 80, on cruelty as ground for divorce; 18 L. R. A., N. S., 303, on making charges of adultery as ground for divorce.

9 Or. 530-536, KNOTT v. JEFFERSON ST. FERRY CO.

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9 Or. 537-541, STAGE v. STURGESS.

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EXTRA ANNOTATED EDITION.

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON.

FROM OCTOBER TERM, 1881, TO OCTOBER TERM, 1882.

T. B. ODENEAL,
REPORTER.

VOLUME 10.

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CIRCUIT COURTS OF OREGON.

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HIERO K. HANNA, ... *First District*,

COMPOSED OF

Jackson, Josephine, Klamath and Lake Counties.

ROBERT S. BEAN, ... *Second District*,

COMPOSED OF

Benton, Coos, Curry, Douglas and Lane Counties.

RUEBEN P. BOISE, ... *Third District*,

COMPOSED OF

Linn, Marion, Polk, Tillamook and Yamhill Counties.

RALEIGH STOTT, ... *Fourth District*,

COMPOSED OF

Multnomah County.

A. S. BENNETT, ... *Fifth District*,

COMPOSED OF

Clackamas, Clatsop, Columbia, Crook, Wasco and Washington Counties.

JOHN J. BALLERAY, ... *Sixth District*,

COMPOSED OF

Baker, Grant, Umatilla and Union Counties.

CIRCUIT COURTS OF OREGON.

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COMPRISING

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[illegible] C. [illegible], ... Second District,

COMPRISING

[illegible] Counties, Coos and Curry Counties and Lane County.

[illegible] . . . . . Third District,

COMPRISING

[illegible] Marion and Yamhill Counties.

[illegible] . . . . . Fourth District,

COMPRISING

Multnomah County.

A. [illegible] . . . . . Fifth District,

COMPRISING

Clackamas, Clatsop, Columbia, [illegible] and Washington Counties.

[illegible] . . . . . Sixth District,

COMPRISING

[illegible] Union Counties.

THE SUPREME COURT

OF OREGON.

WILLIAM P. LORD, CHIEF JUSTICE,

To July 1st, 1882.

EDWARD B. WATSON AND JOHN B. WALDO,

ASSOCIATE JUSTICES.

EDWARD B. WATSON, CHIEF JUSTICE,

From July 1st, 1882.

WILLIAM P. LORD AND JOHN B. WALDO,

ASSOCIATE JUSTICES.

T. B. ODENEAL,

CLERK.

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OCTOBER TERM, 1881.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OREGON,

OCTOBER TERM, 1881.

WILLIAM P. LORD, CHIEF JUSTICE.
EDWARD B. WATSON, } *Associate Justices.*
JOHN B. WALDO, }

KITCHERSIDE *v.* MYERS.

PRACTICE—LAW—EQUITY.—An objection to the jurisdiction in equity, in the absence of a demurrer on the ground of an adequate remedy at law, comes too late after the defendant has, by his answer, put himself upon the merits, and the pleadings suggest no such defense.

PUBLIC LANDS—HOMESTEAD.—Where public lands are subject to be taken under the homestead acts, and a party has taken the initial to homestead, he has a right to the possession of the land for the purpose of doing the required acts to secure his title, and if he is prevented from taking possession by one without legal title, or equal equitable claim, he may ask a court of equity to put him in possession of his rights.

APPEAL from Yamhill County.

E. C. Bradshaw, James McCain and W. D. Fenton, for appellant.

H. & A. M. Hurley, for respondent.

By the Court, LORD, C. J.:

From the pleadings and evidence, it appears that the defendant and those under whom he claims have been in the open and actual possession of the land in controversy since the year 1855, and that this land was included in the original notification of John Myers under the Donation Act, but

that subsequently he filed a corrected notification in which the land in dispute was not included, but relinquished, and that after due proof of residence and cultivation, he received from the proper officer a donation certificate, and finally a patent, as donee of the United States, in both of which the land described corresponded to the description in the corrected notification, and did not include the land in controversy. Nor is there any evidence to show that the land in dispute was omitted in the description of the title papers of John Myers, deceased, as alleged, by reason of a mutual mistake between himself and the officers of the land department of the government, nor of any proceedings begun, heard or determined in the land department for the purpose of correcting such alleged mistake, and including the land in dispute in his donation claim.

The defendant has no other title to this land than bare occupancy, nor had those under whom he claims. The legal title is in the United States, so far at least as the defendant is concerned, and whatever rights he has, if any, are derived from such occupancy, and the occupancy of those under whom he claims his right to the possession of this particular land. The record of the land office shows this to be unoccupied surveyed public lands, subject to be taken as homestead under the act of congress.

In 1878 the plaintiff, after filing the necessary affidavits and paying the requisite fee, received his certificate therefor, and entered upon the tract of land described in the complaint as a homestead—the east half of which is the land in dispute, and in the actual possession of the defendant—and proceeded to do the necessary acts of residence and cultivation, in order to comply with the terms of the homestead acts, and to perfect his title to the land. But it is clear from the evidence that the defendant was, and now is in the

actual possession of the east half of the whole tract which the plaintiff has taken as a homestead, and that he prevented and forcibly resisted the plaintiff from taking possession of the land in controversy, and was cutting down the timber to the irreparable injury of the rights of the plaintiff in the same. It appears then that the plaintiff has never had possession of the land in question, although it is included in his entry, and so stated in the certificate of the officer of the land office, and that the legal title as to the plaintiff is in the United States. So as to both of these parties the legal title to the land in controversy is in the United States, and whatever right either party has to the land, not being legal, must be equitable, if anything, and the question to be decided must necessarily be, who has the superior equity, or the better right to the possession of the land? This virtually disposes of the objections, so urgently insisted upon, that a court of equity would not take jurisdiction, because the plaintiff had an adequate remedy at law, by an action for trespass, or in ejectment. Besides, this objection to the jurisdiction on the ground of an adequate remedy at law, in the absence of a demurrer to the complaint, comes too late after the defendant has, by his answer, put himself upon the merits, and asked the court to determine the equities in the suit.

As applicable to this case, our view is well expressed in *Creely v. Bay State Brick Co.*, 103 Mass., 515, in which the court say: "An objection of this kind should have been made on demurrer, or at least should have been specifically relied upon in the answer, and not raised for the first time at the hearing upon pleadings which suggest no such ground of defense. Under such circumstances, the court could hardly do otherwise than retain the case, provided it is competent to grant relief, and have jurisdiction of the

subject matter, and of this we have no doubt." Moreover, if this is public land of the United States, subject to be taken under the homestead acts of congress, and the evidence shows that the plaintiff has taken the initial steps to homestead it, he has a right to the possession for the purpose of doing the required acts to secure his title from the government, and if he is prevented from taking possession by one without legal title, or of equal equitable claim, he may well ask a court of equity to put him in possession of his rights.

Let us then examine the merits of the respective claims of these parties, ascertain in what they consist, and determine in whom the superior equity resides to the possession of these lands. The donation law provides that the time limited in which claimants are required to give notice of their claims, shall be, and are hereby extended to the first of December, 1855, except where the Surveyor General shall request them so to do as above provided. John Myers, the original owner of the donation claim, and under whom the defendant claims to have equitable rights to the possession of the land in dispute, did file a corrected notification in the land office in November, 1855, in which he gives notice and a description of his land claim, but which does not include the land in question. But it is insisted that John Myers cultivated and resided upon this land at the same time, and with the same object he cultivated and resided upon the land described in his notification and patent; that he always claimed to own the same as a part and parcel of his donation claim, and that it was omitted to be described and included in his notification, and other title papers, by a mutual mistake of himself and the land officers of the government. There is no evidence to show that the mistake was *mutual*, or that John Myers made any mistake as to the land he intended to notify upon and occupy as a

donation land claim. The whole record evidence contradicts it. In his first notification, in June, 1855, he includes the land in dispute in his claim, but in the ensuing November he abandons the whole tract upon which he had notified and files a corrected notification, in which he specifically relinquishes the land in the original notification, a part of which was the land in dispute, and designates and describes other and different lands as his donation claim, and then makes oath to the truth and correctness of the statements therein contained. His certificate, issued upon final proof of residence and cultivation, and made several years after, does not include this land, but conforms to the description in his last notification. The same is also true of the patent, which was issued several years subsequently; and thus it appears that during these different periods, so far as the record or evidence discloses, no effort whatever was made by John Myers to correct the mistake, if there was any, and make the description of the land correspond to what is claimed to be covered by his residence and cultivation.

There is evidence which indicates that he was aware that this land was not included in his donation claim before patent issued, and yet there is no evidence of any attempt to correct the mistake in the land department, or of any proceedings for that purpose, or that there was a mistake as alleged. The fact that John Myers had possession of the land and claimed to own it, in the absence of any evidence of a mistake in the description by which the land in dispute was omitted, and in the face of successive acts required to be taken to complete his title, some of which were under oath, and must have attracted his attention to the correctness of the facts sworn to, and which professed to contain an accurate description of his donation claim and did not include this particular land in controversy, certainly cannot

be held to have the effect to create any legal or equitable rights or interests in this land in favor of Myers and against the United States.

The fact that he claimed there was a mistake in not including this land in his description of his donation claim, without any evidence to correct it on his part at the land office, or to show how it occurred, and opposed as it is by the notice which he gave according to the requirements of the donation law, and reinforced by the sanctity of an oath, and all the successive acts at wide intervals, by which he secured and the government confirmed his title by patent, with an allegation in the defense that the matter was now pending before the land department for correction, and without any proof offered on that subject, will require more and better proof to convince us of the existence of such a mistake, than his mere claim that such a mistake was made, although he held possession of such land.

In the absence of proof of such mistake as alleged, he and those who succeeded to his possession, including the defendant, have only such title as is derived from occupancy. Indeed, in the discussion, the facts seem to be conceded to be with the plaintiff, and the main effort was directed to showing that his remedy was at law and not in equity. According to the evidence, this is public land of the United States, subject to be taken under the acts of congress as homestead, and which the plaintiff has taken the necessary preliminary steps to secure as a homestead; but he is prevented by the defendant from taking possession of it, and not having the legal estate he is compelled to resort to a court of equity to put him in possession of his rights, in order that he may proceed to complete his residence and cultivation, and thus secure the legal title to the land. The right of possession of the plaintiff for the purpose of home-

stead is a valuable right which equity will protect, and the facts in the case showing that the plaintiff is prevented from taking possession by the defendant, who has no legal or equitable title, the decree of the court below is affirmed.

Decree affirmed.

STATE v. LEE PING BOW.

INDICTMENT—WHAT WILL NOT VITIATE.—If from the whole indictment the intention to charge all the parties, named as defendants, with the commission of the alleged offense clearly appears, the use of a singular instead of the plural verb, in the commencement, showing who are accused, will not vitiate it.

IDEM.—Where the indictment charges the defendants with stealing "from and on the person," the words "and on" may be rejected as surplusage.

DISCRETION OF COURT.—The decision of the court below, upon matters resting in its sound discretion and upon conflicting evidence, where such decision does not appear from the record to have been against the weight of such evidence, will not be disturbed on appeal.

CIRCUMSTANTIAL EVIDENCE.—Evidence that the prosecuting witness, only a few hours previous to the time of the alleged larceny of money from his person, had in his possession the amount of money charged to have been stolen, was not immaterial or irrelevant, when offered in connection with other evidence, tending to prove the felonious taking from his person.

IMPERTINENT remarks of counsel, in the course of their arguments to the jury, unconnected with any error or omission of duty on the part of the court trying the case, affords no ground for a reversal of judgment.

APPEAL from Multnomah County. The facts are stated in the opinion.

By the Court, WATSON, J.:

The appellant was indicted jointly with one John Doe, whose true name was unknown to the grand jury, for the crime of larceny from the person, in Multnomah county. Upon his separate trial on the indictment, at the last May term of the circuit court for that county, he was found

guilty as charged, and sentenced to two years imprisonment in the state penitentiary, and adjudged to pay the costs of the action. From this judgment he brings this appeal.

The indictment after stating that Lee Ping Bow and John Doe, whose true name is unknown to the grand jury, is accused by the grand jury of the county of Multnomah, by this indictment of the crime of larcency from and on the person of another, charges that "The said Lee Ping Bow and John Doe, whose true name is unknown to the grand jury, on the 19th day of April, A. D. 1881, in the county of Multnomah and state of Oregon, did wilfully, unlawfully and feloniously take, steal and carry away from and on the person of another, namely from and on the person of Chung John," &c.

The appellant makes two objections to the indictment. First, The employment of the verb "is" instead of "are" in the commencement, indicates that only one of the defendants was intended to be accused and leaves it in doubt which was intended. Second, That the use of the words "and on" in connection with the word "from," in the charging part of the indictment, destroys the meaning of the latter word, and renders the indictment invalid for want of a sufficient charge of the offense.

But neither of these objections appears to possess any substantial merit. The concluding portion of the indictment clearly charges both defendants with the commission of the alleged crime, and viewing the instrument as a whole we think there can be no doubt as to the intention to accuse both. The words "and on" do not, and in the connection in which they appear in the indictment, could not qualify or destroy the meaning and effect of the word "from," or neutralize the effect of the whole charge.

There is no ground for saying that the grand jury did

not intend to charge a larceny *from* the person, and if by employing the additional words "and on" they intended to charge that it was also committed *on* the person, or that the money was on the person when it was stolen, they may be regarded as surplusage, in no wise affecting the force of the allegation which charges a complete offense without them. We have not been able to obtain any view of this matter in which the use of these words, in the connection in which they appear in the indictment, could possibly affect its validity.

The next objection urged by the appellant is to the ruling of the court below denying his motion to correct the record of his arraignment. The record shows a regular arraignment, and the motion to correct was based on affidavits tending to prove that appellant was a Chinaman, who did not understand the English language sufficiently to comprehend the proceedings, and that no interpreter was sworn, neither were the proceedings interpreted or explained to him, at the time of his arraignment. Counter affidavits were filed, on behalf of the state, tending to prove that he did sufficiently understand the English language to comprehend all that was done, and that no interpretation was necessary. As the amendment of its record was a matter resting in the sound discretion of the court below, we have no power to review its determinations made in the exercise of that discretion, unless they disclose errors of law. In this instance the evidence furnished by the affidavits was conflicting, and we are by no means satisfied that the decision complained of was against the weight of the evidence.

The bill of exceptions shows that the court below found that the appellant did possess some knowledge of the English language, and we must presume it considered his knowledge sufficient to enable him to understand the proceedings

as they transpired, and that he did, in fact, sufficiently understand them to avail himself of all the benefits which the statute was designed to confer upon him for his protection in making his defense. Taking into account also the facts disclosed by the record, that he appeared by counsel, as well as in person, at every stage of the proceedings previous to his conviction, and that no objection or suggestion of this nature was interposed until after he had been tried and found guilty by the jury, and we cannot doubt the justice or correctness of the ruling denying the motion.

The next exception relates to the admission of the testimony of Ah Gee, a witness for the prosecution. He testified that he saw the prosecuting witness have eighty dollars in the evening, just previous to the larceny. The prosecuting witness, Chung John, had already testified that the money, or a portion of it, which the indictment charged to have been stolen from his person, was taken from him about 8 o'clock that evening, by the appellant. The objection to the testimony of Ah Gee was that it was immaterial and irrelevant, and not connected with any evidence tending to show that appellant knew Chung John had the money at that time. The amount charged in the indictment to have been stolen was seventy-five dollars, the property of said Chung John.

It certainly was necessary for the state to prove that Chung John owned the money, and had it on his person at the time of the larceny. Both these matters were in issue, and we think the testimony of Ah Gee tended to prove them, so that it was neither immaterial or irrelevant. It may have been of slight or grave importance, under the circumstances, but, in any view, we think it was admissible.

The appellant claims, in the next place, that the court below erred in receiving the verdict in the absence of his

counsel, although he himself was present in person. We are not aware of any principle or authority upon which this can be held to be error.

The last objection urged here by the appellant is based on certain remarks made by the District Attorney, in the course of his argument to the jury. Whether strictly justifiable or not, we need not consider, for the record does not disclose any error or omission of duty, on the part of the court below, in respect to them. The objection and exception were taken to the remarks of the District Attorney, as the bill of exceptions shows, and the interposition of the court either to check him or direct the jury to disregard the objectionable statements, was not requested. The court was not in fault and the objection fails. The judgment is affirmed and the cause is remanded for further proceedings.

Judgment affirmed.

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*HAWLEY, DODD & CO. v. JETTE & CLARK.

BILLS OF EXCHANGE.—Where an instrument in writing was in the following words:

PORTLAND, OR., December 10, 1879.

$300. On January 5, 1880, without grace, pay to the order of H. D. & Co., three hundred dollars, value received, and charge the same to the account of J. & C.

To J. D. M., Oregon City.

Held, That the above order was an inland bill of exchange, and not a check, and that as such, the duties, privileges and liabilities of the law merchant attach to it.

CHECKS AND BILLS—DIFFERENCE.—The particulars in which checks differ from ordinary bills of exchange are: *First,* They are always drawn on a *bank* or *banker,* and are payable on presentment, *without any days of grace. Second,* They require *no acceptance* as distinct from prompt payment. *Third,* They are always supposed to be drawn on a previous deposit of funds, etc.

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*See 45 Am. Rep. 129 and note.

PRESENTMENT AND NOTICE OF NON-PAYMENT.—The text writers and authorities now agree that the bankruptcy and insolvency of the drawer, however well known, constitute no excuse for neglect to make due presentment, or to give due notice of its dishonor to the drawer and indorsee, if not accepted. *And the same rule applies as to the necessity of presentment for payment to the acceptor of a bill or maker of a note, and as to notice of its dishonor by non-payment.* This doctrine rests upon an implied contract to make presentment and give due notice of the dishonor, and further, notwithstanding the failure or insolvency, it cannot be definitely ascertained without presentment for payment that the bill will be dishonored, as through friends, or reasons unknown to others, the principal party may devise means for payment. By receiving the bill, they undertook to do all that the law merchant required to be done to obtain payment, and if they fail in the performance of that duty the debtor is discharged.

APPEAL from Marion County. The facts in the case are as follows:

On December 10, 1879, Jette & Clark were indebted to plaintiffs, Hawley, Dodd & Co., in the sum of $617.03. That on said day defendants, in Portland, Oregon, gave Hawley, Dodd & Co. an order in writing, signed by defendants, and directed to J. D. Miller, of Oregon City, Oregon, ordering said J. D. Miller to pay to plaintiffs, on the 5th day of January, 1880, the sum of three hundred dollars. That on said 10th day of December, 1879, Miller was indebted to said firm of Jette & Clark, in said sum of $300, and was solvent. That plaintiffs received said order, and on the 12th day of December, 1879, presented the same to Miller for acceptance, and that the same was by said Miller on that day accepted. That said order was never presented to Miller for payment. That on January 4, 1881, Miller became and ever since has been insolvent. That on March 23, 1880, defendants paid plaintiffs the balance of said old account, to-wit: the sum of $317.03. That up to the time this case was tried, plaintiffs were still in possession of said order.

Thayer & Williams, for appellants.

Maintain that if at the time the order became due, the defendants had no funds in the hands of Miller to pay it, or no *bona fide*, reasonable or just expectation that it would be paid, they were not entitled to demand and notice of dishonor. (2 Daniels on Negotiable Instruments, secs. 1078, 1079, 1081; 1 Parsons on Bills and Notes, 539-540; *Dickens v. Beal*, 10 Peters, 578; *Dollfus v. Frusch*, 1 Denio, 367.) There is no difference in this respect between a bill and a check. (Edwards on Bills and Notes, 397, 398, 646, 647.) Taking the order was no payment unless the order was paid. (Edwards on Bills and Notes, 191, 192; *Hays v. Stone*, 7 Hill, 128; *Lovitt v. Cornwell*, 6 Wend., 378.)

Bellinger & Gearin, for respondents.

Contend that it is the duty of the holder of a bill of exchange to present the same to the drawee for acceptance, and to present it for payment according to the terms thereof, and to promptly notify the drawer in case of non-payment, and any failure in performing any of these duties, discharges the holder. (*Mauney v. Coit*, 80 N. C., 300.) The known insolvency of the acceptor of a bill is no excuse for non-presentment for payment. (Daniels on Negotiable Instruments, 193; Chitty on Bills, 396, 438; *May v. Coffin*, 21 Mass., 341; *Benedict v. Coffey*, 5 Duer, 226; *Hunt v. Wadleigh*, 26 Maine, 271; *Jackson v. Richards*, 2 Caine, 343.)

By the Court, LORD, C. J.:

The facts in this case were stipulated, and tried before the court. The issue upon which it was tried, was that "if the fact of Miller's insolvency, at the time said order was due and payable, excused non-presentment for payment by

plaintiffs, and notice of dishonor to defendants, it is admitted that the plaintiffs are entitled to recover. If Miller's said insolvency was no excuse for non-presentment for payment and notice to defendants of the dishonor of the order, the defendants are entitled to recover." The written order referred to is as follows:

"PORTLAND, OREGON, December 10, 1879.

$300. On January 5, 1880, without grace, pay to the order of Hawley, Dodd & Co. three hundred dollars, value received, and charge the same to the account of

JETTE & CLARK.

To J. D. MILLER, Oregon City."

The facts stipulated show that this order was received by the plaintiffs on the 12th day of December, 1879, and by them presented to the said J. D. Miller for acceptance, and that the same was by him accepted on that day.

The argument of the counsel for the appellants, and the authorities cited in support of his view, show that he considered this order as a check, or at least, the law in relation to checks under the facts stipulated, as applicable to this order. Our first enquiry then must necessarily be, what is the nature or character of this order, and what is the law applicable to it under the facts admitted? The definition of a check is "a written order, or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to a person named therein, or to him or bearer, or order, a named sum of money." Mr. Justice Story in the *Matter of Brown*, 2 Story's Reports, 512, says: "I agree, that it (a check) nearly resembles a bill of exchange; but *nullum simile est idem*. The distinguishing characteristics of checks, as contradistinguished from bills

of exchange, are that they are always drawn on a bank, or bankers; that they are payable immediately on presentment, without the allowance of any days of grace, and that they are never presentable for mere acceptance."

In *Ballard v. Randall*, 1 Gray, 606, Chief Justice Shaw says: "A check is an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money, no previous notice is necessary, no acceptance is required or expected, it has no days of grace. It is payable on presentment and not before." The distinction between checks and inland bills of exchange has been very clearly and concisely stated by Mr. Justice Swayne in *Merchant's Bank v. State Bank*, 10 Wallace, 647, in which he says: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specified sum payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance, no action can be maintained by the holder upon either, against the drawer. The chief points of difference are that a check is always drawn on a bank or banker; no days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud." As a result of these authorities it may be stated that the particulars in which checks differ from ordinary bills of exchange,

are: First, They are always drawn on a bank or banker, and are payable on presentment, without any days of grace. Second, They require no acceptance as distinct from prompt payment. Third, They are always supposed to be drawn on a previous deposit of funds, etc. (Story on Prom. Notes, sec. 489; *Leslie v. Given*, 8 Bush, 359.)

Tested by these principles, the order in question is an inland bill of exchange, and not a check. Confessedly by the record, it is not drawn on a bank or banker, and in this respect differs from a check. Upon the face of the order appear the words "without grace," indicating that in the absence of these words the order would be entitled to grace, and was so understood, which, in a check, would be wholly unnecessary, because not entitled to grace. It was presented by appellants to the drawee and by him accepted, which indicates that they regarded the order as a bill, with the incidents of the law merchant, and not as a check, for, as Judge Story said, supra, "checks are never presentable for mere acceptance. The ordinary form of a bill of exchange, payable at a future day, is at so many days or months notice after date or sight. When a bill is so drawn, or drawn like the order in question, it will carry with it the privileges and liabilities incident to a bill, and by adopting such form it will be held so to intend."

Will the insolvency then of the drawee excuse the plaintiffs from presentment for payment according to the terms of the bill, and giving notice to the drawers of its non-payment or dishonor? In his recent work, Mr. Daniels says: "The bankruptcy and insolvency of the drawee of a bill, however well known, constitutes no excuse for neglect to make due presentment, or to give due notice of its dishonor to the drawer or endorser if it is not accepted. *And the same rule applies as to the necessity of presentment for*

payment to the acceptor of a bill, or maker of a note, and as to notice of its dishonor by non-payment." And again, that "the American and English authorities are uniform on the subject." (Daniels on Negotiable Instruments, secs. 1171 and 1172; Chitty on Bills, 354, 396; Story on Notes, secs. 286, 367; Story on Bills, secs. 318, 326, 346; 1 Parsons on Notes and Bills, 446, 528; Bigelow on Bills and Notes, 365, 378, sec. 6, and the authorities cited.)

The ground upon which this doctrine rests is said to be that it is a part of the implied obligations of the contract to make due presentment, and give due notice of the dishonor of the bill, to fix the liability of the drawer, and *secondly*, that notwithstanding the failure, it cannot be definitely ascertained, without presentment for payment, that the bill will be dishonored, as through friends or resources unknown to others, the principal party may derive means for payment. (Daniels on Negot. Inst., sec. 1171; Story on Prom. Notes, sec. 286.) Want of injury to the drawer is never a sufficient excuse for default in making presentment for payment and giving notice of dishonor. (Daniels on Negot. Inst., sec. 1170; Chitty on Bills [13th Am. Ed.] 490; 1 Parsons on Notes and Bills, 551, 630.)

But it has been held that want of notice is excused when the party cannot possibly be damaged thereby. (*Smith v. Miller*, 52 N. Y., 545; *Taylor v. Manuf. Co.*, 82 Ill., 579.) But otherwise, if the omission to give the notice *might* prejudice him. In *Mauney v. Coit*, 80 N. C., 300, it is held that when a draft on a third person is given in settlement of an anticipated debt, it is the duty of the holder to present it and to give notice of its dishonor if not paid, and a failure to do so will discharge the debt. And as applicable to this same doctrine, Mr. Daniels says: "When a party contracts a debt and contemporaneously gives in additional

payment his draft upon a third party, it is the duty of the creditor to present it in a reasonable time for acceptance or payment and *to give notice in the event of its dishonor to the drawer*. If he fails to make such presentment or to give such notice, the drawer is not only *discharged from liability* on the bill, but also from the debt or consideration for or on account of which it was given." (Daniel's Neg. Inst., sec. 1276, and authorities cited in the note.)

Laches which would discharge the drawer or indorser of a bill of exchange, will as effectually extinguish the debt for payment of which a bill, or other negotiable instrument is transferred. (*Smith v. Miller*, 43 N. Y., 175.) The result of these authorities is that the order in question is an inland bill of exchange, and as such, the duties, obligations and liabilities of the law merchant attach to it. Although not received in absolute payment of their debt by the appellants, but *sub modo*, yet it was their duty, if they intended to hold the defendants, either as drawers of the bill, or for their prior indebtedness, to present the bill for payment within the time prescribed by law for that purpose, and if not paid to notify the defendants of its dishonor. Had this been done the remedy of the plaintiffs against the defendant would have been very clear. They would have been remitted to all their rights for the recovery of their original claim as if no bill had been drawn. By receiving the bill they undertook to do all the law required to be done to obtain payment, and if they fail in the performance of that duty the debtor is discharged. It follows from these views that the judgment of the court below is affirmed.

Judgment affirmed.

RUBLE v. COYOTE G. & S. M. CO.

INJUNCTION—DAMAGES.—In the absence of malice and want of probable cause a party injured by a preliminary injunction, improperly issued, is confined to his remedy upon the undertaking given by the party procuring the same.

REMEDY AT LAW.—Whether the remedy of the injured party be upon the undertaking or, under peculiar circumstances, an action on the case, he must seek his relief at law, and not in equity.

IDEM.—The undertaking being in terms joint, but the injury being several, owing to the distinct interests of the parties enjoined, in the property affected by the injunction, and the amounts of damage suffered by them being different, will not entitle them to sue in equity; there is still an adequate remedy at law under the provisions of the civil code.

APPEAL from Marion County.

Thayer & Williams, for appellant.

W. H. Holmes, for respondent.

By the Court, WATSON, J.:

This was a suit in equity, brought by the appellants, Wm. and Walter Ruble, against the respondents, The Coyote Gold and Silver Mining Company being principal and E. F. Walker surety, to recover damages upon their undertaking for an injunction, in the sum of $2,500, that being the amount of the penalty expressed therein, and to obtain judgment against said principal for an additional sum which appellants claim to have been damaged by reason of such injunction, in excess of the sum of $2,500, secured by the undertaking. The complaint alleged that the appellants owned the mining property, which was covered by the injunction, in severalty, and that William Ruble's damage, in respect to his portion thereof, was $6,250, and that Walter Ruble's damage, in respect to his individual portion thereof, was $5,500. A demurrer was filed to the complaint upon the grounds: First, Want of jurisdiction over the subject

matter of the suit and persons of the respondents. Second, Improper joinder of distinct causes of suit. Third, Insufficiency of facts stated to constitute any cause of suit.

The demurrer was overruled; respondents answered; appellants replied; some testimony was taken and submitted by the appellants, and on the final hearing the circuit court dismissed the suit with costs to the respondents. The appeal is from this decree.

We are so well satisfied that the appellants' remedy was at law, if he was entitled to any relief at all, that we shall not consider the issues of fact made by the pleadings as they now stand, or the testimony in relation thereto. The pleadings fail to show a case cognizable in a court of equity, and the demurrer should have been sustained.

The matter relied upon by the appellants to sustain the equity jurisdiction are: the inadequacy of the amount specified in the undertaking compared with the amount of damage claimed; the joint character of the undertaking and the several character of their interests intended to be protected, and the necessity of equity interposition to settle the rights of all parties and give full relief. As to the first proposition, the complaint does not show facts entitling them to relief beyond the amount specified in the undertaking, in any form of action. It does not allege that the injunction was sued out or prosecuted by the Coyote Company "maliciously," as well as without probable cause, which all the authorities hold to be necessary even to support an action on the case. *Cox v. Taylor*, 10 B. Monroe, (Ky.,) 17; *Lindsay v. Larned*, 17 Mass., 189; *Chew v. Thompson*, 4 Hals., 249; *Robinson v. Kellum*, 6 Cal., 399.)

Even if it had shown the malice, as well as want of probable cause, by proper averments, and it could be successfully established that the cause of action so arising could be

joined with that arising upon the undertaking, which we need not consider here, still the appellants would have an adequate remedy at law, and consequently not be entitled to maintain this suit in equity. They are the real parties in interest, (sec. 27, Civil Code) and may sue separately or jointly, notwithstanding the joint character of the undertaking. (*Summers v. Farish*, 10 Cal., 347; *Browner v. Davis*, 15 Id., 9.) And sections 241 and 242 of the code, give the courts of law as full power to try the issues in such a case, and adjust and settle the various rights of the parties, both plaintiff and defendant, as the courts of equity could have. (*Loomis and others v. Brown*, 16 Barb., 325.) Besides, sec. 40 of the code authorizes the courts of law to cause any other parties not before them to be brought in, when their presence is necessary to a complete determination of the controversy. The decree of the circuit court is affirmed with costs.

Decree affirmed.

DAWSON v. CROSSEN.

ASSIGNMENT FOR CREDITORS.—The recording of a deed of assignment is not essential to its validity, where possession accompanies conveyance of personal property.

INVENTORY FOR RECORD.—The failure of an assignee to file an inventory for record does not render an assignment void.

APPEAL from Wasco County.

W. W. Thayer and O. F. Paxton, for appellant.

J. E. Atwater, for respondent.

By the Court, LORD, C. J.:

Where McC., by a deed of general assignment, duly executed and acknowledged, conveyed all his property to D. in

trust, for the benefit of all his creditors in proportion to the amount of their respective claims, and delivered the possession of said property to D., but prior to the recording of said deed of assignment, and before an inventory had been filed as required by the act of 1878, C., a sheriff, seized said property under a writ of attachment duly issued, etc., and took the property from the possession of D., who thereupon commenced this action to recover the same; *Held*, That the recording of a deed of assignment is not essential to its validity where possession accompanies the conveyance of personal property, or where an actual transfer of the property assigned takes place; *Held*, further, That the failure of an assignee to file an inventory for record does not render the assignment void, and that D., the assignee, is entitled to the possession of the property.

Judgment reversed.

BOEHREINGER v. CREIGHTON, ET AL.

DEED—DESCRIPTION—PAROL EVIDENCE.—A description of land in a deed, in which the initial point is described as "a stake set for a corner, near the road leading past the residence of William Henkle, it being the road leading from Corvallis to the Lloyd settlement," and from which point the boundaries are given by course and distance, with certainty, and the whole tract stated to be in Benton county, Oregon, and to contain 100 acres, is not void for uncertainty, on the face thereof. Parol evidence is admissible to show the precise location of the stake.

ATTACHING CREDITOR—UNRECORDED DEED.—An attaching creditor without notice of a prior unrecorded deed of the property attached, made by the debtor in the writ to a third person, is not affected by such deed. He is entitled to the same protection as a *bona fide* purchaser, for a valuable consideration, would be under the same circumstances, by force of section 148 of the code. But notice of such unrecorded deed would affect him to the same extent as it would a subsequent purchaser for a valuable consideration. The object of the statute was to place them on an equal footing.

IDEM—EVIDENCE.—Where the reasonable conclusion, from all the debtor said to his creditor, during a conversation between them prior to the levy of an attachment, in favor of the latter, upon the real property of the former, was that the debtor had made some arrangement or bargain for the sale of the property to a third person, but had not made a final disposition of it, nor received the purchase money, and such was the actual impression produced upon the mind of the creditor; *Held,* Not to be sufficient notice of a prior unrecorded deed of such property to such third person, to affect the rights of the creditor, under the subsequent levy of his attachment.

APPEAL from Benton County.

F. A. Chenoweth and Tilmon Ford, for appellant.

J. W. Rayburn, for respondent.

By the Court, WATSON, J.:

This was a suit by the appellant, Boehreinger, to enjoin a threatened sheriff's sale of lands, situated in Benton county. The complaint alleges that the plaintiff is the owner and in possession of such lands, and that defendant, Creighton, has caused an execution to be issued upon a judgment of the county court of said county, in his favor and against the defendant Vandersoll, and delivered to the defendant King, as sheriff of said county, who, at Creighton's request, has levied it upon said lands as the property of Vandersoll, and advertised a sale thereof, upon such execution, and will, unless restrained, sell the same, and execute a certificate of sale and sheriff's deed to the purchaser thereof, and thereby create a cloud upon plaintiff's title thereto.

The answer denies plaintiff's ownership and possession, and avers Vandersoll's ownership of said property, a levy thereon under an attachment, issued in the same action, in which said judgment was rendered, on April 5, 1880, the filing and recording of a certificate of such attached property as required by law, the rendition of judgment and order for the sale of such property, and the insolvency of Vandersoll.

The reply denies Vandersoll's ownership, and alleges the execution of a deed from him to plaintiff of the same premises on March 20, 1880, and that Creighton had notice of such deed prior to the levy of the attachment. Upon the final hearing, the circuit court dismissed the suit and rendered judgment against plaintiff for costs. The case is here on appeal from this decree. The appellant insists that Vandersoll never had any title to the land in controversy, by reason of fatal defects in the description of the premises, in the deed through which he claimed title. But that if such deed did convey any title to Vandersoll it passed to appellant by Vandersoll's deed to him of March 20, 1880, which contained the same description of the premises as the former, and that Creighton had notice thereof.

The respondent, Creighton, contends that this description was sufficient, but that appellant's deed had not been recorded, and he had no notice of it at the time his attachment was levied, and therefore ought not to be affected by its existence. The deed to Vandersoll is dated February 22, 1878, and contains the following description: "The following described real estate, to-wit: Beginning at a stake set for a corner, near the road leading past the residence of William Henkle, it being the road leading from Corvallis to the Lloyd settlement. Run thence west 68.25 chains, thence north 14.70 chains, thence east 67.50 chains, thence south 12 degs. east 14.77 chains, to the place of beginning, in Benton county, state of Oregon, containing 100 acres."

We think this description plainly sufficient. The location of the stake can be established by parol proof, and then the courses and distances in the description will readily give the actual boundaries. (*Wing v. Burgiss*, 13 Maine, 111; *Blake v. Doherty*, 5 Wheat., 359.)

As appellant's deed from Vandersoll, of March 20, 1880,

contained the same description, it was sufficient to pass the title to the property to the appellant. But this deed was not recorded until after the levy of Creighton's attachment on April 5, 1880, and the pleadings present an issue of fact, as to whether Creighton had notice of its execution, prior to that time, which must be determined from the testimony. Our statute has declared that an attaching creditor, from the date of the levy, shall, as against third persons, be deemed a purchaser in good faith, and for a valuable consideration, of the attached property. (Sec. 148, Civil Code.) Counsel for respondents suggested, at the hearing, that the effect of the terms of this statute places the attaching creditor in as good a position as that of a *bona fide* purchaser for a valuable consideration, notwithstanding his notice of previous unregistered deeds or other instruments. But we do not think any such construction can be tolerated. It would encourage fraud and uphold injustice, instead of enforcing a rule of right and fair dealing among men.

The statute was evidently designed to place him upon an equal footing, but not to confer upon him superior advantages, by protecting him in the enjoyment of the fruits of fraud. The wording of the statute does not demand such a construction, and we can discover no reason or analogy to support it. We are fully satisfied that the terms of the statute do not warrant it, and that it should not receive judicial sanction.

The question next to be considered is one of fact. It is, whether Creighton had, previous to the levy of his attachment, any notice of the unrecorded deed from Vandersoll to appellant, or knowledge of any facts, which ought to have led him as an honest and reasonable man to make suitable inquiries concerning such deed. The appellant relies, to some extent, in his effort to fasten such notice upon the

respondent Creighton, on what a Mr. Hanson told the deputy sheriff, while on his way to levy the attachment. It is not claimed that this information reached Creighton before the levy was made, and we are fully convinced that it cannot be held to affect his rights under such levy. The sheriff was not his agent, and notice to the sheriff or his deputy, of prior unrecorded deeds or instruments affecting the title to the property would not, *per se*, be notice to the attaching creditor. (Freeman on Executions, sec. 343.)

The facts relied upon as affecting Creighton personally with notice are substantially these: On Sunday, April 4, 1880, (the day preceding the levy) Creighton and one Webber went to Vandersoll's house, on the premises in question, to see about the payment of the debt upon which the judgment spoken of was afterwards recovered. Vandersoll told Creighton, on this occasion, either that he had sold, or that he had bargained the premises to a man in Salem, and was going down there on the following Monday or Tuesday, and would draw some money. Creighton suggested to him that perhaps the man would back out. Vandersoll told him that he did not think he would. Early on the following morning, Creighton commenced his action and procured the attachment to be issued. After the attachment had been levied, and on the same day, Hanson, who claims to have been appellant's agent, had a conversation with Creighton at Corvallis, in which he told him he would get nothing through his action against Vandersoll, as the latter had sold the premises. Creighton replied he knew it, but that the deed had not been recorded, and he wanted his money.

Evidently the information which Vandersoll had given Creighton the day before, of his having sold or bargained the property to the man in Salem, and his intention to go down on the following Monday or Tuesday, and draw some

money, was meant to satisfy Creighton that his claim would be paid. But no deed or conveyance was mentioned, and it is quite evident from Creighton's remarks to him, after he had given the information, that the former did not understand that a deed had already been executed, or that any final and binding contract for the sale of the land had been entered into. When Creighton asked Vandersoll, after hearing all the latter had to say about the transaction, if the man he had sold or bargained the premises to might not back out, and Vandersoll replied "that he thought not," it is quite certain that all he had heard had not created any impression upon his mind that any final sale or disposition of the property had taken place. Nor was the conversation, taken as a whole, calculated to produce any such impression under all the circumstances.

Creighton undoubtedly thought Vandersoll purposed disposing of the property, and drawing the purchase money when he should go to Salem, and hence his haste in procuring its attachment the following morning. What he told Hanson after the levy, can hardly change the result. He might have heard of the deed after the levy; or what is more likely, he was speaking with regard to what he had heard at Vandersoll's, the preceding day. The deed he referred to was most probably the deed he expected Vandersoll would give upon the consummation of the bargain, of which Vandersoll had spoken. But be this as it may, no notice is made out by the evidence, with the clearness and certainty which the law requires. (1 Story Eq. Jur., secs. 398-400, and notes.)

It is not necessary to pass on the objection that the case made by the pleadings is not within the jurisdiction of equity, for assuming that it is properly here, the conclusions

of fact we have reached, from the evidence, show that the appellant is not entitled to equitable relief. The decree of the circuit court is affirmed, with costs.

SEARS v. McGREW.

SEVERAL JUDGMENT AGAINST JOINT DEBTORS.—When the action is upon a contract, joint and several, a several judgment would be proper, as the defendants might have been sued alone in such case; therefore judgment might be rendered against one or more, without waiting the final trial.

APPEAL from Polk County. The facts are given in the opinion.

Warren Truitt and J. J. Daly, for appellant.

Holmes & Thayer, for respondent.

By the Court, LORD, C. J.:

This was an action against the defendants on two joint and several promissory notes. It came before the court below on the demurrer of the defendants, and when called for argument the demurrer was withdrawn as to all the defendants, the defendant McGrew only asking leave to answer, which was allowed by the court, and the other defendants refusing to plead further, it was ordered by the court that judgment be entered against said defendants, and judgment was rendered accordingly, that the plaintiff have and recover of and from said defendants, George W. Clark and James R. Crowley, severally, the sum, etc. The defendant McGrew answered in pursuance of his leave, and at the same term moved a continuance of the cause, which was allowed by the court. Subsequently, and at the May term, the cause coming on to be heard, the defendant McGrew asked leave to amend his answer, which was granted.

The only difference made by the amended answer was that he supplemented the former answer by pleading the judgment against the defendants Clark and Crowley, in bar of the action. This defense was demurred to and the demurrer was sustained by the court, and this is the assignment of error.

The only question to be determined is, can a judgment be properly rendered against one or more of several defendants, and the action be allowed to proceed as to the others? Before the code, when the contract was joint and several, the plaintiff was bound to prosecute each party separately, or all together. Since the code, he can proceed against one or more, or less than the whole number. Our code provides when the action is against two or more defendants, (sec. 59, sub. 3,) that if all the defendants have been served, judgment may be taken against any, or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone; and it is provided in section 241 that judgment may be given for or against one or more of several plaintiffs, etc., and also in section 242, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them whenever a several judgment is proper, leaving the action to proceed against the others. The complaint in this case, as was said in *Decker v. Trelling et al.*, 24 Wis., 613, sufficiently states the facts out of which the liability of the defendants arose, and although it was in a form adapted to a recovery against all the makers of the note jointly, it was still so framed that a several judgment could properly be had upon it against one or more of them. It alleged that the defendants made their joint and several promissory note in writing, which note was set out in *haec verba*, and attended with suitable

averments to show that the plaintiff was entitled to judgment.

Now, under the sections above referred to, judgment may be entered against any one or more of several defendants whenever a several action might have been brought, or a several judgment upon the facts of the case would be proper, and this is allowable irrespective of the character of the complaint, whether it alleges a joint or several liability. The true criterion being whether a separate action might have been maintained, and if it could, a several and separate judgment is proper. (*Harrington v. Highman*, 15 Barb., 528; *Van Ness v. Corkins*, 12 Wis., 209.)

But if the action is upon a contract joint and several, a several judgment would be proper, as the defendant might have been sued alone; therefore judgment might be rendered against one or more without awaiting the final trial. (*Hempy v. Ramson*, 33 Ohio St., 313; *Smith, Twogood & Co. v. Cooper and Clarke*, 9 Iowa R., 378.)

In *Hempy v. Ramson*, *supra*, the result reached by the court was: "1. That in an action against two or more defendants where it appears that a several judgment is proper, it may in the discretion of the court, be taken against one or more, leaving the action to proceed as to the others. 2. That such separate judgment against one or more operates as a severance of the cause of action, and after such judgment the issues made by the remaining defendants are to be heard and determined as if they had been sued alone. 3. On such final trial a judgment may be rendered against the remaining defendant for the whole, or such part of the cause of action as may be proved against him." And in *Smith, Twogood & Co. v. Cooper and Clark*, *supra*, the court say that "judgment may be rendered against one of the makers of a joint and several promissory note; that the cause

may be continued as to the others, and that such judgment will not bar the plaintiff's right to recover against the other parties when the cause is ripe for disposition as to them."

The doctrine of merger and of the release of one of the makers of a note by taking judgment against the other, has no application to cases of this character under our statute. Nor do the New York cases cited hold any contrary rule. It is sufficient to say that the case of *Stearns v. Aguene*, 6 Cal., 176, relied upon by the appellant, was overruled in *Lewis v. Clarkin, et al.*, 18 Cal., 400. The judgment of the court below is affirmed.

Judgment affirmed.

DeLASHMUTT v. SELLWOOD.

Appeal—Undertaking.—Leave will not be granted to file a new undertaking without a proper showing of excusable mistake in reference to the original undertaking.

Appeal from Multnomah County.

W. W. Chapman, for appellant.

Seneca Smith and H. B. Nicholas, for respondent.

By the Court, Watson, J.:

On motion to dismiss for defects in appeal papers, and on the further ground that none of the errors assigned in the notices of appeal appear from the transcript on file; *Held*,

1st. That only the first mentioned grounds of dismissal can be considered under the established practice of the court.

2d. That where no affidavits showing qualifications of sureties on the undertaking for appeal were filed with it, a cross motion for leave to file a new undertaking, with such

affidavits supplied, without alleging or showing any mistake excusing such omission in reference to the original undertaking, should not be granted. (Citing sec. 527, Civil Code and *State v. McKinsmore*, 8 Or., 207.)

Appeal dismissed.

SIMON *v.* DURHAM.

ELECTION RETURNS—CANVASSING BOARDS.—A board of canvassers, in the exercise of ministerial functions only, have no power, in making their canvass, to consider as election returns any paper not duly authenticated in the mode provided by the statute.

IDEM—UNAUTHENTICATED PAPERS CANNOT BE CONSIDERED.—An attempted canvass, in which the result declared is based upon papers not thus authenticated, may be treated as a nullity by the party injured, and unless the powers of the board have otherwise terminated, he is entitled to the writ of mandamus to compel them to reconvene and make a legitimate canvass of the proper returns.

IDEM.—The writ should not be issued where it is properly made to appear that it would be useless and unavailing to the party applying for it, but the Supreme Court possessing only appellate jurisdiction, in such instances as the present, is confined to such questions as the record shows were determined by the court below.

By the Court, WATSON, J.:

The determination of this cause has become comparatively unimportant to the parties, since the decision of this court in the case of the appellant against D. P. Thompson, on writ of review, has settled the title of the office in controversy in his opponent. But the case presents some questions as to the power of statutory boards in canvassing election returns, of no little interest to the public, which we feel it our duty to determine.

In the first place, this board of canvassers, provided for in the Portland city charter, undertook to consider, in making their canvass of the returns of the city election of June

20, 1881, certain loose sheets of paper returned in the poll books, but not attached or identified in any way as parts thereof, and which contained only the names of the various candidates for city offices, each followed by a number of tally-marks footed up in figures, without any designation of office, or other marks whatever, in order to reduce the number of votes shown by the proper certificates of the judges of election, duly entered upon the poll books and signed by them, and attested by the clerks of election in the form prescribed by the statute, and thereby changed the result of such election for the office of mayor, from a majority of nine, as shown by such certificates, in favor of the appellant, Joseph Simon, to a majority of one for D. P. Thompson, his opponent, as shown by a portion of such loose sheets—another portion showing a majority of two for Simon—which evidently must have been ignored.

It is true the poll books themselves did not contain the entries of the votes in the columns under the names of the persons voted for as required by sec. 23, title 2, chap. 14 of the general laws, (Code of 1872, page 571,) nor did they contain the enumeration of the whole number cast for each person, as provided in section 26, of the same title, but these defects we conceive furnished no justification for the resort to the loose sheets spoken of, in order to contradict and overturn the regular certificates, and change the final result.

We are disposed to concede the power of such a board, in the legitimate exercise of ministerial functions only, where these entries and enumerations are made in the poll books themselves, and authenticated by the certificates of the judges and clerks of election, as provided by the statute, to compare the number of entries in the appropriate column with the number certified to have been cast for any candidate, and to correct any plain clerical error in computation

which may thus be made to appear. Such portions of the returns which have been duly made and authenticated may be considered as embodied in the certificate for this purpose. But the loose tally sheets which the board of canvassers referred to for this purpose, in the case before us, were not authenticated so as to justify them in considering them as part of the election returns. The rule is well settled that election boards of this character can consider no papers as election returns except such as appear to be so on their face. (McCrary on Elections, sec. 82; *State v. Board of Canvassers*, 36 Wis., 498; *Luce v. Mayhew*, 13 Gray, 83. We understand by this that the papers must bear upon their face substantially whatever the statute has prescribed for their authentication as such returns. Obviously in this instance, the legislature intended that the certificates of the judges of election, accompanied by the attestation of the clerks, should authenticate the poll books containing the entries and enumerations of votes. The loose tally sheets, in this instance, bore no mark of authentication, and the board of canvassers had no right to regard them as election returns. As the functions of the board in this respect were purely ministerial, mandamus lay to compel them to disregard the loose tally sheets, and canvass only the duly authenticated returns. (McCrary on Elections, sec. 84, and cases cited.) The claim of respondents that they had made the canvass and exhausted their powers before the writ was served, can not be upheld. Their functions were ministerial and their powers had not terminated by lapse of time or otherwise than by their attempted exercise. But the exercise of ministerial functions does not exhaust them unless the duty has been legally performed. (*State v. County Judge*, 7 Iowa, 201; *Ingerson v. Berry*, 14 Ohio St., 324.) The appellant had a right to treat the attempted canvass as a nullity, and

insist upon a legitimate canvass of the properly authenticated returns.

A motion has been filed in this court to dismiss the appeal on the ground that the ultimate right to the office in controversy is involved in another case, also here on appeal, and that the determination in that case must necessarily supersede any further action on the part of the respondent board, and render the issuance of the peremptory writ useless and of no possible benefit to the appellant. The case of *Ingerson v. Berry*, 14 Ohio St., 324, was cited in support of the motion. The proposition that mandamus should not issue when it can produce no benefit to the relator we regard as well settled. But the supreme court of Ohio had original jurisdiction in that case, and this court has only appellate authority in the present case. Besides, in the former the matter showing that the writ would prove fruitless if issued, appeared in the return, and was not controverted, while in the case before us there is nothing in the record paper denoting such objections to the issuance of the writ, and we cannot take judicial notice of what another record in an entirely different case may contain, although here on appeal, in disposing of the present. The record of each case should be complete in itself and exhibit all the grounds upon which its final determination in this court is based. (24 Cal., 73; 31 Id., 170, 215.) But we have no doubt of the power of the circuit court, after the mandate has gone down, to allow an amended or supplemental return to be filed, upon proper application, showing the facts attempted to be brought into the case by the respondent's motion, and if admitted or established, if controverted by the appellant, to deny the writ. But whatever disposition may be made of this branch of the case by the court below, we are satisfied the judgment appealed from must be re-

versed, as the appellant was entitled to the writ when he applied for it and was refused by the court, and he is also entitled to recover costs, both there and here, whether the writ issues or not. (41 Mo., 38.)

Judgment reversed.

CREIGHTON v. VINCENT.

STATUTE OF LIMITATIONS.—Where an instruction was asked to the effect that a certain amount applied as a credit by the creditor to the indebtedness of the debtor with his assent, was a payment which would take the same out of the operation of the statute of limitations; *Held,* That the refusal of such instruction was error; *Held, further,* That Section 25 of the civil code refers only to payments made on contracts before the statute has run against them, and fixes, by such payment, a new date from which the limitation of action thereon commences to run *de novo.*

APPEAL from Benton County. The facts are stated in the opinion.

Chenoweth & Johnson, for appellant.

J. W. Rayburn, for respondent.

By the Court, LORD, C. J.:

In this case it is admitted that the original indebtedness is barred, and the only question, upon the instruction asked and refused, to be decided is, whether a payment of part of the indebtedness applied by the defendant as a credit upon such indebtedness, with the assent of the plaintiff, would have the effect to take the same out of the operation of the statute of limitations. At the argument it was claimed that a proper solution of this question would depend upon the construction which the court should give to section 25 of the code. That section provides: "Whenever any payment of principal or interest has been or shall be made

upon an existing contract, whether it be a bill of exchange, bond, promissory note, or other evidence of indebtedness, if such payment be made after the same becomes due, the limitation shall commence from the time of the last payment." This section has already received a construction at the hands of this court, and it seems to us that its bare reading must make it manifest that this section has nothing to do with the matter under consideration. It refers only to payments made on contracts before the statute has run against them, and fixes by such payment a new date from which the limitation of actions thereon commences to run *de novo*. In construing this section in *Partlow v. Singer*, 2 Or. R., 310, the court say: "Ordinarily the statute begins to run when the note is due; in this case the statute fixes the time at the date of the last payment, and such plain language can have no other signification." See also *Whitaker v. Rice*, 9 Minn., 13; *Brisbin v. Farmer*, 16 Minn., 222. Plainly, then, it is not under section 25, but section 24 that we must look for the law applicable to the decision of this question. Section 24 reads as follows: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby, but this section shall not alter the effect of any payment of principal or interest."

It may be observed that this section is nearly a transcript of the enacting clause of the statute, 19 Geo., 4th ch., 14, commonly called Lord Tenwiden's act, and that payment of principal or interest on a specific demand is still retained by the statute as sufficient to keep it in force. The instruction only asked that the sum applied by the defendant as a credit upon the indebtedness, with the assent of plaintiff, was

a payment which would take the case out of the operation of the statute. The payment by a debtor of a certain sum to his creditor, with the understanding that it shall be treated as a payment on his debt, will be sufficient to revive the cause of action barred by the statute. And when the creditor applies the amount paid upon the debt as a credit, with the assent of the plaintiff, it is sufficient to revive the debt.

It follows that the judgment is reversed, and a new trial ordered.

STATE v. STURGESS.

SALMON—COLUMBIA RIVER.—The act of the Legislative Assembly, entitled "an Act to protect salmon," approved October 25, 1880, does not apply to the Columbia river.

APPEAL from Multnomah County. The facts are stated in the opinion.

W. H. Adams, for appellant.

H. T. Bingham and James Gleason, for respondent.

By the Court, WATSON, J.:

On June 4, 1881, the respondent was indicted by the grand jury of Multnomah county for catching salmon fish in the Columbia river, contrary to the act of the legislative assembly, entitled "An Act to protect salmon," approved October 25, 1880. He was tried on this indictment in the circuit court for said county and found guilty as charged. The court, however, arrested judgment on motion of the respondent, and the state excepted and appealed. The facts established at the trial, as appears by the bill of exceptions, were that the salmon were caught at eighteen minutes after seven o'clock P. M., Sunday, May 29, 1881, in the Columbia river, beyond the middle channel, and on the Washington

Territory side, within the extended north and south boundary line of Multnomah county, and that by the laws of Washington Territory, of which respondent was a citizen, the act complained of was no offense.

The question presented at the outset is, whether the act, upon which the indictment was found, was intended to apply to the Columbia river. If it was not, a consideration of other points is useless. This act makes no mention of any former act on the subject, and contains no words of repeal. In terms it prohibits "catching salmon in any stream of water, bay or inlet of the sea, or river of this State, with net, seine or trap, at any season of the year, between sunset on Saturday and sunset on the Sunday following of each and every week." The penalty provided for any violation of the act was a fine of not less than fifty nor more than one hundred and fifty dollars, and imprisonment in the county jail not less than five nor more than ten days, and concurrent jurisdiction was conferred upon justices of the peace.

Substantially, this is the whole enactment. But at the time this act was passed, there was an act in force, containing provisions upon the same subject, and applying expressly and exclusively to the Columbia river and its tributaries. This latter act was entitled "An act regulating salmon fisheries on the waters of the Columbia river and its tributaries," and was approved October 16, 1878. It contained the following preamble: "Whereas, the legislative assembly of the territory of Washington, at the last session thereof, passed an act entitled 'an act regulating salmon fisheries in the waters of the Columbia river,' approved November 8, 1877; and whereas, the eighth and last section of said act is as follows, to-wit: 'Sec. 8. No section, proviso, or part of this act shall be considered as valid or operative until the legislature of the state of Oregon shall enact a similar sec-

tion, proviso, or act, in whole or in part, and from and after the passage of such a law by the state of Oregon, such parts thereof as shall be so enacted shall immediately go into full force and effect, and the governor of this territory is hereby requested to transmit an attested copy of this act to the governor of the state of Oregon, requesting him to submit it to the legislature of that state,' therefore, etc." Another act passed at the same session and approved the same day entitled "an act to create the office of fish commissioner for the Columbia river and its tributaries, etc.," contained a similar preamble. Like the former, its provisions applied only to the Columbia river and its tributaries.

By the first mentioned act of October 16, 1878, catching salmon in the Columbia river, or its tributaries, by any means whatever, during the months of March, August and September, or during the weekly close times in the months of April, May, June and July, that is, between the hours of six o'clock P. M., Saturday, and six o'clock P. M. of the Sunday following, during said months, was prohibited under a penalty of from five hundred to one thousand dollars for the first offense, and one thousand dollars for each subsequent offense, with imprisonment in the county jail not exceeding one year added in the discretion of the court.

The act also contains many other particular provisions, devised evidently for the protection of salmon, for any violation of which the same penalty is denounced. The statute is comprehensive in scope and explicit in details, and seems to make ample provision on the subject of protection for salmon in the Columbia and its tributaries. Its provisions are, we believe, in substance if not in form, the same as those contained in the act of the legislative assembly of Washington territory, referred to in its preamble. Upon these facts the respondent contends that the act of October

25, 1880, should not be held to apply to that river or its tributaries.

While we have experienced no little difficulty in reaching a perfectly satisfactory conclusion upon the matter, it is our conviction that the position taken by respondent is the correct one and should be sustained. The previous act of October 16, 1878, was local in its operation, and as we have seen from its preamble, and the correspondence of its provisions with those enacted by the legislature of Washington territory, by virtue of her concurrent jurisdiction upon the same subject, was unquestionably framed in view of peculiar circumstances and considerations not affecting the other rivers or waters of the state. It was a local act, and established such regulations for the protection of salmon in the particular locality embraced by it, as the legislature deemed necessary and expedient, in view of the peculiar condition of the Columbia river, as being not only a common boundary between the state of Oregon and Washington territory, but the common territory of both, and equally subject to the jurisdiction and laws of both. (*The Annie M. Small*, 2 Sawyer, 226.)

From the partial enumeration already given of the provisions of the two acts, it is quite apparent that if the one last enacted should be held to extend over the Columbia and its tributaries, a conflict in several particulars would be developed; repeals by implication in these respects would follow; symmetry would be lost; inconsistencies and incompatibilities introduced, and that uniformity and correspondence in legislation, which the legislatures, both of this state and Washington territory, were so careful to secure in the only instance where they have professed to exercise their concurrent authority, would be destroyed to such a degree that the citizens of neither could find in the laws of their

own sovereignty, safe directions for their conduct upon the common domain. The case before us is but a fair example of the evil consequences of such an application. But it is claimed that the act under examination applies in express terms to every river of this state, and that the Columbia and its tributaries are such; therefore there is left no room for construction.

Without attempting to pass upon the correctness of the premises here assumed, we think it may be conceded, and still the conclusion not follow. These several acts should be viewed together as one enactment in determining their respective applications, and effect given to all the provisions of each, if possible upon any rational construction. (Potter's Dwarris on Statutes and Constitutions, 189.) A general statute will not repeal a particular statute previously enacted simply because it contains inconsistent provisions. (Potter's Dwarris on Statutes, etc., 272 and 273; *Brown v. County Commissioners*, 21 Pa. St., 43; *Fosdick v. Village of Perrysburg*, 14 Ohio St., 472; *Pearce v. Atwood*, 13 Mass., 344; *St. Martin v. New Orleans*, 14 La. Am., 113; *Nichols v. Bertram*, 3 Pick, 342; *Felt v. Felt*, 19 Wis., 208; *State v. Goetze*, 22 Wis., 363; *State v. Bishop*, 41 Mo., 16.) It seems well settled by these authorities that the particular subject covered by the previous statute, although embraced by the general description in the subsequent statute, will be excepted from its operation when necessary to prevent a repeal of the provisions of the former by implication. This principle is decisive of the question under consideration, in our judgment, and virtually disposes of the whole case before us. The act proved against the respondent was not a crime under any provision of the particular statute of October 16, 1878, or any other statute in force on

the Columbia river. The judgment of the court below must therefore be affirmed.

Judgment affirmed.

BRISCOE v. JONES.

EVIDENCE—BURDEN OF PROOF.—Where an agreement, which is the consideration of the contract sued on, is set out in the answer with an averment of non-performance of the plaintiff's engagements under it, and the replication admits the agreement, but puts in issue the allegation of non-performance, the burden of proving performance is on the plaintiff.

IDEM—INSTRUCTION TO JURY.—Where the evidence conclusively shows the performance of such agreement on plaintiff's part, and there is none to the contrary, the court is justified in instructing the jury that there is no evidence showing that there was no consideration.

AN ERRONEOUS INSTRUCTION, which does not prejudice, is no ground for reversal.

APPEAL from Clatsop County.

George W. Yocum, for appellant.

James G. Chapman, for respondent.

By the Court, WATSON, J.:

It is only necessary to pass on the 6th assignment of error in the notice of appeal, as the conclusion we have reached in regard to it virtually disposes of the rest. The circuit court, on its own motion, gave the jury the following instruction:

"The burden of proving that there was no consideration for the note or due-bill sued on, is upon the defendant, and he has offered no evidence to prove that fact."

The first part of this instruction relating to the burden of proof, upon the existing state of the pleadings, was erroneous. The answer set forth the terms of the agreement which constituted the consideration for the contract sued on

and averred non-performance by plaintiff of his engagements under it. The replication traversed the averment of non-performance. This agreement bound the plaintiff to "sell, convey and transfer" to defendant three shares of stock of the Washington Oyster Company, as the consideration of the contract sued on, which was not negotiable.

Thus the issue as to performance was presented—the plaintiff, who admitted the agreement, affirming, and the defendant denying the proposition. The burden of maintaining it by proof was undoubtedly on the plaintiff. But the defendant could not by any possibility have been injured or prejudiced by this error. His own testimony shows conclusively, we think, that the plaintiff did perform his part of such agreement, and there is no evidence to the contrary, and this state of the evidence fully justified the concluding portion of the instruction. The defendant testified that the plaintiff delivered to him, duly endorsed, a certificate for the requisite amount of stock, which he accepted without objection or protest. This certificate disclosed upon its face that a transfer of the stock embraced in it could be made "on the books of the company" only after a surrender of the certificate duly endorsed. The by-laws of the company made provision for such transfer on its books, and the issuance of new certificates to the purchaser upon such surrender and cancellation of the original certificate, and also declared that no such transfer upon its books should be made until the stock should have first been offered for sale to the company.

In the first place we are by no means satisfied that the agreement of the parties contemplated any such transfer on the company's books. Their conduct clearly indicates the contrary. But if it did, the defendant, by accepting the endorsed certificate, put himself in a position to procure such

transfer, and put it beyond the power of the plaintiff to do it, as he no longer had possession or control of the certificate which had to be re-endorsed to obtain the transfer. Such conduct clearly amounted to a waiver of that portion of the performance.

Judgment affirmed.

MULTNOMAH COUNTY v. SLIKER.

THE question presented by this case being the identical question decided in the cases of *East Portland v. Multnomah County*, (6 Or., 64) and subsequently the *City of Astoria v. Clatsop County*, not reported, and no authority being cited not heretofore considered by the court, nor any reason suggested which convinces us that these cases were decided contrary to principle, the judgment of the court below must be affirmed.

APPEAL from Multnomah County.

B. Killin, for appellant.

Bellinger & Gearin, for respondent.

By the Court, LORD, C. J.:

The facts in this case are stipulated, and involve the identical question decided by this court in the case of *East Portland v. Multnomah County*, (6 Or. R., 64,) and subsequently, the principle on which the decision in that case proceeded, was re-examined and re-affirmed in the case of the *City of Astoria v. Clatsop County*, not reported for the reason that the question presented in the two cases were identical. It will thus be seen that the subject matter of this action has already received a careful and thorough investigation from the court, and ample opportunity has been afforded for the correction of any error into which the court might have fallen in the original decision. It is now brought the third time before us on briefs which cite no

authorities, and suggest no reasons which have not already been considered by the court, or which show that the original case was decided contrary to principle. The matter here is the constitutionality of a statute, and the rule is said to be almost universal that in construing statutes and the constitution, to adhere to the doctrine of *stare decisis*. (*Seale v. Michell*, 5 Cal., 481.) Certainly courts naturally feel reluctant to depart from a decision which has been recognized by subsequent cases, unless error is plainly shown to exist, conceding even that a different conclusion might be reached, if the question presented were an open one. We have carefully examined the reasons on which the decision in *East Portland v. Multnomah County* is based and, as at present advised, reaffirm it by affirming the decision in this case. So it is ordered.

Judgment affirmed.

STATE *v.* GROVER, CHADWICK AND FLEISCHNER.

REFEREE'S FINDINGS—EFFECT OF.—Where a suit in equity has been referred to a referee to find the facts, and his findings have been filed and no objection made thereto in the court below, by motion to set aside or otherwise, the supreme court, on appeal from the decree entered thereon, will consider no fact not embraced in such findings nor admitted by the pleadings, nor pass an opinion on any question of law not affecting the correctness of the decree as based upon such findings and admissions.

APPEAL from Marion County.

A. C. Gibbs and W. G. Piper, for appellant.

J. N. Dolph, for respondent, Fleischner.

This was a suit for an accounting for moneys alleged to have been received by the respondents, as the board of commissioners for the sale of school, university and other lands belonging to the state, during the period from September

14, 1870, to September 14, 1874. After the cause was at issue, it was referred to Hon. M. P. Deady, Judge of the U. S. district court for the district of Oregon, to report his findings of fact upon the evidence, and his conclusions of law therefrom. A trial was had before such referee and his report returned as follows:

THE FINDINGS OF FACT.

"The referee having heard the allegations and proofs of the parties and the argument of counsel, now finds and states the following conclusions of fact therein:

"I. That between September 14, 1870, and September 14, 1874, the defendants were the duly qualified and acting governor, secretary, and treasurer of state, respectively, and as such, they constituted and were a board of commissioners for the sale of the school and university lands of Oregon and for the investment of the funds arising therefrom, as provided in § 5 of article VII. of the constitution of the state, with such powers and duties as might be prescribed by law.

"II. That during said period the said defendants by virtue of sundry legislative acts of the state were also authorized and required, as such board, to select some and sell all of the several lands theretofore granted by congress to the state, as follows: (1) The swamp and overflowed lands granted by the act of March 12, 1860, (12 Stat. 3); (2) The 500 thousand acres granted by the act of September 4, 1841, (5 Stat. 455), for the purpose of internal improvement, but by the constitution of the state (§ 2, Art. VII.), with the consent of congress (see joint res. Feb. 9, 1871, 16 Stat. 595), diverted to the support of common schools; (3) The lands granted by the act of February 14, 1859, (11 Stat. 383) for the use of schools in lieu of such portions of §§ 16 and 36 in each township as had been prior thereto sold or

otherwise disposed of; (4) The 72 sections granted by the act last aforesaid for the use and support of a state university; (5) The 10 sections granted by the same act for the erection of public buildings at the seat of government; (6) The 90 thousand acres granted by the act of July 2, 1862, (12 Stat. 503), for the support of an agricultural college; and (7) The tide lands which inured to the state upon its admission into the Union, on February 14, 1859.

"III. That said defendants, as said board, and during said period, sold portions of said lands and received and disposed of the proceeds thereof, as follows:"

(Then follows a statement of the amounts received from the several sources specified, in detail, and the amounts accounted for by the respondents. The aggregate amount received being $218,738.02, and the amount accounted for, $212,584.15, which includes $21,487.73 expended and paid out by the respondents, in the selection and disposal of said lands, leaving a deficiency in their account of $6,153.87.) The report proceeds:

"IV. That the following credits in the accounts of the defendants, as sums paid out from the proceeds of the sales of swamp lands, are erroneous or illegal and therefore disallowed:"

(Total amount $496.40.)

"V. That the defendants Grover and Chadwick and A. H. Brown, constituted and were such board of commissioners from September 15, 1874, to February 1, 1877, and thereafter, and until September 10, 1878, said board was composed of said Chadwick and Brown only; that from September 14, 1870, until September 10, 1878, T. H. Cann was employed by said board as its clerk and custodian of its funds; that on October 10, 1878, said Cann paid to the board of commissioners for the sale of school and university

lands, the sum of $8,951.85, to be applied upon any deficiency that might be found in the accounts of said commissioners during their terms of office, commencing in September, 1870; that on June 10, 1880, and long after the commencement of this suit and of a similar one against the defendants Grover and Chadwick and said Brown, for alleged failure to pay over or account for moneys received by them as members of such board after September 14, 1874, said Cann requested the then board of commissioners to make the application of the payment made by him as aforesaid, but said board made no application of such payment and left the same to be applied as the law will direct.

"VI. That the balance of $6,153.87 aforesaid was, on and after September 14, 1874, a debt due the plaintiff from the defendants herein, upon which the right of suit then accrued, and at the date of said payment, was also the oldest debt due by said commissioners, or any of them, to the plaintiff for or on account of any moneys received for the sale of the lands aforesaid or any of them.

THE FINDINGS OF LAW.

"And as conclusions of law from the premises the referee now finds and states as follows:

"I. That the defendants herein, as the board of commissioners aforesaid, were the lawful custodians of the moneys arising from the sale by them of the lands aforesaid or any of them except the capitol lands, and were also authorized and empowered to expend and pay out so much of the same as they in good faith, and with ordinary care, found and deemed necessary to the discharge of their duty to select and sell lands or any of them.

"II. That the right to commence this suit accrued on September 15, 1874, and within six years from the time it

was commenced, and therefore is not barred by lapse of time.

"III. That the payment of $8,951.85 as aforesaid, must be first applied to satisfy and extinguish the debt of $6,153.87, due from the defendants herein, to the plaintiff, on September 14, 1874, which being done, the defendants are not in any wise indebted to the plaintiff, for or on account of the matters stated in the complaint herein, or any of them, and are therefore entitled to a decree that they go hence without day, and for their costs and expenses.

"MATTHEW P. DEADY, Referee."

Upon the filing of the report in the court below, the appellant moved to set aside the first and third conclusions of law, to affirm it in all other respects, and for a decree against the respondents for the sum of $6,153.87 and costs. Respondent Fleischner moved for an affirmance of the whole report, and his motion was sustained, and a decree entered in accordance therewith, dismissing the suit with costs to respondents. The state appealed.

By the Court, WATSON, J.:

The appellant claims that the court below erred in refusing its motion to set aside the first and third conclusions of law, in the report of the referee, and in refusing to enter the decree asked for in its favor. The first inquiry suggested by the record in the case is, whether the appellant occupies such a position before this court as entitles it to raise these questions or any of them. Upon mature consideration, we are satisfied that it does not. We conceive that the action of a party in the court below, upon the filing of a referee's report, is binding upon him there, as well as in this court.

The referee found that after allowing the respondents all the proper items of expense incurred in the selection and sale of the lands mentioned in the report, there was still a

deficiency of $6,153.87 in their account. In the same motion in which the appellant asks to have the first and third conclusions of law set aside, it asks for a final decree for the amount of this deficiency. The amount of the expenses incurred, in selecting and selling the lands, allowed the respondents by the referee, as appears from his report, was $21,487.73, and was entirely separate and distinct from the amount of $6,153.87 found to be a subsisting deficiency, on September 14, 1874, and it is quite apparent that appellant only intended by its motion to ask for a decree for this deficiency so found due, and not for any portion of the amount allowed by the report to the respondents for expenses as above stated.

It does not matter that the appellant might have moved for a decree for the amount of the expenses so allowed, in addition to the amount of such deficiency, and it would not matter if its legal right to recover the aggregate sum of both were clear and incontrovertible; it was under no compulsion to do so, and if instead, it chose to ask for a decree for only one of such amounts, or only a portion of one, it had the undoubted right to do it, and the court could not have granted more extensive relief. The only question is, what did the appellant intend? And we think there can be no doubt but that it meant to claim only the balance found by the report of the referee to have been due on September 14, 1874, and after all the credits for expenses had been allowed and deducted from the whole amount received by the respondents, and charged against them in the accounting.

If this position is correct, and we feel convinced that it is, then it follows as an inevitable consequence that the appellant must be confined, upon the appeal, to errors in the decree affecting this deficiency of $6,153.87. If the court below properly disposes of this balance, then the appellant

is precluded, by its own act, from urging error in respect to other matters which could not have resulted in injury to its substantial rights. Now the rule of law, adopted by the referee, in his first conclusion, had no bearing upon the final disposition of this deficiency of which appellant complains. It merely covered the allowance of expenses incurred in selecting and selling the lands, while the amount due, on account of this deficiency, which the referee found, and the appellant asked a decree for, definite in amount, and being in excess of such allowance, was not affected by it. If this conclusion had been set aside as incorrect, the final decree of the court would not have been different on that account.

It was irrelevant to the issue before the court, on the appellant's motion for the decree which he asked upon the findings of fact in the referee's report; and as the ruling of the court below upon it could not have influenced its final decree, and the question raised upon it is equally irrelevant here, we feel under no obligation to pass any opinion as to its correctness. As to the objection based upon the refusal of the court below to set aside the third conclusion of law in the referee's report, the position of the appellant is equally unfortunate. It nowhere appears in the report that there was any deficiency in the accounts of the commissioners arising out of transactions of the board, occurring subsequently to September 14, 1874.

The only facts we can consider in this case must be found in the pleadings, or else in the findings of the referee. The effect of the appellant's motion on the report was to affirm the findings of fact, for it moved to affirm, in every other respect except as to the first and third conclusions of law. By this course the appellant confined itself, so far as the facts not admitted by the pleadings were concerned, to the case made by such findings, and if the decree is supported by

those findings, it ought not to be disturbed, and cannot be.

As there is no fact in this whole record, showing or tending to show, any other deficiency to which the payment by Cann might have been applied, the court below committed no error in appropriating it to the only deficiency disclosed by the record before it. This proposition we deem too plain to need any further explanation. It is sufficient to say that in no view of the law upon this subject could the court below have made any different application of this payment than it did by the decree appealed from. We find no error, and shall therefore affirm the decree with costs.

Decree affirmed.

WEISSMAN v. RUSSELL.

PRACTICE—ASSIGNMENT OF ERRORS.—The supreme court will confine its examination to the assignment of errors in the notice of appeal, except in cases where the want of jurisdiction of the subject matter appears from the record, or the complaint fails to state a cause of action or suit.

IDEM—FINDING OF FACT AND LAW.—A finding of fact and conclusion of law therefrom are "separately stated," within the meaning of section 216 of the code, when the effect of each upon the final judgment is distinct and severable from that of the other.

IDEM.—Where the findings of the court below determine all material issues tendered by the new matter in the answer, it will be presumed on appeal that such issues were properly raised by a replication, although none appear in the transcript.

By the Court, WATSON, J.:

This action was brought to recover the amount alleged to be due and unpaid on a certain promissory note executed by appellant, in favor of respondent, a copy of which was set forth in the complaint. The note was negotiable, and by its terms due June 1, 1881. The appellant was entitled to three days of grace. The endorsement of the clerk of the

circuit court shows that the complaint was filed June 2, 1881. The answer denies, among other things, that the note was due when the action was commenced, and as a separate defense alleges facts showing a failure of consideration. The cause was tried by the court and judgment entered upon its findings for the respondents, and this appeal taken from this judgment.

The notice of appeal contains many assignments of error, but the grounds upon which they rest may, for the sake of brevity and convenience, be summarized as follows: 1. The findings of fact and conclusions of law are not separately stated. 2. The court did not determine, as a matter of law, that the complaint was insufficient for not alleging that the note sued on was due; also that the note was not due; also that appellant was entitled to judgment on his answer, no replication having been filed. 3. The construction given by the court of the agreement between the parties concerning the consideration of the note sued on was erroneous. 4. The written decision of the court below was not entered in the journal.

Several other propositions were discussed at the hearing, but as they are not within any of the assignments of error in the notice of appeal and do not fall within either of the two recognized exceptions to the general rule of practice in this court, which precludes us from inquiring into any alleged errors not so assigned, we cannot consider them. The two exceptions are, want of jurisdiction over the subject matter, and no cause of action stated. (Sec. 534, Code; *McKay v. Freeman*, 6 Or., 453; *State v. McKinnon*, 8 Or., 492.) The first objection cannot be sustained in view of the findings in this case. The conclusions of law, although immediately following the findings of fact from which they are deduced respectively, and not under a separ-

ate head, are not blended with them so as to produce any uncertainty or confusion as to the distinct and separate effect and operation of either, and are, we conceive, separately stated, within the meaning and spirit of section 216 of the code.

There is no difficulty in perceiving what the facts found were, or the conclusions of law which the court below drew from such facts, and the distinct effect of each in producing the judgment appealed from. And in our judgment this is all that the statute requires. The complaint alleging that the note sued on was wholly unpaid, and that the amount thereof with interest at the stipulated rate was due and owing from defendant to plaintiff on account thereof, and the answer denying such allegations, we are at a loss to understand how the court below could have determined as matters of law, as claimed by appellant under his second assignment of error, that the complaint was insufficient for want of such allegations, or that the note was not due in fact. The allegations were clearly sufficient and the issue raised by the denial in the answer was one of fact. (*Allen v. Patterson*, 3 Seld., 479; *Beekman v. Platner*, 15 Barb., 550; *Kettletas v. Myers*, 19 N. Y., 231; *Davenay v. Eggenhoff*, 43 Cal., 395.)

In regard to the averments in the answer, entitling the appellant to judgment in the absence of a replication, it is only necessary to remark that the findings of the court, which do not appear to have been impeached or questioned in the court below, on this account fully determine all material issues tendered by such averments, showing conclusively that such issues were tried there, and justifying the presumption that they were properly raised by a replication. (Bliss on Code Pl., sec. 442; *McAlister v. Howell*, 42 Ind., 15; *Henslee v. Cannefax*, 49 Mo., 295.)

The third objection to the construction of the written agreement between the parties fails for the reason that we are unable to discover any such construction in the record. The fourth and last objection, that the written decision of the court below on the trial was not entered in its journal, fails for the same reason, and it is unnecessary to determine the effect it might have if made to appear properly upon the record. We find no error, and affirm the judgment.

Judgment affirmed.

SHIVELY, ET AL. v. HUME, ET AL.

WATER COURSES—EQUITY WILL PREVENT DIVERSION FROM NATURAL CHANNEL.—Every proprietor of land through which flows a stream of water, has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and this is equally true of water which flows in a well defined and constant stream in a subterranean channel. But it need not flow continually; it may at times be dry, but it must have a well defined and substantial existence.

THE interference of equity rests on the principle of a clear and certain right to the enjoyment of the subject in question and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented.

APPEAL from Clatsop County.

W. D. Hare, for appellants.

Fred R. Strong, for respondents.

By the Court, LORD, C. J.:

There is no dispute as to the principles of law applicable to this case. Both parties cite with approbation *Taylor v. Welch*, 6 Or., 200, and rely upon the rules of law as therein enunciated as applicable to, and controlling the facts of this case. In *Taylor v. Welch*, *supra*, it was held that every proprietor of land through which flows a stream of water,

has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and that this was equally true of water which flows in a well defined and constant stream in a subterranean channel. But it may be added that it need not be shown that a stream of water flows continually, it may at times be dry, but it must have a well defined and substantial existence. (Angel on Watercourses, secs. 3 and 4 c.)

With this statement of the law, our duty is reduced principally to the examination of two questions of fact: First, Does the evidence prove the existence of a natural watercourse, which, from time immemorial, has been accustomed to flow upon and over the lands of plaintiff as alleged? and, second, Have the defendants, by locating a bottomless tank in the manner and at the place as alleged, diverted and entirely deprived the plaintiff of the use and benefit of said water? It is not disputed that the plaintiffs are the owners of lot 7 in block 16, in Shively's Astoria, and that such lot is bounded by Arch street on the south, and west 8th street on the west. Nor is there any dispute as to the existence of a spring of water in Arch street near lot 7, but the contention disclosed by the evidence is, whether the water flowing from the spring runs or flows in its natural channel across the southwest corner of lot 7, or only near such corner, but sufficiently remote to render it impossible to produce the effect or diversion of which plaintiff complains. Nor is there any disagreement in the evidence that "in an early day," and before the town was located and improved in this direction, but what quite a stream of water flowed from the spring at all seasons of the year, and that the "cutting off the brush" and clearing up the land have had the effect to diminish the stream of water, and during the dry season to reduce it to a very small stream." There is no

doubt, however, that there is a stream of water flowing from the spring in a well defined channel, and our first inquiry must be to ascertain its direction from the evidence. One witness says that the spring was located "about 20 feet from the south line of block 16 and ran across lot 7;" another, that "there is a stream which flows upon and across lot 7 in block 16, in Shively's Astoria. It rises in Arch street; it is small; there is no great quantity of water flows over there. I have known of this stream flowing across that lot about nine years; it is a well marked stream and flows over the ground from the spring." Another, referring to 1875 or 1876, says: "When I was first up there, there was considerable of a stream flowing across the corner of lot 7, and my means of knowing where the corner of lot 7 was, that I examined it with a view of purchasing that lot, and that water I supposed was a living stream, and would be on the lot." Another, that "there was a stream of water running over lot 7, block 16. It was a small stream, quite a little amount of water passed through, at some times more than others."

Although there is the testimony of several other witnesses of the same purport, the testimony of these we apprehend is sufficient to indicate the nature of the evidence upon which plaintiffs rely to maintain their right to the use of the water, and, unless overborne by the weight of counter-evidence, to establish the existence of the water-course across the corner of plaintiff's lot. Now the gist of the defendant's evidence is to show that the stream of water, as it flows from the spring, does not run across, but near the corner of plaintiff's lot; but this evidence does not locate the course of the stream outside the limits of plaintiff's lot, if the ownership of that lot extends to the middle of the street. Nor is their evidence entirely uniform in this regard. From the

point at which some of the witnesses locate the spring, or as some of them say, "where the stream breaks out of the ground," and the direction in which their testimony indicates the stream flows, must meander it across the corner of the lot, although from the changes and improvements made in that quarter of the town, and a lack, perhaps, of an occasion to require any particular or careful observation of the exact direction of the course of the stream, they are not able to testify with any degree of certainty to this fact. Others whose evidence contains the elements of greater certainty, only controvert the fact of the stream running across the southwest corner of the lot, but the evidence of these does not exclude the flow of the stream without that portion of the street belonging to the plaintiff's lot. Mr. Parker limits its nearest approach to the corner to about ten feet. Under the familiar principle that the adjacent owners own to the middle of the street, it is not certain that this evidence, unaided, would not be sufficient to maintain the rights of plaintiff to the use of this watercourse without obstruction or diminution. (*Hinchman, et al., v. Paterson R. Co.*, 17 N. J. Eq., 82; *Bisser v. N. Y. Cent. R. R. Co.*, 23 N. Y., 61; *Adams v. Saratoga and Washington R. R. Co.*, 11 Barb., 414; 3 Kent's Com., 432-3; Redfield on Railways, 159, and note cases cited; *Champlin v. Pendleton*, 13 Conn., 26.)

But the occasion does not require any consideration of that view, as there is a clear preponderance of direct and unequivocal proof of the existence of the water-course in question across the corner of plaintiff's lot as alleged. Have the defendants by the location of the tank in question diverted the stream of water from its natural channel across the lands of plaintiffs, and, by reason thereof, deprived them of a supply of water for the uses and purposes as alleged?

It appears by the evidence that plaintiffs, by means of a barrel or reservoir, which derived its supply of water from the stream, obtained a sufficient quantity of water for household and domestic purposes, and also to supply a few citizens of the town with water, from the sale of which plaintiff derived a small monthly revenue.

Some time in September, 1878, the defendants placed a tank in Arch street about thirty feet south and above the tank of plaintiffs, to which they connected pipes for the purpose of conveying the water, diverted by reason thereof from its natural channel, across the lot of plaintiffs to the mill of Mr. Hume. The natural effect of this diversion was to cut off plaintiffs' supply of water from the watercourse and to deprive them of its accustomed use and benefits. Mr. Shively thus describes the work and its results: "He (Mr. Hume) put a tank in Arch street abouty twenty-five feet, more or less, above where mine was; it was about thirty feet east and twenty-five feet south of the southwest corner of block sixteen. He conducted the water from this tank into a tank in West Eighth street, north of Arch street, and from thence to his mill. Since Mr. Hume placed that tank in Arch street, very little water has flowed across lot seven. No water has flowed across lot seven, above ground, in the dry seasons in summer, since that tank was put in; if any does I don't know it. No water flowed across lot seven, since this tank was put in, in sufficient quantities to supply the houses on lot seven that I know of."

Another witness, who was in the habit of filling his tank from Mr. Shively's reservoir, says: "The day before I went away from home, I filled up both tanks. I returned home on the 21st of September; I put the hose to the hydrant to fill up the tanks again, and the water did not run. I had a curiosity to know why, and went up to the spring in Arch

street. I found a man who said he was at work for Mr. Morgan, putting in a box in an excavation in the earth. The box was five or six feet long and about three feet wide; its depth I don't know, as it was below the ground; suppose it was three or four feet. The box was about half full of water; or a little over when I saw it. It was sunk in the earth its full depth. The excavation in the earth when the box was sunk was, I think, about fifteen feet above the spring. I looked at the barrel in the spring and saw no water in it. Four or five, or perhaps six days before that, I was there and saw the water in the barrel. I came back to Mr. Morgan and said: 'You have cut off our water.' Mr. Morgan's answer was there was no water in that spring. Some days afterwards, probably a month, I went up to examine the spring to see if there was water there; there was no water there, but there was a plenty running above into Mr. Morgan's tank."

The testimony of these witnesses is uncontradicted and sufficient to show that the locating of the tank at the place described, and by means of pipes connecting it with the mill, resulted in a diversion of the stream from its natural channel across the corner of plaintiffs' lot and deprived them of its use and enjoyment.

"It is a clear principle of law," says Mr. Chancellor Kent, "that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water course is a private nuisance, and the books are full of cases and decisions asserting the right and affording the remedy. The interference of equity rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon

just and equitable grounds ought to be prevented. (*Gardner v. Village of Newburg*, 2 John. Ch., 164, and cases cited.)

We do not think the rights of plaintiff in the premises are doubtful, and the decree of the circuit court must be affirmed.

Decree affirmed.

NICHOLS v. GAGE.

CONVERSION OF CHATTELS.—It is a conversion for one entrusted with the possession of chattels, with power to sell only, to pledge the same as security for advances made on his own account.

IDEM.—Such conversion would support an action by the owner for the value of the property without reference to any other remedy she might have on contract; but if she elect to bring her action on the contract, for the amount of the proceeds of sales made under such contract, without charging the act of conversion, as a breach, she is not entitled to recover for the value of the property so controverted.

APPEAL from Wasco County.

J. E. Atwater, for appellant.

W. Lair Hill, for respondent.

In 1878 the respondent let her flock of sheep to the appellant on shares. The contract was in writing, and among other things, bound the appellant to market the wool which should be shorn from the flock, at his own expense, and pay over to the respondent one-half of the gross proceeds. The action was brought on this contract, and the breach assigned was the appellant's refusal to pay over to respondent her share of the proceeds of the alleged sales of the wool, amounting to $835.95. The appellant denied any breach,

and averred payment in full of the respondent's share of such proceeds.

It was established at the trial that no sale of the wool had taken place previous to the commencement of the action, but that appellant had delivered it to a merchant firm at The Dalles for shipment to their correspondent at San Francisco, to be sold there on commission, and had received an advance of several hundred dollars on the wool from said firm. The court below charged the jury, in effect, that such acts, if proven, amounted to a conversion, and entitled respondent to recover the value of her property so converted, and the appellant excepted. The respondent obtained a verdict and judgment for $160 and appellant appealed, assigning said charges as error.

By the Court, WATSON, J.:

There are only two questions involved in this appeal. 1. Did the act of the appellant, in delivering the wool and receiving an advance upon it equal to a large share of its value, amount to a conversion of the respondent's property therein? 2. If it did, was respondent entitled to recover anything, on account of such conversion, in this action?

The contract gave the appellant the power to sell the wool; but he was to defray all expenses and pay over to respondent one-half of the gross proceeds of all sales he might make, as her share. It seems well settled, that an agent in possession of personal property belonging to his principal, who transfers that possession to a stranger, without authority from his principal, and in derogation of his rights of ownership, becomes liable for a conversion. If he transcends his actual authority in this respect, he is not protected, by his relation to his principal, from the ordinary consequences of such wrongful act. It would constitute an "unlawful intermeddling" with the goods of his principal,

and subject him to the same liabilities as it would anyone else, who, having lawful possession of such goods, should make the same disposition of them. But it is laid down by many respectable authorities, and we have discovered none to the contrary, that an agent is guilty of a conversion when he pledges his principal's goods as a security for the payment of his own debt. (*Reynolds v. Shuler*, 5 Conn., 323; *Kennedy v. Strang*, 14 John., 128; 13 Mass., 177; *Van Amringe v. Peabody*, 1 Mason C. C., 440; *Nash v. Mosher*, 19 Wend., 431; Story on Sales, Sec. 104; *Jaries v. Rogers*, 15 Mass., 389; *Frost v. Plumb*, 40 Conn., 111; *Hall v. Corcoran*, 107 Miss., 251.)

This is the very position occupied by the appellant in this case. He had authority to sell the wool, but none to transfer the possession to a stranger, without a sale, and thus encumber it with a lien for advances made by such stranger for the appellant's sole benefit. Upon this point we are satisfied the law was laid down correctly by the circuit judge.

On the second point, however, we have not been able to coincide in his view, as we find it expressed in his charge to the jury. This action is essentially an action on the contract. The obligation of the appellant to market the wool, and pay over one-half of the gross proceeds, is clearly alleged. Then follows the allegation of sales of the wool by appellant, the aggregate amount of the proceeds, the amount unpaid of respondent's share, and the refusal of appellant to pay the last mentioned amount.

There is not a single word in the pleadings indicative of any purpose to charge the appellant with the value of the respondent's interest in the wool, for or on account of any conversion. No wrongful act of his, except a refusal to pay to respondent the full amount alleged to be due as her share

of the proceeds of sales already made, is anywhere charged against him. The respondent had an election between suing on her written contract and recovering any damage she might have suffered from its breach by the appellant, or suing for the value of the property converted, making the tortious act the basis of her action.

But she must have made her election to seek her remedy in one form or the other. She could not have the benefit of both in the same action. The issues would be different and the amount of recovery estimated by different standards. (*Deyron v. Elmore*, 5 N. Y., 1; *Ross v. Mather*, 51 Id., 103; *Walter v. Bennett*, 16 Id., 607; *Bywbie v. Wood*, 24 Del., 607; *Gordon v. Bruner*, 48 Mo., 570; *Hawk v. Thorn*, 54 Barb., 164; *Eversale v. Moore*, 3 Bush., 49; Bliss on Code Pl., sec. 13.)

There can be no doubt in this case as to the election of the respondent to seek her remedy under the provisions of her contract with appellant. (Bliss on Code Pl., sec. 155; *Cony v. Gaynor*, 21 Ohio St., 277; *Gillette v. Tregonza*, 13 Wis., 472.) We therefore conclude that it was error in the court below to instruct the jury that they might find for the respondent in this action, the value of her share of the wool which the appellant had converted; and that it was productive of material injury, we cannot doubt. Indeed, it was not possible for the jury to have rendered any verdict against appellant, except in obedience to this portion of the charge. The judgment is reversed and cause remanded.

Judgment reversed.

BOARD OF SCHOOL LAND COMMISSIONERS v. WILEY AND DAVIS.

CONVEYANCE—SURPLUSAGE IN DESCRIPTION.—A sufficient description of lands, in a written instrument, is not impaired by the addition of a false particular inconsistent with such previous description. The false particular should be rejected as surplusage.

IDEM.—So held where, to a good description of lands in a mortgage, was added the statement that they *lay* in a designated township, while in fact, they lay partly in that, and partly in an adjoining township.

CO-TENANT—PARTITION.—A partition of land, upon the undivided half of which one co-tenant has previously executed a mortgage, does not affect the interest of the mortgagees; such co-tenant acquires no new title or interest by the partition, its effect being merely to sever his interest in the land from that of his co-tenant.

A DECREE of foreclosure and sale, rendered upon such mortgage, prior to the partition, is not affected by it, and such decree effectually secures the rights of the mortgagees, and no further decree is necessary.

APPEAL from Linn County.

Strahan & Bilyeu, for appellant.

Bonham & Ramsey, for respondent.

By the Court, WATSON, J.:

This suit was brought in the circuit court for Linn county, to set aside a decree of foreclosure and sale of mortgaged premises, rendered by that court in a former suit between the same parties, and to obtain a new decree of the same character, but containing an accurate description of the premises intended to be sold by the former decree. The mortgage foreclosed was executed by the respondent, Andrew Wiley, and Elizabeth Wiley, his wife, on February 22, 1870, to secure the payment of a promissory note of $1,000, given by Andrew Wiley for money loaned him by the appellant out of the school fund. The respondent, Davis, claims title to a portion of said claim, as a subsequent purchaser in good faith, and for a valuable consideration, and

although a party to the former suit, and bound by the decree therein, objects to the relief sought by the appellant in the present case. The description of the lands in the mortgage, which is the same as in the former decree, is as follows: "The undivided one-half of the donation land claim of Andrew Wiley and Lucy Wiley, his wife, (now deceased) notification 7,630, lying and being in township 13 south, range 1 east, Willamette meridian."

It appears from the complaint that at the time the mortgage was executed the land claim mentioned belonged to the respondent, Andrew Wiley, and the heirs of his deceased wife, Lucy, under the donation law, but that it had never been divided at the proper land office, and the half enuring to him designated, as provided by that law, and no patent had been issued. That it was the intention of the parties that the mortgage should bind the half which should be allotted to the said Andrew, on such division, and the description in the mortgage was employed by them to designate such half. That after the entry of the former decree, foreclosing said mortgage and directing the sale of the property by the same description which the mortgage contained, the land claim was divided in the proper land office, and the south half designated as enuring to the said Andrew, and the north half to the heirs of the said Lucy, deceased. That said land claim lies partly in said township 13 and partly in township 14 adjoining, and in the same range.

Upon this state of facts the appellant claims, that, in the absence of any intervening equities in third parties, they are entitled, in equity, to have the former decree set aside, and to have a new decree entered foreclosing said mortgage on said south half of said donation land claim, as set apart to the respondent, Andrew Wiley, at the land office, and also to have the description of the whole claim amended so as to

show that it lies in township 14, as well as in township 13 S., R. 1 E. In our view of the case it is not necessary to consider the claim interposed by the respondent Davis, or the evidence adduced in its support. We are fully convinced that the appellant has stated no case entitling it to the equitable relief sought.

The description of the tract mortgaged as the "donation land claim of Andrew Wiley and Lucy Wiley, his wife, deceased, notification 7,630, lying and being in township 13 S., R. 1 E., Wil. mer.," would be sufficient to identify it if the township should be entirely rejected. The intention to mortgage the undivided one-half of the whole donation is too apparent from the description to admit of doubt or controversy. No court, either of law or equity, could hesitate to so pronounce.

In *Myers et al. v. Ladd et al.*, 26 Ill., 417, Caton, C. J., delivering the opinion of the court, commenting upon the effect of false particulars in the written description of property, says: "The description of the property itself was perfect, but there was a mistake as to the geographical position of the mill in which it was situated. Parol evidence was not only admissible, but was absolutely indispensable to identify the property described in the mortgage, and where that parol evidence did identify the property consistently with the description in the mortgage, that was sufficient. If I give a bill of sale of my black horses, and describe them as being now in my barn, I shall not avoid it by showing that the horses were in the pasture, or on the road. The description of the horses being sufficient to enable witnesses acquainted with my stock to identify them, the locality specified would be rejected as surplusage. Nor is this rule confined to personal property. It is equally applicable to real estate. If I sell an estate and describe it as my dwell-

ing house, in which I now reside, situated in the city of Ottowa, I shall not avoid the deed by showing that my residence was outside the city limits. So if a deed describe land by its correct numbers, and further describe it as being situated in a wrong county, the latter is rejected. The rule is that where there are two descriptions in a deed, the one as it were superadded to the other, and one description being complete and sufficient of itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature, or circumstance of the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone." The same doctrine is maintained by all the authorities. (*Raymond v. Coffer*, 5 Or., 132; *Wade v. Deray*, 50 Cal., 376; *Heaton v. Hodges*, 30 Amer. Decis., 736, note.

If the description, then, as it is found in the mortgage and decree of foreclosure and sale, sufficiently discloses the real intention of the parties in this respect, after rejecting the false and unnecessary addition, which could mislead no one, then we perceive no good ground for resorting to a court of equity for any relief as to this matter. When such intention is thus manifest, upon the face of the instrument, it is equally binding upon subsequent purchasers, as it is upon the courts, when called upon to construe it. Upon the only remaining proposition, contended for by the appellant, little need be said. The complaint shows upon its face that the parties to the mortgage deliberately employed the words of the description to express their meaning as to the interest in the donation land claim, which was to be subject to the mortgage lien.

The appellant now claims, and truly perhaps, that this description was employed to designate the half of the donation land claim which should afterwards be set off to the

mortgagor, Andrew Wiley, in the proper land office. But if the language so employed did not disclose such intention, viewed in the light of surrounding circumstances, it was a mere mistake of law, and did not entitle them to equitable relief. If the description, however, either alone or in connection with the condition of the title to the premises, and the relations of the parties thereto, could have been made to express such an intention, then obviously it was incumbent upon the appellant to assert such rights in the former suit, or show some lawful excuse in the present, for not having done so. But if this ground could be ever so fairly established, we cannot perceive its materiality.

If Andrew Wiley, at the time he executed the mortgage, owned an undivided half of the donation land claim, no matter what the source from which he derived his title, the lien of the mortgage attached to it. A subsequent partition, whether by the proper officers of the U. S. government under the provisions of the donation law, or by the decree of a competent state court, allotting him his half in severalty, could not affect such lien. He would acquire no new title or interest by the partition. All that would be affected would be a severance of that interest from the interest of his co-tenants. The lien would not be disturbed, for the interest to which it attached, at its creation, would remain the same. (*Wade v. Deary*, 50 Cal., 376; *Campon v. Godfrey et al.*, 18 Mich., 27.)

We are well satisfied that partition taking place subsequent to the entry of a decree of foreclosure of a mortgage, given upon an undivided interest, and order of sale thereof, works no such change in the situation of the parties to such decree, as to require any additional decree, such as is sought for in this suit.

Decree dismissing suit affirmed.

MARCH TERM, 1882.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OREGON,

MARCH TERM, 1882.

WILLIAM P. LORD, *Chief Justice.*
EDWARD B. WATSON, } *Associate Justices.*
JOHN B. WALDO, }

JACKSON *v.* SIGLIN.

FEES OF OFFICERS.—Statutes which give costs are construed strictly. The rule is said to be inflexible that an officer can demand only such fees as the law has fixed and authorized for the performance of official duties.

IDEM—PROMISE TO PAY ILLEGAL FEES IS VOID.—It is a doctrine of the common law, founded on public policy, that an officer shall be confined to the compensation or fee prescribed, and therefore, a promise to pay money for doing that which the law did not suffer him to take anything for, or to pay more than was allowed by law, was void, however freely and voluntarily made.

IDEM.—A note, the consideration of which was for fees illegally charged, is void.

APPEAL from Coos County. The facts are stated in the opinion.

S. H. Hazard, for appellant.

N. B. Knight, for respondent.

By the Court, LORD, C. J.:

To properly understand the question in controversy, it is sufficient to state that it appears from the transcript that

while the appellant was county clerk of Coos county, one J. D. Fry obtained a judgment in the circuit court of that county for a large sum of money, against Tom Utter et al., upon which execution was issued and real property sold to the amount of $41,000. The respondent, as the agent and attorney of said Fry, bid off the premises at this sum, but no money was paid to the sheriff except his fees, the credit being endorsed on said execution, and thus returned. The appellant seems to have considered this return as equivalent to the return of the money made on the execution, and claimed the legal commissions "for receiving, keeping and disbursing the whole amount."

The respondent denied the legal right of the appellant upon this state of facts to collect the commissions, but upon being threatened with legal proceedings, and to prevent, as he alleges, any misunderstanding with Fry, with whom he had entered into a valid agreement to pay all legal costs and expenses incident to such sale, he agreed with appellant to pay, and did pay him a portion of such commissions, and gave him the due bill sued on for the balance, upon which the appellant released Fry from further liability.

Upon this state of facts, the court below held that no action would lie to recover the amount of the due bill. The only question really presented by this record is: Was the clerk entitled to the per centum allowed by law for receiving, keeping and disbursing money, when no money was *actually* received, kept or disbursed by him? As the decision of this question involves the construction to be given to our statute regulating the fees of officers, it must be borne in mind that it was long ago settled by eminent judicial authority that statutes which give costs must be construed strictly. (Dwarris on Statutes, 253.)

Our statute allows the sheriff "for all moneys actually

made on any process and returned to the clerk, under one thousand dollars, three per centum," (Or. Laws, p. 602,) and the clerk "for receiving, keeping and disbursing money, on the first five hundred dollars, one per centum" (Or. Laws, p. 601,). The facts concede that no money was actually received, kept or disbursed by the clerk. Will the rule of strict construction, applicable to such statutes, admit of the argument that there was a constructive receiving, keeping and disbursing of this money, which entitled the clerk to his commissions?

No one will deny that whoever renders service for another ought to be suitably compensated for such service. As a general principle this is equally true in morals as in law, and applies with equal force to services rendered in public station as in private life. Our laws fixing the salaries, and in prescribing the fees of officers for services rendered, recognize the soundness of, and put in practical operation, this just principle. The instances wherein officers are required to perform services for which no compensation is provided are rare, and usually applied to offices considered honorary in their character, or include the performance of other services for which there are compensating advantages. But where an officer claims compensation without having rendered any service, or assumed any responsibility, the statute upon which he bases such right to compensation ought to express that intention in clear and unmistakable terms. For it is hardly probable that the legislature intended to require the public, or individuals, to pay officers fees or their compensation without the performance of some official acts or service, and the courts certainly will not impose such liability by mere construction. The basis of allowance to an officer, Mr. Chief Justice Hosmer says, is his trouble and

risk, or in other words, his *actual* service and responsibility. (*Preston v. Bacon*, 4 Conn., 478.)

The evident intention of our statute was to pay the clerk for his labor and responsibility imposed in receiving, keeping and disbursing money. But where, as in the present case, there was no money received, kept or disbursed by the clerk, there could be no service performed, or official responsibility assumed by him, which would put his claim to commissions within the terms of the statute. The statute contemplates service, official acts, the performance of which are essential to establish the officer's legal right to the commission. It provides for doing certain things, the officer shall receive a certain fee or per centum, and without doing these things the statute does not contemplate that the officer is entitled to the fee or per centum. It is "for receiving, keeping and disbursing" money returned on execution which entitles the clerk to his commissions, and unless he has rendered such service he is not entitled, nor did the legislature contemplate he should receive, any compensation. (2 Wallace Ch. R., 477.) The rule is said to be inflexible that an officer can demand only such fees as the law has fixed and authorized for the performance of official duties. (*Carlisle v. Crump*, 25 Ark., 235.)

A strict enforcement of this principle is regarded by the courts as essential to the protection of the people and will not be repealed. "Every officer," says Mr. Justice Caruthers, "must beware that he takes no compensation for services not sanctioned by some law on the subject. He collects costs at his peril, and for each and every item he must be able to put his finger upon some particular act." (*The State v. Merrill*, 37 Tenn., 68.)

Ignorance of the law excuses no man, least of all an officer, for, having undertaken to perform the duties of his

office, he must know and perform them at his peril. (*York v. Clopton, et al.*, 32 Ga., 364.) And again, in the *American Steamship Co. v. Young*, 89 Penn. St., 192, the court say: "It is his special business to be conversant with the law under which he acts and to know precisely how much he is authorized to demand for his services, but with the public it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands."

The demand of the appellant of the per centum charged was without warrant or authority of law; he had performed no service which entitled him to demand such compensation; it was therefore an illegal charge, which the facts show was exacted under threats of litigation and settled by a due-bill, to avoid misunderstanding, and which, if he wilfully and knowingly charged, was an offense against public justice. (Crim. Code, sec. 636, p. 429.)

It is a doctrine of the common law, founded in public policy, that an officer shall be confined to the compensation or fee prescribed, and therefore a promise to pay money for doing that which the law did not suffer him to take anything for, or to pay more than was allowed by law, was void, however freely and voluntarily made. (*Hatch v. Mann*, 15 Wend., 44.) This became the settled law at an early day in England, and has been constantly adhered to by the courts of that country, and followed by the highest courts of the several states of the union. (*Lane v. Seawall*, 1 Chitty, 176; *Morris v. Burdette*, 1 Camb., 218; *Preston v. Bacon*, 4 Conn., 471; *Bussin v. Pry*, 7 Sergt. & Rawle, 447; *Churchill v. Perkins*, 5 Mass., 541; *Gilman v. Lewis*, 12 Ohio, 281.)

So, too, where an officer by virtue of his office demands and takes unauthorized and illegal fees, he may be compelled to make restitution, although such fees were paid without protest or notice of intention to reclaim. Public policy requires that such payments shall not be considered voluntary. (*American Steamship Co. v. Young, supra.*) "It should be deemed sufficient," says Judge Woodruff, "that the officer takes advantage of his official position to make the exaction; due protection to those whose necessities require them to deal with persons exercising official powers, or discharging duties in their nature official, requires that money so paid should be the subject of reclamation." (*The Fire Ins. Co. v. Button*, 8 Bosw., 148.)

Nor in sustaining a civil action against a public officer for money illegally demanded and paid, is it necessary any turpitude should be proved against him. The action rests on no illegal purpose of the defendant in exacting the payment. It is well sustained if his official power was exercised in the collection, without warrant of law. (*Ogden v. Maxwell*, 3 Blatch., 319.)

The difference between a civil action and an indictment for taking illegal fees, is that in the indictment it must be shown that the illegal charge was made "wilfully and knowingly," while in an action the officer is liable, although the charge was made by mistake, and without any intention to extort. (*Miller v. Lockwood*, 17 Penn. St., 258.)

Certainly then, if such illegal charges may be recovered back when voluntarily paid to the officer, they never can constitute a valid consideration for any contract. Indeed it is an elementary principle that a bill or note which is founded upon an illegal consideration is void. It matters not whether such illegal consideration is opposed to public policy or interdicted by some statute, or both, the law uni-

versally condemns all contracts founded upon them. (Daniels on Negotiable Instruments, sec. 196; Story on Promissory Notes, secs. 189 and 190.)

To forbear to prosecute a claim, or to compromise a doubtful one, is a good consideration for a note or bill, but, Mr. Daniels says, "the compromise of one clearly illegal is not," (sec. 196, *supra.*) The due-bill of the respondent is admitted in the pleadings to have been given to the appellant in payment of fees which he claimed against Fry, but which were clearly illegal and without warrant of law. Such illegal charges cannot be made the basis of any valid agreement. The due bill is therefore without any valid consideration to support it and cannot be enforced. The judgment of the court below is affirmed.

Judgment affirmed.

Dissenting opinion by WATSON, J.:

The execution commanded the sheriff to satisfy the judgment, (Civil Code, sec. 273.) The statute further provides that he shall pay the proceeds of all execution sales to the clerk upon return of the execution, (Id., sec. 293.) And that the clerk "shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment." These provisions, it seems to me, attach the right to receive the proceeds of execution sales, and to charge the legal commission for disbursing them, to the office of the clerk. They cannot be diverted or intercepted before reaching his hands in the course pointed out by these provisions of the statute, without a violation of official duty on the part of the sheriff. This right of the clerk, I cannot but regard as one of the most important prerogatives of his office, created by the express provisions of the statute, and which can be destroyed only by an exercise of legislative power. This principle is, I think, fully sustained by authority.

In *Moore v. Gibbons*, 43 Cal., 377, upon a statute which provided "for commissions for receiving and paying over money on execution, without levy, or when the lands or goods levied on shall not be sold, on the first one thousand dollars, one and one-half per cent., and one per cent. on all over that sum;" the court held the sheriff entitled to the half commission allowed by the statute, although after levy and advertisement, but before sale, the execution debtor paid the amount specified in the writ directly to the creditor therein. I quote from the opinion in the case delivered by Wallace, C. J.: "It is said, however, that as the sheriff did not in fact *receive*, nor of course *pay over* this money, he is not entitled to the commission. I am of opinion, however, that the payment made to Du Point, under these circumstances, must be considered for this purpose to have been made to the sheriff, whose official duty and interest it was to have received it, had it been tendered him. The statute has allowed the judgment debtor to reduce the commissions of the sheriff by one-half, should he pay off the judgment before sale actually made, but has not permitted him to deprive the officer of the whole compensation by ignoring him and making such payment directly to the judgment creditor." The court cite, as sustaining this view, *Bolton v. Lawrence*, 9 Wend. 435; and *Parsons v. Boudoin*, 17 Ind., 14.

The case of *Tell v. The Board of Supervisors of McLean County*, 43 Ill., 216, appears to me more directly in point. The statute of Illinois provides that "it shall be the duty of the county treasurer to receive all moneys belonging to the county, from whatever source they may be derived, and all moneys belonging to the state which by law are directed to be paid to him, and to pay and apply such moneys in the manner required by law." It also provided him a commis-

sion of one per cent. for receiving and one per cent. for paying out the county tax. The county board of supervisors levied a special war fund tax during the years 1862, 1863 and 1864, and caused such tax to be paid over directly to a special agent, by whom it was disbursed. No part of the tax ever went into the treasurer's hands, yet the court held it came within the definition of "county tax," which the treasurer was entitled to receive and disburse under the law, and as it was to be presumed the officer would have done his duty if he had been permitted, he was entitled to the statutory commissions. When it is also considered that the clerk's commissions for this service are collected on the execution as accruing costs, and that the judgment debtor is entitled to have him satisfy the judgment on the record, when proceeds of sale sufficient for the purpose have been paid over to him by the sheriff, I cannot doubt that the requirement of the statute upon the sheriff to make such payment was intended to have some meaning, and should be given some effect.

But whether the clerk, in the present instance, was strictly entitled to the commissions claimed as such, as the authorities cited seem to declare, or not, he had rights in the premises, if the view of the law I have already expressed is not mistaken, which neither the execution creditor nor the sheriff could wholly ignore, and which certainly would support a compromise, entered into in good faith, and with full knowledge of all the material facts, as seems to have been done in this case.

The appellant's claim was not illegal. It was not prohibited by any statute, or in conflict with any principle of public policy. On the contrary, the only real objection to it was that it assumed as having been done what the law required, and the appellant had a right to demand should be

performed, but which had in fact been omitted. It could only have been impeached for want of consideration, and the law is well settled that this became immaterial after the compromise.

I can conceive of no good reason for debarring a public officer and any person for whom he has performed official service, from afterwards making a valid compromise of a doubtful right to fees and commissions. If otherwise capable of contracting, they should be accorded the same privilege of settling their disputes over doubtful rights, to put an end to a vexatious controversy and avoid the expense of litigation, as would be allowed to private individuals under similar circumstances. For these reasons I am of the opinion that the judgment should be reversed.

GODDARD, ET AL. v. PARKER.

EVIDENCE—CERTIFIED COPY OF CERTIFIED COPY.—A certified copy of a certified copy is not competent evidence of the contents of the original record, unless made so by statute.

BOUNDARY—AFFIRMING PARTY MUST ESTABLISH BY PROOF.—Where land is described as lying between a boundary line of a certain lot "as laid out" by a person named, and another given line, and the existence of any intervening space is controverted, the party affirming must establish the boundary of the lot "as laid out" by the person named, by competent proof.

COMMON REPUTATION—PRESUMPTION.—Common reputation is competent evidence on questions of private boundary under the statute of this state, and wherever a practical location of boundaries is proven, a presumption arises that it is in conformity with the boundaries originally located, which presumption, in the absence of opposing proof, is sufficient to establish such correspondence.

IDEM.—The force of such presumption is not destroyed by proof of casual expressions of a former owner who neither knew nor professed to know the exact location of the original lines, of his opinion simply in favor of a location somewhat different. Such expressions made without fraud furnish no ground of estoppel.

ESTOPPEL—BURDEN OF PROOF.—Where the defense is that land was purchased with reference to and in reliance on the representation of boundaries on a certain map, and an estoppel is claimed, the burden of proving such averment, if denied, is on the defendant.

IDEM.—Where the defendant was notified of plaintiff's claim to a certain tract of land the next day after he began to make improvements, and as soon as plaintiffs are shown to have had knowledge of his acts, *Held*, there was no estoppel.

APPEAL from Clatsop county.

E. C. Bronaugh, for appellant.

C. W. Fulton, for respondent.

By the Court, WATSON, J.:

The respondents brought this suit to compel appellant to convey to them a parcel of tide land situated on the south side of the ship channel of the Columbia river, and north of lot one, in block three, in the city of Astoria, as laid out by John McClure. They allege in their complaint that they are the owners of a strip of high land, 50 feet wide, and 100 feet long, adjoining said lot on the north, and extending thence due north to the line of ordinary high water mark on the south bank of said river, and were such owners at the time appellant made application and obtained his deed from the state for said tide land, and by virtue of their said ownership had the exclusive right to purchase said tide land from the state, and that the purchase thereof by appellant was without notice to them, unauthorized by law, and a fraud upon their rights as owners of the adjoining shore.

Appellant's application to purchase said tide land was made, and his deed therefor obtained from the state in the year 1876, at which time the owner of the adjoining shore had, under the law, a preference to purchase the tide land in front, and no other person could purchase it without giving such adjoining owner proper notice of his intended applica-

tion for that purpose. It is conceded that no notice was given in this case. The appellant in his answer denies that there is any high land, as alleged in the complaint, and denies that respondents are the owners of any high land between the north end of lot one and the river. He admits making application and obtaining a deed from the state for the tide land in controversy, but denies all charges of fraud and avers his ownership at that time of said lot one, and of the shore in front, and of all intervening high land, if any exists.

For a separate defense he alleges that both parties derive all the title they have or claim, respectively through and under said John McClure, the original proprietor of the shore in front of which said tide land lies. That in the year 1848, McClure laid out said city of Astoria, including said lot one, in block 3, and caused the same to be surveyed and a map or plat thereof to be made. That afterwards, on February 6, 1854, he caused said map to be duly recorded in the office of the clerk of the county where said lands are situated. That upon said map the north end of said lot one is represented and printed as abutting upon, and being bounded by high water mark of said river, and that appellant, and those under whom he claims title, purchased said lot with reference to, and relying upon the boundaries thereof as represented and designated upon said map, and upon the understanding that the north end of said lot abutted or fronted upon the waters of the said river, as shown by said map. That at the time said map was so made and recorded by McClure, and at the time he parted with his title to said lot to those under whom appellant claims, said lot did, at its north end, abut and front upon and was bounded by the tide land of said river, lying between said north end and the ship channel of said river, and that any and all land, if

there be any now lying between said points, has been formed by accretion since said map was made and recorded, and since McClure parted with his title to said lot as aforesaid.

For a further defense, appellant alleges that after purchasing said tide land from the state, he proceeded to place valuable and permanent improvements thereon in good faith, and at great expense, and that respondents stood by and permitted him to do so without objection or notice of their said claim, and are therefore estopped from now asserting it against him. The respondents, in their replication, deny all the averments in the answer except the appellants' ownership of said lot one, and the derivation of their title from the same source. The court below decreed conveyance to respondents.

It is unnecessary to make any particular mention of the various mesne conveyances and intermediate descents through which the parties respectively profess to derive title from the common source, to whatever high land may be found to lie between the north end of lot one and the Columbia river. It is not disputed that if there is any such land lying between said points which was not owned by appellant when he purchased the tide land and procured a deed therefor in 1876, it was owned by respondents, and they are entitled to the relief they ask, unless estopped by some of the matters alleged in his answer. The respondents having alleged, and the appellant denied the existence of high land between the north end of lot one, "as laid out by John McClure," and ordinary high water mark, they must prove the affirmative throughout by a preponderance of the evidence. The concluding words in the description of lot one, "as laid out by John McClure," are essentially to its identification as the particular tract whose north line forms one of the boundaries of the tract in controversy.

They contain matter of essential description, which must be proved in conformity with the allegation. (1 Greenleaf Ev., secs. 56 and 62.)

It is urged on behalf of appellant that respondents have furnished no competent evidence on this issue. The only documentary evidence offered by them is a certified copy of a certified copy of a map purporting to have been acknowledged by John McClure on February 6, 1854, from the files of the board of commissioners for the sale of state lands. Respondents claim that it is admissible because the certified copy of the original map was filed by appellant with said board, as evidence to support his application to purchase said tide land. But there is no proof of this fact. It does not appear from the evidence that appellant caused this certified copy to be filed or in any manner assented to its correctness or even knew of its existence; nor is there any pretense that a certified copy of the original could not have been procured just as readily. Its admissibility as evidence is therefore to be determined by the effect to be given it simply as a certified copy of a certified copy of an original; and in this view it is clearly incompetent and cannot be considered. Nothing short of an express provision by statute could render such a copy competent evidence, and no such provision exists.

The parol evidence produced by the respondents does, however, fix the location of the north line of lot one as it actually exists at the present time, and has existed for some years past, and shows an intervening space between said north line and ordinary high water mark, substantially as alleged by respondents. Some of the witnesses refer to the record or map as the basis of their knowledge in respect to the size and location of block three in which lot one is situated, while the greater number simply refer to the location

and boundaries of said block and lot as matters within their knowledge, without specifying the sources of their information. But if this testimony should be deemed equivalent to common reputation only, the respondents have made out their case *prima facie*, for under our statute common reputation is itself competent evidence on questions of boundary. (Code, sec. 696.)

Here, then, we have proof of a most satisfactory character of a practical location of the boundaries of lot one, which we feel bound to presume has been adopted under and with the intention to conform to the original survey and plat executed by McClure in 1848. It is neither shown nor claimed that there has been any subsequent survey or plat made or change of boundary effected. Both parties claim according to the boundaries actually established by McClure.

We do not hesitate to say that the practical location proven in this case creates a strong presumption that it is in accordance with the original plat and boundaries of lot one "as laid out by John McClure," which ought to be deemed conclusive in the absence of opposing proof. (*Cutts v. King*, 5 Greenl. 482; *Floyd v. Rice*, 28 Tex., 341.)

To rebut this presumption, certain acts and declarations of the late Judge Cyrus Olney, immediate successor to McClure's title to the premises in controversy, and of his immediate grantees of lot one, and other lots similarly situated, are relied upon by appellant. Judge Olney sold lot one in 1864 to G. W. Cook, under whom appellant derives title, and told Cook at the time that he should always have a landing in front, and no one to disturb him. Cook afterwards built a house on the gravel beach, almost within reach of the highest tides, and lived there four and one-half years. If lot one extended to ordinary high water mark,

this house was situated upon it. Olney was at the house after it was built, but said nothing whatever as to its location with reference to the lot.

In 1866 or 1867, Olney sold lot one in block four, in the same row, to I. Driscoll. Driscoll told him he wanted a lot fronting on the river. Olney pointed with his cane to a mark that was about on the line of high water mark, as Driscoll thought, from the location of the drift wood, and stated that he believed the corner was somewhere near that. Olney also told Driscoll no one could go outside of him, and Driscoll got the impression that he had a right to the water front when he bought. He soon after built a house on the lot, as he supposed, from 14 to 16 feet back from the line of extreme high tides. Olney was in this house also, but said nothing as to its location. About this time Olney told William Chance, then sheriff of the county, when the latter proposed to assess him for property in front of this row of blocks, that he did not claim any further out than the town plat already surveyed. He sold Chance lots 2 and 7 in block 2 in the same row in 1868, and stated to him at the time that by buying them no one could prevent his getting to them from either north or south. W. W. Parker, the appellant, testifies that from conversations had with McClure in 1852, and with Olney in 1861 and 1862, he considered the land in front of lot one in block 3 to be a public levee attached to the property. Both McClure and Olney, respectively, told him on these occasions that the lots of the town fronting on the river, as shown by the map recorded in the county clerk's office, carried with them the water front and any space between them and high tide.

After appellant bought lot one, in block 3, he moved the house built by Cook back from the shore and set it on the north end of said lot, in accordance with its present actual

boundaries. He gives among other reasons for so doing, that said lot one actually ends there "by the map," as he has "found by recent measurements." It seems quite probable from this testimony that Judge Olney and those purchasing lots from him, were under the impression that the north line of the front row of blocks ran much nearer the river that it did in fact; and that he intended the owners of such lots should have uninterrupted access to the water in front. But it is evident that he did not know, nor profess to know, the precise location of their north boundary, nor did those purchasing have sufficient ground for supposing that he did know or intended to be so understood. It is certain. however, that both he and they were dealing with reference to actual boundaries susceptible of definite location and not with reference to mere conjectures made at the time as to their probable situation. The presumption which arises from a practical location of boundaries attested by numerous witnesses, and fortified by common repute, certainly should not yield to any inference from casual expressions of opinion or belief, which carry on their face the open admission of want of actual and definite information.

We conclude, then, that respondents have fairly, and by a preponderance of competent evidence, established the fact of there being a tract of high land between the north end of lot one, in block 3, "as laid out by John McClure," and the line of ordinary high water mark on the south bank of the Columbia river, as they have alleged in their complaint. There is no testimony tending to show that this tract has been formed by accretion since McClure laid out this portion of Astoria in the year 1848; but the fact is conclusively shown, by the testimony, to be otherwise.

Appellant insists, however, that having plead in his answer that lot one, in block 3, was represented on the Mc-

Clure map as abutting on the tide lands in the Columbia river, and that said lot was purchased with reference to, and in reliance upon such representation, the burden of proving that it did not so abut devolves on the respondents, and that they have offered no evidence upon this point. But that is clearly an affirmative defense which the appellant must prove if he would have the benefit of it. The fact that the respondents charge him with fraud in obtaining his tide land deed from the state cannot have the effect of thus shifting the burden of proof. (*Kent v. White*, 27 Ind., 390; *Vedths v. Hogge*, 8 Iowa, 163; *Costigon v. Mohawk R. R. Co.*, 2 Denio, 609; *Phelps v. Hartwell*, 1 Mass., 71 and 335.)

As there is no proof that lot one, in block 3, was represented on the map which McClure caused to be made and recorded as extending to ordinary high water mark, and none that either appellant or those under whom he claims title purchased with reference thereto, and in reliance upon such a representation, we shall dismiss this branch of the defense without further consideration.

The only remaining defense is fully disproved. The appellant is shown to have been notified of respondent's claim to the tide land in controversy, the next day after he commenced to place improvements upon it. He admits himself that he had notice that they objected the day after he began to make the improvements. There is no evidence showing or tending to show that the respondents did not notify him as soon as they were informed of his taking possession and commencing to make improvements. As he had persisted in going forward with full notice of the respondent's claim, he cannot be heard now to complain of the loss he will suffer if they are permitted to assert their rights. Our conclusion upon all the points raised upon the appeal is that

they have been correctly determined by the court below, and that its decree should be affirmed.

Decree affirmed.

CROSSEN v. WASCO COUNTY.

COUNTIES—BODIES CORPORATE.—By the law of this state each county is a "body politic and corporate" for the purpose, among other things, "to sue and to be sued."

COUNTY COURTS—COUNTY BUSINESS.—The county court, when exercising the authority and powers pertaining to county commissioners in the transaction of county business, is a court of inferior or limited jurisdiction, and has only such jurisdiction, and can only exercise such powers as are expressly conferred or necessarily implied.

JUDICIAL ACTS REVIEWABLE.—The "decisions" given or made in the transaction of county business referred to in section 875 of the code, which can only be re-examined by writ of review under the subdivisions of sec. 870, are judicial in their nature.

FEES OF OFFICERS—ACTION AGAINST COUNTY.—When the law prescribes the services of the officer and the fees to be paid therefor, and directs that the county must pay such fees when the services are rendered, the county court, as the agent of the county, has nothing to do but to pay such fees—the occasion is not one which confers jurisdiction on the county court to render a "decision" either for or against its principal—it must pay or the county will be liable in an action at law.

COUNTY FUNDS—PAYMENT OF OFFICERS.—The general care and management of the county funds and business confided to the county court under subdivision 9 of section 870, while it authorizes the county court, as representative of the county, to pay the fees of officers for services rendered for the county, and, perhaps, all just and lawful claims against the county, does not necessarily imply the authority to audit and allow claims in the judicial sense "to hear and to determine," and its refusal to pay such fees, in whole or in part, is not the exercise of judicial functions, or a "decision" which can only be reviewed by the writ of review provided by the code.

JURISDICTION NOT IMPLIED.—Such jurisdiction is not essential or necessary to enable the county court, as the financial agent of the county, to perform the duties imposed under that subdivision, nor to make it effective and operative, and cannot therefore be implied.

COUNTY COURT—FISCAL AGENT OF COUNTY.—In settling with the sheriff in such case, the county court acts merely as the fiscal agent of the county, and in performing that duty, it acts precisely as would the agent of a private corporation, and for that purpose it does not constitute a court in the proper sense.

APPEAL from Wasco County. The facts are stated in the opinion.

Bellinger & Gearin, for appellant.

W. Lair Hill, for respondent.

By the Court, LORD, C. J.:

The respondent, as plaintiff, brought his action against the appellant, as upon account, to recover fees alleged to have been earned by him as sheriff of the county of Wasco, and which were chargeable against the county. The items of the demand are set forth in the complaint. It is also alleged that the bills specified were presented to the county court, and payment thereof demanded, and that the county court "refused to audit, allow or pay" the same, or any part thereof, except certain items specified in the complaint.

The inquiry presented by this appeal is as to the remedy to be pursued in such case. The position of the appellant is, that the county court in passing upon claims against the county, acts judicially, and that its decision is an adjudication, and consequently the only remedy of an aggrieved party under our statute is by a writ of review. On the other hand, the respondent claims that when the county court refused to audit and allow his claim in whole or in part, his right of action against the county accrued. It will thus be seen that both parties concur in the opinion as to the requirement of first presenting the claim to be audited and allowed before any remedy whatever against the county can be pursued. By the law of this state each county is a "body politic and corporate" for the purpose, among other

things, "to sue and to be sued," (Or. Laws, p. 535). The law of this state also prescribes the services of a sheriff, and specifies the fees to be paid therefor, (Or. Laws, p. 602 and 603) and further provides that "the fees herein allowed for services rendered the county or state must be paid by the county or state as the case may be." (Or. Laws, sec. 17, p. 606.) Thus it appears that a county may sue or be sued the same as any private person, or other corporation, and that the law, in addition to prescribing the services to be rendered by the sheriff, and the fees to be paid therefor, requires the county, when such services are rendered the county, to pay the same; when, then, in such case, services are rendered by an officer, the liability of the county to pay the fees prescribed by law for such services is fixed, and an action at law may be maintained by the officer against the county to enforce the payment of the same, unless some other mode or remedy has been exclusively provided by statute. But it is claimed by the appellant, under subdivision 9, section 870, of the code, that the county court has devolved upon it the authority and power to audit and allow claims against the county; that when engaged in the performance of such duty it is exercising judicial functions, and that its decisions, in allowing or disallowing such claims, is an adjudication, and can only be reviewed by the writ of review provided by the code. This argument assumes that the authority of the county court to audit and allow claims is included in the powers conferred by subdivision 9, section 870, and consequently the party aggrieved by the decision in such case is limited entirely and exclusively to the remedy by review as provided in section 875 of the code.

Section 870 provides that the county court has authority and powers pertaining to county commissioners, to transact county business, "that is," (subdivision 9) "to have the gen-

eral care and management of the county property, funds and business, where the law does not otherwise expressly provide," and section 875 provides, "its decisions given or made in the transaction of county business shall *only* be reviewed by the writ of review provided by this code." It is not claimed, nor will it be controverted, that the authority or power to audit and allow claims against the county is by any of the subdivisions enumerated under section 870, expressly or in direct terms conferred on the county court. If such jurisdiction or power, then, exists in that tribunal, it must result by necessary implication from the powers conferred by subdivision 9, before adverted to. Now the county court, when exercising the authority and powers pertaining to county commissioners in the transaction of county business, is a court of inferior or limited jurisdiction, and it would be a work of supererogation to cite authorities to show that such courts have only such jurisdiction, and can only exercise such powers as are expressly conferred or necessarily implied. Nor will jurisdiction be implied where the existence of the power is doubtful and does not result as necessarily and inevitably as when expressly conferred. What is necessary may be supplied by implication, but it must be so supplied *ex viscerebus actus.*

The "decisions" given or made in the transaction of county business, referred to in section 875, which can only be re-examined by writ of review under the subdivisions of section 870, are judicial in their nature or character, and concern public affairs. But when the law prescribes the services of the officer and the fees to be paid therefor, and declares that the county must pay such fees when the services are rendered the county, the county court, as the agent of the county, has nothing to do but to pay such fees—the occasion is not one which confers jurisdiction on the county

court to render a "decision" either for or against its principal—it must pay, or the county will be liable to an action. While "the general care and management of the county property, funds and business" is expressly conferred on the county court as the representative of the county, by subdivision 9 of section 870, and undoubtedly authorizes the county court to pay such fees, and all other just and lawful claims against the county, it by no means follows that the authority or power to audit and allow such claims in the judicial sense, "to hear and to determine" is impliedly conferred on the county court by this subdivision, and that its refusal to pay such claims, in whole or in part, is the exercise of judicial function—a "decision" which can only be reviewed by the writ of review. Such jurisdiction is not essential or necessary to enable the county court, as the financial agent of the county, to perform the duties imposed under that subdivision, nor to make it effective and operative, and therefore cannot be implied. Besides, it is an ancient and salutary principle of the law that nothing is to be intended in favor of the jurisdiction of such courts (Bac. Ab. courts, p. 630) for as was said by Fortescue, J., "it was never said that this court shall construe an inferior court into jurisdiction." (*Pierce v. Hopper*, 1 Strange, 260.) And, in general, a strict construction of statutes is best at any rate." When implications are admitted beyond the limits of the most rigid necessity, it is very easy to drift unconsciously away from the meaning of the law giving power altogether, and establish what was never intended, or even thought of. (Wells on Jurisdiction of Courts, sec. 72.)

And there can be but little doubt that if the legislature had intended to invest the county court with such jurisdiction as would give to its decisions, in the allowance or rejection of claims, the force and effect of a judgment, it would

not have left the authority to exercise such jurisdiction to conjecture or construction, or doubtful implication, but would have conferred the power in direct terms. Where the county court is invested with the special duty or authority to audit and allow certain claims by statute, it has been held that its order, or decision in allowing or rejecting such claims is the exercise of judicial functions, and can only be reviewed by the writ of review provided for in the code. The statute making provision for the state militia, among other things, provides that the county court shall provide for each company an armory, etc., and shall also, "at each of its sessions, audit and allow, and cause to be paid the necessary expenses of the same," etc., (Misc. Laws, p. 668, section 19,) and in construing this provision, in *Mountain v. Multnomah Co.*, 8 Or., 474, Judge Prim said: "It will be seen that by the provisions of this section it is made the special duty of the county courts to audit and allow, and cause to be paid, the necessary expenses of organized volunteer companies within their respective counties. And as the county courts, as a matter of necessity, in allowing or disallowing these accounts, have to exercise judicial functions, their action may be reviewed by the writ of review provided for in the code."

But there is no such provision in respect to the matter under consideration, or enumerated among the express powers conferred under the subdivisions of section 870, nor can such power or jurisdiction be implied from the general care and management of the county funds and business confided to the county court under that subdivision. In settling with the sheriff in such case, the county court acts merely as the fiscal agent of the county, and in performing that duty, it acts precisely as would the agent of a private corporation, and for that purpose it does not constitute a court

in its proper sense. The judgment of the court below is affirmed.

Judgment affirmed.

HARVEY'S HEIRS v. WAIT.

RECORD—INHERENT POWER OF COURT TO AMEND.—Every court has the inherent power to amend its record at any time so as to make it show what determination was actually made, and such amendment is not open to collateral attack.

FINAL DECREE.—The final character of a decree depends upon the intention of the court, to be ascertained from the terms of the decree. The addition of an order of continuance in these words: "It is further ordered that this proceeding be and the same is hereby continued until the next term of this court for further proceedings," to the decree of the probate court on the hearing of an executor's final account which ascertained and declared the amount due from him to the estate of his testator, and the property still in his hands belonging thereto, and made full provision for the payment and application of the money and delivery of the property, did not affect the final nature of such decree, or preserve the power of the court to change or modify its essential provisions at the subsequent term.

APPEAL from Multnomah County.

The appellant filed his final account as one of the executors of the will of Daniel Harvey, deceased, in the county court of Multnomah county. Objections were filed to its allowance by the widow and heirs of the deceased, the repondents here. The matter was then referred to E. Quackenbush, James Steel and Shubrick Norris to hear testimony and report upon the disputed items in the account, and particularly upon the appellant's claim for extra compensation. The referees, after hearing the testimony and examining the accounts, made their report in due form—a majority pronouncing against the allowance of the extra compensation claimed. On the 4th of November, 1880, the court con-

firmed the majority report, and after reciting the order fixing the time for the hearing of the final account; the proof of notice; the appointment of Eloisa Harvey as trustee under the will of deceased, of the residue of his estate after payment of claims, expenses and legacies; the proper accounting of said Eloisa Harvey as executrix; the payment of all claims, expenses and legacies, and due settlement of the estate, and the right of Eloisa Harvey to the custody of the residue, as trustee under the will; and the giving a particular description of the property still in the appellant's hands as executor, and not otherwise disposed of, rendered the following decree:

"It is therefore ordered and decreed that said executor, A. E. Wait, do forthwith deliver to said Eloisa Harvey, trustee, all the hereinbefore mentioned promissory notes belonging to said estate, and all notes, accounts and property of every name and nature, taking her receipt therefor.

"That he do forthwith pay to said Eloisa Harvey, as trustee under the will of Daniel Harvey, or into this court for her, the said sum of $6,722.38, found by said referees to be due from him to said estate January 1, 1880, together with interest on said sum of $6,722.38, from said January 1, 1880, at the rate of ten per cent. per annum, amounting to $567.20, and the further sum of $346.90, amount of the commissions allowed by law, hereinbefore ordered to be retained in lieu of the said sum of $346.90 in the hands of executor Ralston, and allowed to him as commission, amounting to the total sum of $7,636.48, and that until so paid, said sum draw interest at the rate of ten per cent. per annum. It is further ordered that said A. E. Wait pay to said Eloisa Harvey, as executrix, the said sum of $500 of said commissions, after deducting the amount in the hands of said Ralston, and now allowed to him as compensation,

or pay the same to the clerk of this court for her, and that said A. E. Wait pay the costs of this proceeding since the filing of objections to said account, taxed at $464.95-100 dollars.

"It is further ordered that this proceeding be and the same is hereby continued until the next term of this court for further proceedings."

Afterwards, on November 16, 1880, before the decree rendered had been entered in the journal of the court, the probate judge, upon appellant's suggestion, and with the consent of respondents, to facilitate the taking of an appeal by the former, and to remove any doubt as to the final character of the decree, struck out the last sentence continuing the proceeding from the draft which had been furnished the clerk of the court for entry in its record.

The appellant was not notified of the change however, and had no knowledge of this action on the part of the probate judge, until after the time for taking an appeal from the decree of the 4th of November, 1880, had expired. He then petitioned for an amendment of the record so as to make it conform to the order actually made, which was granted by the court on notice to respondents, and the sentence restored which had been stricken out. This was done on December 14, 1880, and on the 20th day of the same month the following order was made and entered in the record of the probate court:

"In the matter of the estate of Daniel Harvey, deceased:

"And now on this 20th day of December, 1880, comes up to be heard the order upon the final account of the executors of the estate of the said Daniel Harvey, deceased, which order was continued from last term, and it appearing that no further proceedings are necessary or required, it is here-

by ordered and decreed that within twenty (20) days the said executor, A. E. Wait, deliver to Eloisa Harvey, trustee, the promissory notes mentioned in said order and pay over to said Eloisa Harvey, trustee, the said several sums of money in said order decreed to be paid by him, and that upon said A. E. Wait delivering said notes and paying said several sums of money as herein ordered and decreed, and filing receipts therefor, that the said executors of said estate shall be discharged and their sureties exonerated from all further liability herein, and that if the said A. E. Wait shall fail to deliver said notes and pay said sums of money within twenty days as hereinbefore ordered, execution issue to enforce the same."

On January 5, 1881, the notice of appeal to the circuit court was served, and the appeal perfected by the filing of the notice with proof of service endorsed, together with a sufficient undertaking, with the clerk of the probate court. The notice specified the order of December 20, 1880, as the one appealed from, but described the provisions of the decree of November 4, 1880, as if embraced in it. The circuit court on motion dismissed the appeal, and this is the ruling which appellant complains of in this court. The merits of the case are not involved in the appeal.

W. H. Effinger, for appellant.

E. C. Bronaugh, for respondent.

By the Court, WATSON, J.:

The power of the probate court to correct the record of its proceedings at a subsequent term, and make it conform to truth and the determination actually made at a preceding term, can hardly be questioned at the present time. (Freeman on Judgments, sec. 71; *Dunning v. Burkhardt*, 34 Wis., 588.) And it is equally certain that its action in this

respect cannot be assailed in a collateral proceeding. These propositions seem to us to entirely obviate the objections urged by the respondents, that the change or modification of the decree of November 4, 1880, attempted by the probate judge, should be presumed to have transpired during the November term, and therefore to be valid, it not appearing from the record that the term had previously expired, and that the court had no power to amend its record after the term.

If the change or modification of November 16th was made during the continuance of the regular November term, it was valid, and the action of the court at the ensuing December term, amending its record so as to render wholly ineffectual the attempted change or modification of its original decree, was erroneous and unwarranted.

The parties in this proceeding are bound by the action of the probate court in making the amendment, and cannot contest its regularity here. But the main question presented on this appeal is whether the decree of November 4, 1880, was final in its character, and this must be determined upon the intention of the probate court, to be ascertained from the terms of the decree itself, as we have already decided that there was no change or modification of it during the term at which it was rendered. There can be no controversy as to the principle governing the determination of this issue.

In *Rubber Company v. Goodyear*, 6 Wall., 155, in passing upon this very question, the court say: "But we must be governed by the obvious intent of the circuit court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." We are not unmindful that this very case has been cited by appellant's counsel as a decision in his favor,

in view of the similarity of the facts to those in the case before us. But we think a close examination will disclose substantial differences.

In the former, the first entry was in the form of an order entered in the minute book and contained the substance of the decision rendered. The second entry was made eight days afterwards, during the same term; was entitled "final decree," and was in the appropriate form for a final decree, and besides contained a particular description of the patent rights, for the violation of which the action had been brought to recover damages, while in the first entry they were mentioned merely as "the patents in the case," and also determined the amount of costs recovered, which was not done in the first entry. But in the case at bar, the second order was not made at the same term with the first, and does not contain any of its essential provisions. Without referring to the previous decree, it is impossible to tell what the rights and liabilities of the parties are. It is true the last order refers to the first as having been continued from the preceding term, but it does not assume to decide any issue or direct anything to be done which was covered by the first decree and can not be held to have been intended to supply its place as a final decree, in any view of the matter.

But if the second order were ever so formal and comprehensive and unequivocally denoted the intention of the court, when it was entered, that it should be deemed the final decree in the cause, still it could not be so held, in derogation of the effect of the first, equally formal and comprehensive in its provisions, and with equal force, evincing the intention of the court as to its final character. No court can be permitted thus to avoid the effect of its previous decisions after it has lost the power to further change

or modify them by direct methods. Now the decree of November 4, 1880, is in form a final decree. It ascertains and declares every liability and gives every needful direction. The appellant, by complying with its requirements, would have entitled himself to an immediate discharge, and it is quite evident that the court so understood the effect of its proceeding. The last sentence containing the order for a continuance of the proceeding until the next term "for further proceedings" has no bearing in opposition to this view. It does not indicate any purpose to alter or modify the provisions of the decree previously declared, or to reserve any of them for further consideration before making a final disposition of the matters involved. The further proceedings mentioned in this order were evidently proceedings in addition to those already taken, and finally settled by the decree and in all probability referred solely to the discharge of the appellant on presenting proper vouchers, showing his compliance with the requirements of the decree.

We therefore hold that the decree of November 4, 1880, was the final decree in this proceeding, and that it is distinct from the order of December 20, 1880, and there is nothing in this last order, considered by itself, from which an appeal will lie. The appeal not having been taken to the circuit court within thirty days from the entry of the final decree in this cause, it was rightfully dismissed.

Decree affirmed.

LANE v. COOS COUNTY.

SHERIFFS—THEIR DUTIES.—Under sec. 16, art. 7 of the constitution, the duties of the sheriff are not necessarily confined to the execution of orders, judgment and process of the courts, the service of papers and the like, but may include the performance of such other duties as may be prescribed by law.

TAX COLLECTOR NOT A DISTINCT OFFICE.—When the legislature imposed the duty of collecting the taxes upon the sheriff of each county, and required him to file an additional bond to secure the increased public trust confided to him, no new or distinct office was created thereby. The effect was to impose additional duties only, and not to confer an additional office upon the sheriff of each county, and consequently the compensation which the sheriff received under the act of 1880, providing the compensation for sheriffs and clerks, etc., includes his compensation as tax collector, and was all the compensation to which he was entitled.

APPEAL from Coos County.

S. H. Hazard, for appellant.

J. W. Hamilton, district attorney, for respondent.

By the Court, LORD, C. J., WATSON, J., concurring:

This was an action upon a written submission made by the parties, the object of which was to ascertain whether the plaintiff, as sheriff of Coos county, the defendant in this action, is entitled to the per centum prescribed by the revenue act for the collection of taxes during a certain period alleged in the submission. The inquiry arises out of an act passed at the last session of the legislature providing compensation to the sheriffs and clerks of certain counties therein enumerated, which was subsequently declared void by this court. From the taking effect of that act to the time it was judicially pronounced void, the appellant received the compensation provided by the act, but insists, notwithstanding this, that he is entitled to receive the per centum allowed by the act of 1874 for the collection of taxes, because the office of sheriff and tax collector are separate and distinct offices. (Session Laws, 1880, p. 125; Session Laws, 1874, sec. 5, p. 125; *Manning v. Klippel*, 9 Oregon, 367.)

It is not disputed that the act of 1880 did not provide the full compensation to be paid the sheriff for services rendered as such, but the argument is, that it is immaterial

whether that act is valid or void, the services which he renders in the collection of taxes, and the per centum allowed by law therefor, are not incident to his office as sheriff, but as tax collector. The particular question then presented for our decision is, is the office of sheriff and tax collector separate and distinct offices? Or in other words, are there two distinct offices—that of the sheriff and that of the tax collector? If there are two, then the claim of the appellant to the per centum must be allowed, if not, he has received the full compensation for his services, and it must be disallowed.

The constitution of this state provides: "There shall be elected in each county by the qualified electors thereof at the time of holding general elections, a county clerk, treasurer, *sheriff*, coroner and surveyor, who shall severally hold their offices for the term of two years." (Sec. 6, art. 6.) A tax collector, as an officer *per se*, is not named in the constitution, but the succeeding section undoubtedly confers the power upon the legislature, when the exigency of the public service require it, to provide for the election or appointment of such officer. That section provides: "Such other county * * officers as may be necessary, shall be elected or appointed in such manner as may be prescribed by law." (Sec. 7, art 6.)

Under this provision the legislature may provide for the election of a tax collector *per se* as they have provided for the election of an assessor for each county, although such officer is not enumerated in section 6, art. 6. (General Laws, p. 694.) But the constitution further provides: "A sheriff shall be elected in each county for the term of two years, who shall be the ministerial officer of the circuit and county courts, and shall perform such other duties as may be prescribed by law." (Sec. 16, art. 7, Const.)

Now under this provision of the constitution, the duties of the sheriff are not necessarily confined to the execution of orders, judgments and process of the county, the service of papers in actions and the like, but may include the performance of "such other duties as may be prescribed by law." Nor can it make any difference that the "other duties," which the legislature is authorized to impose, are even incongruous in their nature with those already existing, when the authority to impose such duties is derived from the paramount law. And whatever "other duties" are prescribed by the legislative authority, the effect is only to impose additional duties upon the sheriff, and not to confer an additional office, unless the intent of the legislature is otherwise plainly manifested. And when the legislature imposed the duty of collecting the revenue, in the shape of taxes, upon the sheriff of each county, and required him to file an additional bond to secure the increased public trust confided to him by the law, no new or distinct office was created thereby, but simply other or additional duties were prescribed by the legislature in pursuance of the authority invested in them by the constitution. (General Laws, pages 762, 763 *et seq.*) Except to say in the first section of the revenue act that the sheriff shall be tax collector in each county, a tax collector, *eo nomine*, is not named afterwards in that act. It is the sheriff who is to collect the taxes, to give the required bond, and to do all the numerous acts enumerated in the revenue act. It is no more in effect than saying the sheriff shall collect the taxes, and making the duty of collecting the taxes a part of the duties of his office. Nor are the duties of collecting the revenue incompatible with, or incongruous in their nature, with the office of sheriff.

To a similar objection in *Wood et al. v. Cook*, 31 Ill.,

274, it was said, "there is nothing in the office to inhibit the legislature from imposing other duties upon them, even if incongruous in their nature. But there is really no incongruity between the collection of taxes on a warrant or tax list, which empowers the sheriff to levy and sell in case of default, and the collection of money on an ordinary *fi fa*. In fact the one is quite germane to the other." And the court, in construing the revenue act of 1845, which provided that the sheriff should be *ex officio* the collector of taxes, held that it merged the office and duties of collector into those of sheriff.

In *Kilgore v. The People*, 76 Ill., 548, the court, in construing section 144 of the revenue law, in which it is declared that the treasurer of counties under township organizations, and the sheriffs of counties not under such organization, shall be *ex officio* collectors of their respective counties, say: "This is a duty the legislature had a right to impose upon those officers, and to require of them additional bonds for the performance of such additional duties. No office was created thereby, but a legislative order that all county treasurers in certain counties shall, by virtue of their office of treasurer, collect the revenue of the county. Should one of these treasurers fail or refuse to give bond for the faithful performance of the duty of collecting, the office may be declared vacated. What office? The office of treasurer, there being no other." And the result reached by the court on a careful re-examination of the case of *Wood et al. v. Cook*, *supra*, was to reaffirm the principles therein enumerated, and hold that the proper construction of the statute is to consider it as imposing additional duties only, and not as conferring an additional office upon the county treasurer. (*Broadwell v. The People*, 76 Ill., 555;

Hughes et al. v. The People, 82 Ill., 79; *Price v. Adamson*, 37 Mo., 151.)

In *Jarnagagin v. Atkinson*, 4 Humph., 470, which was a motion by the sheriff against his deputy for failing to pay over taxes collected by him as deputy sheriff, the court say: "It is said the bond in this case, executed by the deputy, is not broad enough to cover the responsibility; that the bond is given for the faithful performance of his duty as deputy sheriff; that the office of the sheriffalty and collector of the revenue are distinct and separate offices, and the deputy sheriff is not deputy collector. It has been held in this state that the collection of the revenue is devolved by the law upon the sheriff, and although he gives a bond as collector, yet he collects as sheriff, and not under a distinct, separate authority, created by another office. This being so, the deputy sheriff may collect, and if in doing so, he acts so negligently or faithlessly as to discharge his principal, he is responsible therefor as deputy sheriff, and, of course, his principals."

It is true it has been held by the supreme courts of California and Mississippi that the offices of sheriff and tax collector, although held by the same person, are separate and distinct offices. (*People v. Ross*, 38 Cal., 76; *Moore et al. v. Foote*, 32 Miss., 480.) But it is thought that these decisions are based on some provisions of their constitutions or statutes differing from ours, with which we have not been favored. By our law, the sheriff can only collect the taxes by virtue of his office as sheriff, and in no other capacity. This duty the legislature has seen fit to devolve upon him and attach to the duties of his office. The fact that this duty might be segregated from the office of sheriff and made to constitute a separate and distinct office, with a tax collector as an officer *per se*, whenever the legislative author-

ity may deem it best, and so prescribe, is not sufficient of itself to constitute such office.

In *The State, ex rel., &c. v. The Judges, &c.*, 21 Ohio St., 14, where the validity of an act imposing additional duties upon the judges of common pleas was contested upon the ground that the performance of these duties was the exercise of an office, the court say: "The act does not create or invest them with a new office. What they are authorized to do they can only do by virtue of their offices as judges. It does not follow from the fact that the new duties or powers might have constituted a new office, that therefore they do constitute such office. New duties may as well be attached to an existing office, as that part of the duties of an existing office may be assigned to a new one."

We are therefore of the opinion that the legislature, in imposing the duty of collecting the taxes upon the sheriff, did not intend to confer upon him an additional office, but that the office of sheriff and tax collector are one and inseparable as provided by our law, and consequently that the compensation which the sheriff received, under the act of 1880, included his compensation as tax collector, and was all the compensation to which he was entitled. From these views it follows that the judgment of the court below must be affirmed.

Judgment affirmed.

ROWLAND, ET AL. v. WARREN.

ESTATE IN FEE TAIL ABOLISHED.—H., a testator, devised a tract of land to his daughter, M. E., and her body heirs, but ordered that if she died without leaving children, the land should revert to his other heirs. M. E.'s title to the land passed to a stranger in the life time of M. E., by purchase at a sheriff's sale. M. E. died leaving children. *Held*:

1. That estates in fee tail have been impliedly abolished in this state.
2. That M. E. took either a fee simple or a fee simple conditional, defeasible on the contingency of her dying without children, with a limitation over by executory devise.
3. That the sheriff's deed passed a fee simple.

APPEAL from Yamhill County. The facts are stated in the opinion.

H. & A. M. Hurley, for appellant.

McCain & Fenton, for respondent.

By the Court, WALDO, J.:

This cause turns upon the construction of a devise in the will of Joel J. Hembree, of Yamhill county, Oregon, who died in said county in 1868, leaving a last will made on the 22d day of April, 1868. The devise was to the testator's daughter, Mary E. Hembree, in the following clauses in the will: "I further will and do give and bequeath to my youngest daughter, Mary E. Hembree, the following described land: The south half of the Andrew T. Hembree land claim, to her and her body heirs forever." At the end of the will the testator further says: "I further will that if my daughters, Martha Ann and Mary E. Hambree, die without children the land shall revert back to my other heirs."

The question is, what estate did Mary E. Hembree take in the land? The first clause of the devise to Mary E. Hembree would give her a fee simple conditional at common law, and a fee tail under the statute *de donis*. The statute *de donis* converted the fee simple conditional into a fee tail by taking away the tenant's power of alienation. (4 Kent's Com., 11; 4; 1 Sharswood's Blackstone, 110, n. 11.)

Now if the tenant is given full power of alienation, the effect must be impliedly to repeal the statute *de donis*.

(*Jewell v. Warner*, 35 N. H., 176.) Our statute concerning conveyances (Gen. Laws, t. 1, ch. 6, p. 514,) seems, evidently, to confer this power, and to substitute a deed, signed and witnessed, for all common law conveyances whatsoever, including a common recovery. So our statutes in relation to the sale of land under execution for the payment of debts, and by executors and administrators for the payment of claims and charges against the estate, and the power to devise by will, seem clearly to design, and impliedly to enact, that all estates of inheritance are subject to a general power of alienation.

A conveyance to A., and the heirs of his body, created a fee simple conditional at common law, which became a fee tail by the statute. The repeal of the statute *de donis*, simply, would restore the old fee simple conditional. Whether the power to create such an estate has, also, been taken away by our statute of descents, or otherwise, it is not necessary in this case to determine. The devise in the first clause of the will, therefore, gave Mary E. Hembree either a fee simple absolute or a fee simple conditional. It remains to be seen what qualification has been annexed to the estate by the last clause in the will.

In *Ray v. Enslin*, 2 Mass. 554, there was a devise to the testator's wife for life, and after her decease unto the testator's daughter and her heirs forever, but in case the daughter should happen to die after she came of age, or have lawful heir of her body begotten, then over. The court held the devise a fee simple, defeasible on a condition subsequent.

In *Maurice v. Graham*, 8 Paige, 483, the testator devised a house and lot to J. and E., and their heirs and assigns forever, provided they both attained to the age of twenty-one years, and to the survivor if only one of them

attained that age, and further directed that if they both died leaving no child or children, the house and lot should go to L. and her heirs and assigns forever. The devise over to L., upon the happening of the contingency named, was held good. The court said: "It is the ordinary case of an executory devise of the whole property in fee simple, limited upon a determinable estate in fee, in the event of the death of the first taker without leaving children."

In *Wilson v. Wilson*, 32 Barb. 328, the testator devised his lands to his son in fee, and ordered that if his son should die without any male issue, the estate should go over. The court construed the word "issue" to mean child, and held that the son took a defeasible fee, and that upon his death without leaving such male issue, the lands went over. In the case before us the expression "die without children," determines the contingency—if there could have been any question had the word "issue" been used—as one that must happen, if at all, at the death of Mary E. Hembree. (2 Jarman on Wills, 199; *Turner v. Ivie*, 5 Heisk., 222.)

In *Wilson v. Wilson* the devise to the son was a fee simple, and in this case the devise to the daughter, possibly, was a conditional fee. There is no other difference between the two cases. But clearly such a limitation over may be engrafted on a conditional fee as well as on an estate in fee simple to take effect on a contingency reasonably determinable. (*Lippitt v. Hopkins*, 1 Gall., 454, 465.)

It follows that Mary E. Hembree took either a fee simple or a fee simple conditional, defeasible on the contingency of her dying without leaving children, with a limitation over by executory devise. As such contingency did not happen, she held the whole estate, and the sale of the estate, under the judgment against her, conveyed a good fee simple title to the purchaser. The fact that the sale was made before

the period had arrived at which the contingency was to happen or fail, does not affect the title. The purchaser took the estate subject to be defeated by the happening of the contingency. (*Blanchard v. Blanchard*, 1 Allen, 223, 230.) The judgment must be affirmed.

Judgment affirmed.

CARMAN, ET AL. v. WOODRUFF, ET AL.

COUNTY FUNDS—TAX-PAYER MAY SUE TO PREVENT FRAUDULENT DISPOSITION OF.—A tax-payer has such an interest in avoiding an increase in the rate of taxation as will enable him to maintain a suit in equity to annul a fraudulent disposition of county funds, or property by the county court, under color of authority, and to restore the same to their proper custody, when necessary to prevent their loss to the county. The county is not a necessary party to such a suit.

APPEAL from Curry County.

William R. Willis and Webster & Crawford, for appellants.

S. H. Hazard, for respondents.

By the Court, WATSON, J.:

This suit was brought by respondents as tax-payers of Curry county, Oregon, on behalf of the whole body of tax-payers of the county, to annul and avoid certain proceedings of the county court, composed of the appellants, Delos Woodruff, judge, and Patrick Hughes and James A. Cooley, commissioners in county business, on the ground of fraud and collusion among themselves, and with their co-appellant, John H. Gauntlett, and to have certain sums paid out of the county funds, under color of such proceedings, restored to the county treasury. The appellants filed a demurrer to the complaint, which was overruled; and upon their failure

to plead further, the court below rendered a decree against them.

The complaint states facts which, in our opinion, clearly show a fraudulent alienation of county property, and misappropriation of county funds; and the important questions raised by the demurrer and determined by the decree of the lower court are: 1. Whether a tax-payer can maintain a suit of this character. 2. Whether Curry county is a necessary party.

Upon the first point the authorities are by no means harmonious. It has been held by the highest courts of New York, Massachusetts, Michigan and Kansas, in the absence of any statute on the subject, that wrongful acts of this character on the part of municipal authorities, affect all members of the community alike, and produce no such special injury to any individual as entitles him to equitable redress. (*Doolittle v. Supervisors of Broome Co.*, 18 N. Y., 155; *Roosvelt v. Draper*, 23 N. Y., 318; *People v. Ingersoll*, 58 N. Y., 1; *Hale and others v. Cushman and others*, 6 Met., 425; *Carlton v. Salem*, 103 Mass., 141; *Chaffer v. Granger*, 6 Mich., 51; *Miller v. Grundy*, 13 Mich., 540; *Croft v. Jackson County*, 5 Kansas, 518; *Bridge Co. v. Commissioners*, 10 Kansas, 526.)

The high character of these courts for ability and learning, as well as the elaborate examination of the question which their opinions disclose, entitle these decisions to great consideration. But the array of authority holding the opposite view is inferior neither in point of numbers or respectability. In addition to numerous cases to which our attention has been directed, where tax-payers have been permitted by the courts to maintain such suits without any question having been raised as to their capacity to sue in that character, and which cannot be said to possess no

weight on a question like the one we are considering, we may cite the following cases where the doctrine that the tax-payer has the right to bring such suits is either expressly decided or mentioned with approval: *Rice v. Smith, County Judge*, 9 Iowa, 570; *Cornell College v. Iowa County*, 32 Iowa, 520; *Colton et al. v. Houchett et al.*, 13 Ill., 615; *Drake et al. v. Phillips et al.*, 40 Id., 388; *Harney v. The I. C. and D. R. R. Co. and others*, 32 Ind., 244; *Webster v. Town of Harwinton*, 32 Conn., 131; *Terrett v. Town of Sharon*, 34 Id., 105; *Merrill v. Plainfield*, 45 N. H., 126; *Page v. Allen*, 58 Pa. St., 338; *Wheeler v. Philadelphia*, 77 Id., 338; *West v. Ballard and others*, 32 Wis., 168; *Baltimore v. Gill*, 31 Md., 375; *Newmeyer et al. v. Mo. and Miss. R. R. Co.*, 52 Mo.; *Blening v. The City of Galveston*, 42 Tex., 641; *Packard v. Commissioners*, 2 Col., 388; *Crampton v. Zabriskie*, 11 Otto, 601. Mr. Dillon, in his popular work on municipal corporations, adopts this view, and asserts that "it is the prevailing doctrine on this subject," sec. 731.

In commenting upon the effect and consequences of the opposite course of the New York decisions, up to and including that of *The People v. Ingersoll, supra*, Mr. Burroughs, in his treatise on taxation, sums up as follows: "The effect of these decisions in New York was to leave the inhabitants of a municipal corporation without remedy, where its officers made a fraudulent disposition of its revenues, and caused the legislature to pass an act 'for the protection of tax-payers against the frauds, embezzlements and wrongful acts of public officers or agents,' allowing any person residing in the town assessed for, and liable to pay taxes therein, or who had paid taxes therein within one year previous to the commencement of the action, to maintain an action against such officers. This statute enforces in

New York, what was the general doctrine on the subject in most of the states—that one or more tax-payers might file a bill to restrain the officers of a county, or other subdivision of a state, from levying a tax not authorized by law, and from making any illegal disposition of the revenues of the municipal corporation, and that their interests as citizens and tax-payers were sufficient to entitle them to maintain a suit." (Burroughs on Taxation, 448.)

An examination of these authorities in detail would be tedious and probably useless. In no case which we have had the good fortune to discover, have we found the grounds upon which the jurisdiction of equity in the premises has been affirmed or denied, very fully discussed. Those authorities which are opposed to the existence of any such right on the part of the tax-payer, proceed on the principle already stated, viz.: that he has no individual interest in the public funds or property, and consequently can suffer no special or peculiar injury from the wrongful acts of public officers in relation thereto. Those holding the contrary doctrine are founded on the proposition that a wrongful and illegal disposal of public funds or property by those who have been entrusted with their care and preservation for public purposes, will necessarily lead to increased rates of taxation to restore the loss, and thereby become the efficient cause of special and peculiar damage to the tax-payer, against which the law is powerless to afford him an adequate remedy.

That the fraudulent or illegal diversion of the funds and property of a municipal corporation from the legitimate public purposes to which they should be applied, would result practically in special and peculiar injury to the tax-payer, whose property must contribute an additional amount to supply the loss occasioned by such diversion, cannot be

gainsaid. His interest in the matter is real and substantial.

But it is contended that he has no such technical interest as can be recognized, either in law or in equity. It seems clear enough that he can have no remedy at law. If the funds and property so diverted are lost to the municipal government, and future assessments are thereby necessarily increased, he cannot, on this ground, impeach them, or resist the imposition of the additional burden. The amount needed for the purposes of municipal government must be supplied. The losses occasioned by the negligence or corruption of municipal officers work no reduction in the amount of the necessary tax; nor has the tax-payer any such legal title in the public funds or property so diverted, as will enable him to recover his proportion from those into whose hands such funds or property have passed. (*People v. Ingersoll*, 58 N. Y., 32.) In equity only can he protect himself, if at all. And we think his case falls within the general principles in accordance with which courts of equity administer justice and afford protection to individual rights. The tax-payer may have no legal right, but he certainly has an equitable one, as against those who, through fraud and collusion with municipal officers, have obtained the possession of the public funds and property, which ought by every consideration of equity and justice to be applied to the lawful purposes of municipal government, in reduction of the amount of future contributions from him, in the form of taxes, to supply those same purposes. It seems to be true that the precedents for suits of this nature are of modern origin. But the novelty consists only in the application to a new class of cases, developed in great numbers, as our court reports attest, under the operation of our peculiar system, with its almost countless subdivisions, into municipal departments, of an ancient time and fundamental

principle of equity jurisprudence. The tax-payer has an equity which entitles him to claim, through a court of equity, that he shall not be subjected to the payment of additional sums as taxes on account of the fraudulent and illegal disposal of the public funds and property by public officers, under cover of official action, so long as such funds and property can be reached by their process and restored to the proper custody. The tax-payer does not, in such proceedings, represent the public. He could not do so without authority conferred by statute. Nor does it seem to us that he can be held to represent the whole body of tax-payers, or any interest save his own. (*Du Page County v. Jenks et al.*, 65 Ill., 275.)

Any advantage which may result to the public, or other tax-payers, not parties to the suit, must, in our view, be deemed accidental, and not adding to the merits of his cause. That the municipal corporation could itself maintain a suit for the same purpose, we think unquestionable, but this right is not in conflict with the right of the tax-payer to do the same. (Dillon on Municipal Corporations, sec. 736.) Their rights in the premises rest on different grounds. What has already been said as to the nature of the right which enables the tax-payer to bring a suit like this, and the character in which he sues, virtually settles the second point against the appellants. The respondents do not represent the county or sue in its behalf. They can obtain all the relief they are entitled to, and all they have received by a decree against the parties already before the court. Besides the propriety of making the county a party when the suit was against the members of the county court, yet in office, and who, under the law must have appeared for and represented its interests, was at least doubtful, and we think

it was not necessary. The decree of the court below is affirmed.

Decree affirmed.

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*CITY OF CORVALLIS v. CARLILE.

MUNICIPAL CORPORATIONS—POWERS STRICTLY CONSTRUED.—In construing the powers given to a municipal corporation by its charter, regard being had for the ends to be accomplished, the courts have inclined to adopt a strict rather than a liberal construction of such powers, thus applying substantially the same rule that is applied to charters of private incorporations.

IDEM.—Municipal corporations can exercise no powers but such as are expressly conferred upon them by the act of incorporation, or are necessary to carry into effect the powers thus conferred, or are essential to the manifest objects and purposes of the corporation.

IDEM.—Power to pass ordinances "to secure the peace of the city" does not include the power to pass ordinances upon subjects which do not affect, or tend to disturb, in a legal sense, the public peace. Offenses against public policy are not offenses against the public peace.

APPEAL from Benton County. The facts are stated in the opinion.

John Kelsay and John Burnett, for appellant:

Contend that municipal corporations have no power except those expressly given, or which are necessary to the exercise of expressly conferred powers. (*City of Oakland v. Carpenter*, 13 Cal., 540; *Robertson v. Groves*, 4 Oregon, 210; Kent's Com., 360 and note; Cooley on Const. Lim., 193-4, and note.) The authority to provide for the health and peace of the city does not include good order or trade, as all charters do relied upon by respondent. (Charter of Corvallis, sec. 6, p. 5; Dillon on Municipal Corporations, sec. 330; 9 Ohio St. R., 439.)

M. S. Woodcock and J. R. Bryson, for respondent:

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*See 45 Am. Rep. 134.

The ordinance in question is not inconsistent with the laws of the state. (Code, p. 437, sec. 668.) Every municipality has the power incidental to all corporations, to enact all by-laws necessary for its government, and essential to the purposes and objects of its corporate existence. (Dillon on Municipal Corporations, secs. 250 and 253; *Kyle v. Malin*, 8 Ind., 34; American Corporation Cases, 288; *McCallis v. Mayor of Chattanooga*, 3 Head. (Tenn.) 317; *State v. Ferguson*, 33 N. H., 424.)

By the Court, LORD, C. J.:

The appellant was convicted in the recorder's court of the city of Corvallis, and sentenced to pay a fine, for keeping open his store in violation of a city ordinance, entitled "An ordinance to provide for the closing of stores, shops and places of business on Sunday." The important and really the only question which we are required to decide is, "Did the city council have the power, under their charter, to provide by ordinance against stores and shops being kept open on the first day of the week, commonly called Sunday, for the purpose of labor and traffic?"

A municipal corporation, says Mr. Justice Bradley, is a subordinate branch of the domestic government of the state. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, instituted for the purpose of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. (*The Mayor v. Ray*, 19 Wallace, 475.)

But in construing the powers given to a municipal cor-

poration by its charter, regard being had for the ends to be accomplished, the courts have inclined to adopt a strict rather than a liberal construction of such powers, thus applying substantially the same rule that is applied to charters of private incorporations. (Cooley on Constitutional Limitations, 195, and note.) They can exercise no powers but such as are expressly conferred upon them by the act by which they are incorporated, or are necessary to carry into effect the powers thus conferred, or are essential to the manifest objects and purposes of the corporation. The rule is well expressed by Mr. Justice Nelson in the case of *Minturn v. Laure*, 23 How., 430, in the following language: "It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. The principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities." (Dillon on Municipal Corporations, sec. 55, and notes.)

The proper determination of the question above suggested cannot be reached without an application of these principles of construction to the chartered powers of the respondent. At the outset it is conceded that the power to pass the ordinance in question is not conferred in direct terms upon the common council by the act of incorporation, but it is claimed that such power may be fairly implied from the authority conferred on the common council "to make by-laws and ordinances not inconsistent with the laws of the United States or of this state, to carry into effect the provisions of

this charter and secure the health, *peace* and improvement of the city." (Section 6, Charter of Corvallis.) An ordinance prohibiting stores and shops to be kept open on Sunday is one of the regulations, and to restrict the operation of the above clause of section 6, to the objects specified in other provisions of the same section or charter, would be fatal to the power to pass such ordinance. (*City Council of Montgomery v. Montgomery Plank Road Co.*, 31 Ala., 82; *Mount Pleasant v. Breeze*, 11 Iowa, 399; *St. Louis v. Laughlin*, 49 Mo., 599; *City of Keokuk v. Scroggs*, 42 Iowa, 451.)

The power conferred on the common council to regulate "taverns, ordinaries, bar-rooms and tippling houses," being all the houses, or places of business enumerated in that section, or referred to in the charter, cannot be considered to include the power to regulate stores and shops. We are not disposed to give this limited effect to the operation of this clause, but to include in the authority to pass ordinances to secure the "peace" of the city, such power as the word peace fairly imports, when applied to the ends to be accomplished by the corporation. The word peace, in its legal signification, means "quiet, orderly behavior of individuals to another," (Abbott's Dict., "Peace,") and "toward the government, which is said to be broken by acts of a certain kind," (Burrill's Dict., "Peace.") Any riotous, forcible or unlawful conduct or proceeding is a breach of the peace. Offenses against the public peace include all acts affecting the public tranquility, such as assaults and batteries, riots, routs and unlawful assemblies, forcible entry and detainer, &c. (4 Blk. Com., 142, *et seq.;* Stephen's Criminal Law, 78.)

Of course it is not supposed that the power conferred on the common council to pass ordinances to secure the peace

of the city extends to all acts or proceedings which might be included under offenses against the public peace. Such a construction would extend their power to every department of the criminal law affecting the public peace, which is not pretended, nor claimed. Our purpose is simply to show what the word *peace* imports in the legal sense, and the nature and quality of the acts or proceedings which disturb the peace of communities or governments, and render legislation essential and necessary to secure the public tranquility. These are acts or proceedings which are always disorderly in their quality and character, often violent, and sometimes dangerous "to life, limb and property," and the effect of which is to disturb the repose and break the peace of society. And within the scope of its authority, and to effect the governmental objects and purposes of its creation, the respondent, as a local government existing for the benefit of the people within its corporate limits, is authorized by its charter to enact such ordinances as shall secure the peace of the city, and to punish the peace-breakers "by fine not to exceed $100, and by imprisonment not more than 20 days." But can it be said that the keeping open of a store or shop on Sunday, and the selling of wares and merchandise, are acts of a disorderly character, or in any sense within the purview of such acts as tend to disturb the public peace? There can be no breach of the peace without a disturbance, acts disorderly or violent in their nature, and the day on which such acts are committed will not alter the nature or quality of such acts in the eye of the law. The keeping open of a store or shop on Sunday, for the purpose of labor or traffic, is not an offense against the public peace, but an offense against public policy, punishable under the laws of this state. (Code, sec. 668, p. 437.)

The power then, conferred on the common council to

pass ordinances to punish offenses against the peace of the city does not include the power to pass ordinances to punish offenses of another and different character, and which do not tend to disturb the public peace. Power to pass ordinances to secure the peace of the city does not authorize an ordinance to prohibit the keeping open of stores and shops on Sunday; nor are the words used in this clause of the charter susceptible of any legal construction from which such power may be inferred. Nor are any of the cases referred to by counsel in contravention of the principle of construction which we have applied to the clause under consideration. All of them contain words in their charters specially conferring power to do the acts or things in question, or the power is plainly and legally deducible from the words used as applicable to the ends and objects to be accomplished by the act of incorporation.

As an illustration, in the case of *St. Louis v. Cafferty*, 24 Mo., 94, the terms used in the charter which the court held authorized the ordinance prohibiting the keeping open of stores and shops on Sunday, were "to maintain the peace, good government and order of the city, and the trade, commerce and manufactures thereof." The difference in the power conferred by this clause and the one under consideration is too manifest to require comment. And an examination of the cases cited by counsel, show that the terms used in the charters in respect to which the controversy had arisen, were fuller and broader and included the authority to exercise the power. (*Jones and Co. v. City of Richmond*, 18 Gratt., 523; *State v. Freeman*, 38 N. H., 426; Dillon on Municipal Corporations, sec. 330, and notes.)

In respect to the moral considerations which should influence and enforce the observance of Sunday, we have nothing to do, further than to declare what the law is, not what

it *should be.* That belongs to another department of government, which, so far as the state is concerned, has provided a law prohibiting the keeping open of any store, shop, &c., for purposes of labor or traffic on Sunday. (Criminal Code, p. 437.) From these views, it follows that the council is not invested with the power to pass the ordinance in question, and the judgment must be reversed.

Judgment reversed.

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*STATE v. POWERS.

INCOMPETENCY OF JUROR, DISCOVERED AFTER CONVICTION.—The prisoner's counsel discovered, after conviction in a capital case, that one of the jurors, some years before, had been convicted of a crime involving moral turpitude; *Held,* no ground for a new trial.

APPEAL from Multnomah County. The case is stated in the opinion.

Bellinger & Gearin, for appellant.

John F. Caples and M. F. Mulkey, for respondent.

By the Court, WALDO, J.:

The appellant was indicted by the grand jury of Multnomah county, for the murder of Benjamin Cornelius, in the city of Portland on the evening of the fourth of July, 1881. He was tried and found guilty of murder in the first degree, and sentenced to death. A motion for a new trial was overruled, which is the error chiefly relied upon here. The only error alleged to have occurred at the trial, that calls for consideration, was the ruling out of the declarations of the appellant to the witness Imbrie of the purpose of his, the prisoner's, visit to Morrison street wharf on the morning of the day of the homicide. The prosecution proved by

*See 45 Am. Rep. 138.

Miss Tilly Cornelius that the prisoner said to her, in connection with other declarations, some time in October, 1880, that on the fourth day of next July he would give her a chance to go to the funeral of some one else; and in May, 1881, he told Oliver Hinman that on the fourth day of next July, he, the prisoner, would have a new lease of life.

In *Benedict v. The State*, 14 Wis., 425, Dixon, C. J., says: "Experience demonstrates that the minds of many persons are so constituted that when intent upon the commission of a crime, secrecy becomes impossible, and they cannot refrain from giving vent to feelings of revenge or malicious satisfaction at the anticipated occurrence, and that they often utter threats and make mysterious and blind allusions to their objects and purposes, or boast of what they will do." The prosecution offered these declarations "as a dark hint thrown from a mind that already felt the shadow of the coming tragedy." The defense construed this testimony as evidence tending to show that the prisoner designed to kill Cornelius on that day, and offered to prove that on the morning of the fourth of July, 1881, the prisoner went to the foot of Morrison street with the intention of leaving the city by boat for St. Helens. The court allowed the visit to the wharf to be proved by the witness Imbrie, but ruled out what the prisoner said to the witness, on their way from the wharf, of the object of his visit to the wharf. This ruling was correct, conceding that the declaration would have been admissible had they been made at the wharf.

But the relevancy of the testimony of Tilly Cornelius and Oliver Hinman lies in its tendency to show a murderous purpose, generally, against the deceased. Had the killing taken place on any other day than the 4th, these declarations would still have been admissible, like the declaration of the

prisoner to Tilly, in September, 1880, that he would kill her father that night. Neither the fact of the declarations, nor the malice they are supposed to imply, is controverted by the evidence offered for the defense. The point, as argued on the part of the prisoner, is to show that the prisoner did not intend to kill Cornelius on that day—not that there had been a change of intention, generally, or any abatement of malice. There is some doubt of the revelancy of the transaction of the visit to the wharf in any view. (*Hunt v. Roglance*, 11 Cush., 117; *Blight v. Ashley*, Pet. C. C., 20; *Jones v. The State*, 18 Tex., 176.)

The newly discovered evidence set out in the affidavits of Hawks, Hare, and Courtney Meek, affords no ground for a new trial. Hawks is a resident of San Francisco, and without the jurisdiction of the court. Hare's reputation for truth has been impeached by counter affidavits, and Courtney Meek was a witness at the trial. No good reason is given why he did not then testify to the matter now found in his affidavit.

After the verdict was rendered, the prisoner discovered that one of the petit jurors, R. A. Sutherland, had been convicted of a crime involving moral turpitude, and therefore was not qualified to sit in the case. The disqualification of this juror was greatly and chiefly relied on to reverse the judgment of the circuit court. Cases from Wisconsin, Michigan, Illinois, Vermont, *State v. Babcock*, 1 Conn., 401, and *Cancerni v. The People*, 18 N. Y., 134, were cited for the appellant. *Schumaker v. The State*, 5 Wis., 324, was where, after a conviction for manslaughter, a motion for a new trial was made on account of the alienage of one of the jurors, not discovered until after verdict. The motion was granted with some hesitation, and without much examination of authorities. The doctrine laid down is that found

in *Guykowski v. The People*, 1 Scam.; *State v. Babcock*, 1 Conn., and cases from Vermont. These authorities are adversely commented on by Gray, C. J., in *Wasum v. Feeney*, 121 Mass., 117.

In *State v. Vogel*, 22 Wis.,—a case of arson—there is a dictum, unsupported, that in capital cases the prisoner is not held to waive anything. *Cancerni v. The People* was cited in the argument of counsel. *Hill v. The People*, 16 Michigan, 351, was a capital case, in which the verdict was set aside and a new trial granted, because one of the jurors was an alien, and this fact was unknown to the defendant or his counsel, until after the rendition of the verdict. The question in fact discussed in this case was whether the defendant in a criminal prosecution could consent to a trial, and by such consent bind himself to abide by the verdict of a jury of eleven men.

It was held in *Cancerni v. The People*, 18 N. Y., 128, that a verdict by such a jury was a nullity. In *State v. Kaufman*, 51 Iowa, the same question came up, and was decided the other way. The objection appeared on the face of the record. But in *Hill v. The People* the court heard parol proof to contradict what the record probably showed, as it shows in this case, that the jury were all good and lawful men. Now, after a record has been made up in a suit *inter partes* it is a principle of the common law that no plea shall be afterward admitted to impugn the verity of the record, and there may be ground for holding that the principle applies to the case where a defendant fails to take exception to an objectionable juror, and the case goes to verdict. (See *Boyington v. The State*, 2 Port., 100; *Hall v. The State*, 4 Gr., (Iowa), 73.)

But we may confidently rest the case on authority. In *Hollingsworth v. Duane*, C. C., 152, it is said to be against

the policy of the law to allow such an objection to be taken after verdict. "I should have as soon expected to have heard an argument to prove that the verdict ought to have been set aside because the plaintiff was an alien enemy, or labored under some other disqualification, which ought to have been pleaded in abatement, as to hear it maintained that it was competent, after verdict, to inquire whether a juror was an alien, an infant or a servant; of affinity to the party; interested; infamous; favorable. Upon the record no exception appears." (Id., 153.) This was a civil case, but the same principle governs in criminal cases. (*Gillespie v. The State*, 8 Yerg., 509.)

In Wassum v. Feeney, 121 Mass., 94, one of the jurors who tried the case was but nineteen years of age. Upon a motion to set aside the verdict on this ground, Gray, C. J., says: "When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relationship, (*Jeffries v. Randall*, 14 Mass., 205; *Woodward v. Dean*, 113 Mass., 297,) but, even in a capital case, to a juror who was not of the county or vicinage, as required by the constitution. (Declaration of Rights, art. 13, Anon., cited by Jackson, J., in 1 Pick., 41, 42.)

The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after verdict. (*Hollingsworth v. Duane*, 4 Dall., 353, S. C., Wall. C. C., 147; *State v. Quarrel*, 2 Bay., 150; *Presbury v. Commonwealth*, 9 Dana, 203; *The King v. Sutton*, 8 B. & C., 417; *S. C. nom., The King v. Despard*, 2 Man. & Ry., 406.) In the case of the *Chelsea Water Works Co.*, 10 Exch., 731, Baron Parke said: "In the case of a trial by a jury *de medietate linguae*, which by

the 47th section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them."

In *United States v. Baker*, 3 Benedict, 68, a motion was made to set aside the verdict in a criminal case, because after verdict it was found that one of the jurors was deaf. In denying the motion, Blatchford, J., said: "On principle, as well as on authority, nothing that is a cause of challenge to a juror before verdict, can be used to set aside a verdict, as for a mistake, even though the cause of challenge was unknown to the party, when the jury were sworn."

McClure v. The State, 1 Yerg., 206, 218, was a capital case, in which it was discovered, after verdict, that one of the jurors who found the verdict was an atheist. This was an objection to the moral capacity of the juror. Mr. Justice Catron, afterward of the supreme court of the United States, while of opinion that this was not a ground for challenge under the laws of Tennessee, went on to say: "The objection comes too late. If a juror is not a good and lawful man, can he be challenged after he is sworn? The ancient and well settled English authorities are, that you can not challenge a juror after he has been sworn, unless it be for cause arising afterwards. We adopted the right of trial by jury as we found it at the time we declared our independence in 1776; the English common law and the statutes passed before the 4th Jac. 1, we adopted. By these statutes and by the common law, we are now bound in the administration of justice in this state.

"If the rules of decision were well settled, and we are bound by them, why look into doubtful decisions of sister states. Nothing has been better settled for centuries in

England, than that after a juror is once sworn, he cannot be challenged for any pre-existing cause. 1 Inst., 158 a: 3 Vin. Abr. E., 11, p. 764; Yelverton Rep., 240; 2 Hawk Chapter 43, premises it to be a settled point of practice 'that no juror can be challenged, either by the king or prisoner, without consent, after he has been sworn, unless it be for some cause which happened since he was sworn.' It would be most dangerous to pursue a different practice. It is admitted that if the defendant had knowledge of the objection before the juror was sworn, then he could not after be permitted to take advantage of it. Of this want of knowledge what evidence has the court? The affidavit of a convicted felon—proof always to be had, when deemed necessary. It is said the want of knowledge is an exception to the general rule. This is a mistake. The case of Watson in Yelverton was this very case, where the exception was discovered after the jury was sworn, and the court declared it within the general rule."

In *State v. Greenwood*, Hayward (N. C.), 141, Hayward, J., in an *obiter dictum*, said: "Were a defendant allowed to take his challenge to the jurors after the trial, he never would do it before, but would always rather depend upon moving it to the court after the trial—for if he should be acquitted he would say nothing about the disqualification of the juror, and if convicted, he could avoid judgment by offering his objection. This in fact would be placing him in a situation totally exempt from danger and from punishment, so long as he could get a juror sworn against whom he could offer any legal objection, and would give him the additional advantage of several chances for his acquittal."

State v. Davis, 80 N. C., 412, was a conviction for burglary, and a motion for a new trial because the defendants had discovered since the verdict that one of the jurors was

an atheist. The court say: "Their objection to the juror comes too late. It is well settled by English authorities, sanctioned by the uniform practice of centuries, and by numerous decisions in this state, that no juror can be challenged by the defendant, without consent, after he has been sworn, unless it be for some cause which has happened since he was sworn. The challenge *propter defectum* should be made as the juror is brought to the book to be sworn. If not then made the defendant waives his challenge. * * * And in conformity with this rule of practice is the ancient formula used by clerks, both in England and in this country, in their address to prisoners before the jurors are drawn—"those men that you shall have called and personally appear are to pass between our sovereign (or the state) and you upon your trial of life and death; if, therefore, you will challenge them or any of them, your time is to speak to them as they come to the book to be sworn, and before they are sworn.

George v. The State, 39 Miss., 570, 590, was a capital case in which it was found after verdict that one of the jurors was an alien. A motion for a new trial for this cause was denied. (*State v. Quarrel*, 2 Bay, 150, [2 Am. Dec., 637,] *State v. Fisher*, 2 Nott & McCord, 261, and *Hollingsworth v. Duane*, 4 Dall., 353, are cited.) It follows that though what the court said in *State v. McDonald*, 8 Or., 118, may have been a *dictum*, as claimed by defendant's counsel, it is, nevertheless, good law.

The last point to be considered is the objection to the sufficiency of the evidence to support the verdict. In *State v. Wilson*, 6 Or., 428, the court seem hardly to have considered this a ground of error on appeal. It is not necessary, however, to express any opinion on this point, since it must be admitted that the jury were the sole judges of the

weight of evidence, and that there is testimony to support the verdict, which it is clear, therefore, we cannot review. (*State v. Music*, 71 Mo., 401; *State v. Cook*, 58 Mo., 548; *Miller v. Petrie*, 40 Mich., 657; *Dickerson v. The State*, 48 Wis., 288.) The judgment must be affirmed.

Judgment affirmed.

HILL v. COOPER.

EVIDENCE—RENTS AND PROFITS.—It is competent to show the amount of rents and profits received in a suit therefor, by proving the use and occupation of the premises by the party sought to be charged, and the fair annual value of the same.

APPEAL from Douglas County.

Herman & Ball, for appellant.

William R. Willis, for respondent.

By the Court, WATSON, J.:

The appellant brought this suit to recover the sum of $1,500, which he claimed the respondent had received as rents and profits from a certain tract of land in Douglas county, from June 3, 1873, to February 16, 1878, while he held the equitable title, but respondent had the legal title and actual possession. The appellant obtained a decree for $400 and costs. Both parties have appealed. We deem the appellant's right to recover in this suit, whatever amount the evidence shows the respondent to have received as rents and profits during the period mentioned, as settled by the opinion of this court in *Hill v. Cooper*, (the same parties) 8 Or., 254.

And we are satisfied further, that evidence of occupation and use by respondent of the premises in controversy, to-

gether with evidence of the annual rental value thereof, was competent upon the question as to the amount of rents and profits received by him. If the respondent received the benefits from such use and occupation directly, he is as properly chargeable with their value as he would be for rents received or crops harvested therefrom. And the annual rental value is *prima facie*, at least, the value of such benefits. (3 Phillips on Ev., 623; 1 Sedgwick on Damages, (7 Ed.) 251; 15 Wall., 625.) We do not deem it necessary to enter into any particular discussion of the evidence. We are satisfied that it warrants the decree. The amount may not be entirely accurate, but perfect accuracy would be impossible upon the state of the evidence in the case; the decree is, however, in substantial accordance with our own deductions from the evidence, and we are satisfied to affirm it. And as both parties have appealed, we think neither should be allowed costs.

Decree affirmed.

READ v. BENTON COUNTY.

APPEAL—COPY OF NOTICE MAY BE WAIVED.—On an appeal from the county to the circuit court, in a proceeding in which the county was defendant, the following admission, indorsed on the notice of appeal, was offered to prove service of the notice:

"STATE OF OREGON, } ss.
BENTON COUNTY. }

I, B. W. Wilson, do hereby accept service of the within notice of appeal in Benton county, Oregon, this 13th day of October, 1881, and waive copy and all irregularities and informalities of said service.

"B. W. WILSON, County Clerk."

Held, That the county as a body corporate to sue and be sued, had a right to admit service of a copy of the notice of appeal, and that the clerk was the proper officer through whom to make such service.

APPEAL from Benton County.

Chenoweth & Johnson, for appellant.

Kelsay & Burnett, for respondent.

By the Court, WALDO, J.:

Section 517 of the code of civil procedure enacts that the proof of the service of a notice of appeal shall be the same as the proof of the service of a summons. Service of a summons may be proved by the written admission of the defendant. The question in this case is the sufficiency of the following written admission of the county clerk of Benton county, indorsed on the notice of appeal:

"STATE OF OREGON, }
COUNTY OF BENTON. } ss.

I, B. W. Wilson, do hereby accept service of the within notice of appeal in Benton county, Oregon, this 13th day of October, 1881, and waive copy and all irregularities and informalities of said service.

B. W. WILSON, County Clerk."

Where a court has jurisdiction of the subject matter of the action, consent, evidenced by the voluntary appearance of the defendant, may give jurisdiction of his person. (*McConnell v. The Pennsylvania C. R. R. Co.*, 49 N. Y., 303-309.) So, it would seem, when a summons has been issued, it is equivalent to the service of the writ, when the defendant voluntarily acknowledges service.

In *Story v. Weare*, 35 Miss., 399, the following return of the service of a summons was held good: "I told him I had a writ for him in the within named case, and offered him a true copy thereof, which he refused to receive. I then commenced reading the within to him, and he refused to hear it, and left me. H. T. R., sheriff." Here, the refusal to receive the copy or to hear the writ read, was held the equivalent of a copy and reading.

So in *Rowan v. Wallace*, 7 Porter, 171, the court say: "The object of the statute in directing the sheriff to furnish the defendant with a copy of the writ, was doubtless to advise him of the complaint to which he was required to answer, and being intended for his benefit only, it was surely competent for him to dispense with it." See also, *Gregory v. Harmon*, 10 Iowa, 445; *Johnson v. Monell*, 13 Iowa, 302; *Donlevy v. Cooper*, 2 Nott & McCord, 550; *Cady v. Tilly*, 4 Col., 342; *Marling v. Brobrecht*, 13 W. Va., 463; *Castell v. Hiday*, 13 Ind., 536.)

An acknowledgment of service outside the state, like an actual service, of which such acknowledgment is the equivalent, has no validity. (*Scott v. Noble*, 72 Penn. St., 115.) Whether an admission of knowledge of the pendency of the action and a waiver of the publication of summons, outside of the state, made after an order of publication of summons, would be the equivalent of the publication, is hardly decided by the last mentioned case, or that of *Wetherbee v. Wetherbee*, 20 Wis., 499. But in *McCormack v. The First National Bank of Greenburg*, 53 Ind., 466, it was held that an indorsement made on a complaint in vacation: "We hereby enter an appearance to the foregoing action, and waive the issuing and service of process," did not confer jurisdiction of the person. The case was reasoned principally on the ground of the insufficiency of the indorsement to constitute an appearance. What the distinction is, if any, in principle, on the other point, between this case and that of *Castell v. Hiday*, 13 Ind., 536, where it was held that a party might waive the reading of a summons, equivalent to the waiver of a copy with us, it is not necessary to consider, as the latter case, which involves the point now before us, rests firmly on reason and authority.

There would seem no ground for making a distinction

between the waiver of a copy by a county and by a natural person. The county is a body politic and corporate to sue and be sued. (Gen. Laws, 535.) An acknowledgment of service may include a waiver of the steps requisite to constitute a personal statutory service. (*Rowan v. Wallace*, 7 Porter, 171; *Tolman v. Barnes*, 12 Wen., 227.) An admission of service is a mode of proof of service recognized by the statute. The county clerk for the purpose of service is the representative of the county. "Any one (of legal capacity) on whom service may be executed may acknowledge that he has been served." (*Talladega Ins. Co. v. Woodward*, 44 Ala., 287.) See also *County of Randolph v. Post*, 93 U. S., 502; *Shepherd v. Gas Light Co.*, 11 Wis., 234; *Northrup v. Insurance Co.*, 47 Mo., 435. The judgment of the court below must be reversed.

Judgment reversed.

JACKSON v. NEW IDRIAN C. M. CO.

PLEADING—ADMISSION.—A decree, founded upon a claim to the extent admitted by the pleadings, is good.

APPEAL from Douglas County.

Northrup & Gilbert, for appellant.

J. J. Walton, for respondent.

By the Court, LORD, C. J.:

This was a suit to foreclose a mechanic's lien for labor and services performed by the plaintiff at the request of the defendant. As we are satisfied nothing should be allowed in this case outside of what is admitted by the answer, it becomes unnecessary to examine several other questions which were submitted at the argument. It is conceded

that the plaintiff performed labor and services in the construction and erection of the furnace as alleged, to the amount of $600, and that, including this last amount, the full amount for services rendered was $1,040, and that the defendant had paid the plaintiff, at two separate times, before the commencement of the suit, the sums of $387.49 and $236. As no application was made of these payments, the court below applied them, first to the extinguishment of that portion of the claim unsecured, and the remainder upon that amount conceded by the answer to be lien. Nor is this assigned as error or the subject of objection. The result is that the sum thus produced, with interest, is the amount adjudged by the decree of the court below, which must be affirmed.

Decree affirmed.

BROWN AND CO. *v.* RATHBURN, ET AL.

RELINQUISHMENT OF COLLATERAL SECURITY EXONERATES SURETY.—The voluntary relinquishment by a creditor of collateral security of equal or greater value than the amount of his debt, will exonerate a mere accommodation surety from liability upon a promissory note executed by himself and the principal debtors in favor of the creditor as additional security for the payment of such debt.

IDEM.—Such defense is available to the surety in an action at law upon the note by the creditor, or his assignee, with notice of the facts.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman & Ball, for appellants.

William R. Willis, for respondents.

By the Court, WATSON, J.:

The appellants, as assignees of Ica F. Rice, brought this action against the respondents to recover the amount of a

certain promissory note, executed by the respondents in favor of Rice, in the following form:

"OAKLAND, OREGON, September 25, 1878.

"Two years after date, without grace, we, or either of us, promise to pay to Ica F. Rice, the sum of six hundred dollars, in United States gold coin, value received.

S. V. R. RATHBURN,
THOMAS HANNA,
C. B. HANNA."

The respondents filed a joint answer denying the assignment, and alleging, as a separate defense, the lease of a farm and some live stock by Rice to Rathburn and Thomas Hanna, at a rent of $600, upon the condition that Rice should have and hold possession of all the wool and farm products until the rent should be fully paid. That the note sued on was given as additional security, and that C. B. Hanna signed the same as surety merely, without consideration to himself, and in view of and relying upon the provisions in said lease concerning the security therein stipulated for, and not otherwise. That afterwards, on September 3, 1880, Rice having in his possession, at said farm, under the provisions of the lease, 1600 or more bushels of wheat, which had been produced on the farm during the continuance of the lease, joined with Rathburn and Thomas Hanna in selling and delivering all said wheat to the appellants at the agreed price of 62½ cents per bushel, in consideration of the payment of said note by them, and the payment of the balance of the agreed price of said wheat to Rathburn and Thomas Hanna, and that Rice took and received said wheat in full payment of the note and rent, and sold and delivered the same to appellants as aforesaid. That appellants afterwards took said note will full knowledge and understanding of all the foregoing facts.

Appellants filed a general demurrer, which was overruled. They then replied, taking issue with the new matter alleged in the answer. By consent of parties, the issues of fact were submitted to the court upon the pleadings and testimony; and its findings of fact and conclusions of law were afterwards duly reduced to writing and filed pursuant to the statute. The court found the facts substantially as alleged in the separate defense in the respondents' answer, except in relation to Rice's possession and the sale of the wheat to appellants. As to these matters, it found that the amount of wheat sold was 1552 bushels at 62½ cents per bushel. That when appellants were negotiating for the wheat, Rice was present as well as Rathburn and Thomas Hanna; but C. B. Hanna was not, and had no knowledge of the transaction. Rice claimed that he had the right to prevent the sale or removal of the wheat until said note should be paid, and forbid its sale or removal until payment of the note should be made. The appellants then agreed with Rice that they would satisfy the note whenever Rice withdrew his objections and permitted the sale to proceed. Sometime after this the appellants paid Rice $600 and took an assignment of the note.

By the terms of the written agreement executed by Rathburn and Thomas Hanna at the time of the sale, no part of the proceeds was to be applied to the payment of the note in dispute. The court below rendered judgment for all the respondents for their costs. Appellants, being dissatisfied with this decree, appealed, assigning as error the overruling of their demurrer and the rendition of the judgment against them on the facts found by the court. The decision on the demurrer was correct beyond all question. The facts stated in the separate defense in the answer, if true, exonerated all the respondents from liability on the note in the appellants'

hands. They showed that it had been fully paid and satisfied before it came into the possession of the appellants, and besides being non-negotiable the appellants had actual knowledge of the facts constituting such payment at the time they affected to purchase it and take the assignment. But the findings of fact upon which the judgment was rendered do not support all the allegations in the separate defense. They do not show a payment of the note as therein set forth. They do not establish any defense to the action in favor of Rathburn and Thomas Hanna, and the judgment as to them is clearly erroneous, but they do make out a complete defense for C. B. Hanna, the surety. (Brandt on Suretyship and Guaranty, secs. 17, 384 and 386; *Rogers v. School Trustees*, 46 Ill., 428; *Hubbard v. Gusney*, 64 N. Y., 457.) The findings in this case show that Rice, the payee in the note sued upon, while the same was still in his possession, voluntarily relinquished his right to the possession of valuable property belonging to the principal debtors, which he was entitled to hold under the terms of his lease as security until the note should be paid.

Such property was more than sufficient to satisfy the note, and his recourse to it to obtain payment of the note was lost through his own act alone. The surety thereby became exonerated from any further liability upon the note in his hands, and the appellants as his assignees, with notice, occupied no better position. It is undoubtedly true that the surety should have answered separately if he intended to avail himself of matters which would amount to a defense for himself alone. But no objection upon this ground appears to have been made in the court below when it could and doubtless would have been obviated by an amendment, and it cannot be successfully urged here.

Appellants do not claim to have been misled as to the

real defense which C. B. Hanna, as surety, intended to set up in the answer, and did in fact establish by his proof. And it was not error therefore for the circuit court to find the facts and render the judgment accordingly, without directing an amendment. But as the judgment of the circuit court was in favor of the principal debtors, Rathburn and Thomas Hanna, it was so far erroneous, and must, to that extent, be reversed and modified and a judgment entered against them for the amount due on the note with costs. As to C. B. Hanna, the judgment is affirmed without costs.

OREGONIAN RAILWAY CO. v. WRIGHT.

PRACTICE—BILL OF EXCEPTIONS—EXHIBITS.—Papers attached to a bill of exceptions, and referred to therein as "hereunto annexed, marked exhibit A," "Exhibit B," etc., are sufficiently identified as parts of the bill, although not marked as exhibits in any manner.

IDEM.—JUDGMENT ROLL.—A motion for a new trial and the record of the proceedings thereon, form no part of the judgment roll unless made so by a bill of exceptions and cannot be considered on appeal.

JUDGMENT BY AGREEMENT—PAROL EVIDENCE.—W. received $70 from a railroad company under a written agreement that it should be applied on any judgment for damages he might recover in an action there pending for the condemnation of a portion of his land for the use of the company as a track for its railroad. Judgment was afterwards entered by consent for $150 damages, and $50 costs, in favor of W., which was paid and the land condemned to the company's use. *Held,* That W. might defend in an action afterwards brought against him by the company to recover said sum of $70, as overpaid by mistake, by alleging and proving that said judgment was entered in pursuance of a subsequent parol agreement by which he was to receive the amount of such judgment in addition to said sum of $70 previously received by him under the written contract, and that such defense does not violate the principle which forbids the admission of parol evidence, to vary or alter the meaning of written instruments.

APPEAL from Marion County. The facts are stated in the opinion.

Ellis G. Hughes and J. A. Stratton, for appellant.

Bonham & Ramsey, for respondent.

By the Court, WATSON, J.:

The appellant brought this action to recover the sum of $70 alleged to have been overpaid to the respondent by mistake. The facts relied upon by the appellant to establish the overpayment were in substance as follows: The appellant, a railroad company, had commenced an action in the circuit court for Marion county to condemn a certain portion of respondent's land for a track for its railroad. Pending the action, and before a trial had been reached, it paid the respondent, through its agents, the sum of $70 under a written agreement, signed by such agents, as well as by the respondent, by the terms of which the latter was to allow the company to use so much of his land as it needed for a track for its road until a decision could be obtained in such action. The $70 to be deemed as paid on account of any judgment for damages the respondent might recover in such action, and if it should prove to be greater in amount than such judgment, he was to repay the excess. Afterwards, judgment was entered upon consent of the parties in open court, for the condemnation of the land, in favor of appellant, and for $150 damages, and $50 costs, to respondent, which amounts were at the time paid to the respondent. The appellant claimed this last payment was made in ignorance of the former, and by mistake, and that in equity and good conscience the respondent ought to repay the amount so overpaid him.

The respondent denied there was any mistake or overpayment, and alleged, in effect, that said judgment was entered, and the amount thereof paid over to him in pursuance of an agreement entered into between himself and the appel-

lant, subsequent to the execution of the written contract before mentioned, by the terms of which he was to permit judgment to be entered against him condemning said land to the use of the appellant, and was to recover judgment for said sum of $150 damages and $50 costs, in addition to the sum of $70 already received by him. The appellant denied having entered into the alleged agreement.

Upon this issue, the cause was submitted to a jury, who found for the respondent, and a judgment was rendered in his favor for costs. The main objection urged by the appellant's counsel to secure a reversal of this judgment, and the only one which, in our opinion, it is in a position to make on the appeal, is that the court below, on the trial, admitted evidence on the part of the respondent to establish a parol agreement in terms corresponding with the agreement set up in his answer.

It has been urged in support of the objection, that the admission of this testimony was a violation of the cardinal principle forbidding the introduction of parol evidence to vary or alter the meaning of written contracts. But it had no such effect as to the previous written agreement. For it was a new and distinct agreement, and, if supported by a sufficient consideration, supplanted the previous written one. (1 Greenleaf on Ev., secs. 303 and 304.) And the compromise of the action to condemn the respondent's land for the use of the railroad company, and his acceptance of a sum certain as damage and costs, when possibly he might have prevented any condemnation, or have recovered a much larger amount as damages and costs, was undoubtedly a valid consideration for the parol agreement.

"It is indeed necessary that the consideration should be of some value, but it is sufficient, as we have said, if it be of slight value only, or even if it be such as could be valu-

able to the party promising, eg., the compromise or abandonment of a doubtful right is a sufficient consideration for a contract even when it turns out that the point given up was in truth against the promise." (1 Chitty on Contracts, 29.) Nor did this evidence have any tendency to alter or vary the meaning of the judgment entered by the consent of both parties, and by the terms of which they were as completely concluded, so far as the introduction of parol evidence to vary or alter their meaning was concerned, as though it had been a written contract, executed by them in the most formal manner. That judgment merely evidenced an agreement to estimate the damage at the sum of $150 and the costs at $50. The parol agreement for the compromise did not, in any manner, conflict with any provision in the judgment, or have any tendency to vary or alter its meaning and effect. It was as distinct from the judgment itself as it was from the previous written contract, and was supported by a distinct consideration of its own.

The respondent's consent to the entry of the judgment just as it was, was the consideration for the parol agreement by which he was to have the $70 already received, in addition to the amount of such judgment. If he did agree, as the judgment recites, that his actual damage was only $150, it was not equivalent to a declaration that he was only to receive that much regardless of the terms of the compromise, in accordance with which such judgment was entered. There was no contradiction of the terms or meaning of the judgment in the respondent's claim under the parol agreement. On the contrary, we think there is perfect consistency between them, and that the parol agreement, if proved, which was for the jury to determine, was a good defense to the action.

We have discussed this question on the assumption that

to the respondent's case. If the appellants were right as to the legal presumption from the marks upon the note, the non-suit should have been granted. Such marks would afford *prima facie* proof that whoever placed them on the note intended to cancel and extinguish it.

"If a promissory note or bond should chance to be found in the hands of the debtor, or if it be crossed, razed or torn in pieces, either of these circumstances will create a presumption that it has been acquitted; which presumption will remain until clear proof be brought that the debt is still owing." (Phillipps on Evidence, 676, note 192; *Garlock v. Geostner*, 7 Wend., 198; *Palmer v. Guernsey*, 7 Wend., 248.)

But unless there be some ground for imputing such an act to the person having the legal right to cancel and extinguish the obligation of the instrument upon which the marks appear, there is no room for such presumption. Such an act by a mere stranger would only amount to a spoilation, and in no manner affect the obligation of the instrument. (*Lubbering v. Kohlbrecker*, 22 Mo., 596; *Davis v. Tenney*, 1 Met. 221; *Hayden v. Goodnow*, 39 Conn., 164; *Bailey v. Taylor*, 11 Conn., 531; *Crabtree v. Clark*, 20 Maine, 337; 1 Greenleaf on Evidence, sec. 566.)

The answer in this case shows that the attempted cancellation of the note was the act of Ladd & Tilton, after respondent had paid them the whole amount due upon it, and after their power to do so had ceased. There was no ground for any inference from the proof introduced, at the time respondent rested his case, that the marks were placed on the note by his authority or with his sanction, or that Ladd & Tilton had any right to cancel it. We think, therefore, that the presumption of discharge, contended for by the ap-

pellants, did not exist, and that the denial of the non-suit was proper.

The appellants offered testimony on the trial to prove that Manciet had money on deposit at Ladd & Tilton's bank, when the note in suit was executed, which the court below refused to admit. They claim that this refusal was error. But they concede that Manciet was liable to Ladd & Tilton in the amount for which the note in suit was given, and that it was deposited in payment of such previous indebtedness, and we are at a loss to perceive the bearing of the evidence which was offered by them and rejected by the court. The argument in favor of its admission assumes, as a legal inference, that a debtor possessing available means for the present payment of his debt, will not obligate himself for its future payment; that being in no need of credit, he could not have stipulated for credit; that he must be presumed to have signed a note payable at a future day, and designed to be applied in payment of his own debt, as an accommodation maker, from the mere circumstance of his ability to make present payment. The evidence offered in this instance seems to us to have been clearly irrelevant, and should have been excluded.

The last point we deem necessary to examine is in reference to the second finding of fact. Appellants claim that this finding shows that the note in suit was delivered to the bank of Ladd & Tilton as the property of Manciet, and thereby became extinguished. If such was the character of the transfer to Ladd & Tilton, the result claimed would certainly have followed. The language of the finding is that the respondent "indorsed the note and turned it over to the bank of Ladd & Tilton for the benefit of Pierre Manciet." Ordinarily this language would convey the meaning which the appellants contend for. But it is averred in the plead-

ings of both parties that the note was delivered to Ladd & Tilton in payment and discharge of Manciet's antecedent liability to them as indorser of E. H. Whitlock's note. The note then must have become Ladd & Tilton's property, and the only "benefit" accruing to Manciet—the liquidation of his previous debt. And as the employment of the words used in this sense would support the judgment, and in that contended for by appellants would not, they should be so interpreted. Such a construction both comports with the pleadings of the parties and sustains the judgment, and, we have no doubt, accords with the real intention of the court. The findings, as a whole, we deem sufficient to support the judgment, and, while not very full, to embrace substantially all the material issues. The judgment must be affirmed.

Judgment affirmed.

LUHRS v. STURTEVANT.

NUISANCES—PUBLIC—ABATEMENT.—A court of equity ought not to interfere to prevent a public nuisance, or to abate one already existing, at the instance of a private party, unless he shows a special injury distinct from the public, justly apprehended, or actually sustained.

PUBLIC HIGHWAY—OBSTRUCTION OF, A PUBLIC NUISANCE.—The obstruction of a public highway is a public nuisance, but this of itself is not sufficient to justify the interposition of equity, unless the plaintiff sustains some private, direct and material damage beyond the public at large.

IDEM—PLEADING.—Where it does not appear from the complaint that the property of the plaintiff adjoins the alleged road, or that his only means of access to and from it is over and along such road, or that the road obstructed is the only highway which connects his farm with the store and school house in question, and no special injury to his property is averred, nor personal injury outside of the inconvenience he experiences from the obstruction of the highway in common with all the people; *Held*, That such complaint does not state facts sufficient to authorize the interposition of equity at the instance of a private party.

IDEM.—Facts must be alleged, and specifications of the injury made, so that the court can understand how and to what extent there will be injury.

EQUITABLE RELIEF—WHEN GRANTED PRIVATE PARTY.—When the right of the public to the use of a highway is clear, and the obstruction of it seriously affects the value and substance of an individual's estate, or he suffers an injury distinct from the public, as a consequence of such obstruction, equity will afford relief and abate such nuisance.

APPEAL from Wasco County.

John J. Balleray, for appellant.

Lucian Everts, for respondent.

By the Court, LORD, C. J.:

This is a suit in equity to enjoin an obstruction of an alleged public highway. Substantially, the complainant alleges for himself and on behalf of all other persons similarly interested, that he owns and resides on a farm on the east side of the east fork of Birch creek, in Umatilla county; that the school house of the district and the store at which he has been accustomed to trade, are situated on the west side of said creek, and in or near a village known as Mount Pleasant; that a public highway extends through said village in an east and west direction; that plaintiff has for a number of years been in the habit of passing over said highway to said school house and store, and that on or about the 18th day of November, 1878, the defendant obstructed said highway by building fences across it, so that the plaintiff and the traveling public generally, could not pass over it in the manner they had been accustomed to do, and to the damage of plaintiff in the sum of one hundred dollars.

Our first inquiry is, do these facts justify the awarding of an injunction? A court of equity ought not to interfere to prevent a public nuisance, or to abate one already existing, at the instance of a private party, unless he shows a special injury distinct from the public, actually sustained or justly apprehended. The obstruction of a public highway is, without doubt, a public nuisance; but this of itself is

not sufficient to justify the interposition of equity in behalf of the plaintiff, unless he sustains some private, direct and material damage beyond the public at large. Mr. High says: "No principle of law is more clearly established than that private persons seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to themselves, aside from and independent of the general injury to the public." (High on Injunctions, sec. 762 and note.) This is a plain rule, and, as the authorities indicate, inflexibly adhered to in cases of this character. (*Irvin v. Dixon*, 9 How., (U. S.) 26; 6 Johns. Ch., 439; Angell on Highways, secs. 280-284; Story's Eq. Jur., sec. 924; High on Injunctions, sec. 816 and note.)

Now do the facts alleged show that the plaintiff has suffered any special or peculiar injury, either in his person or estate, which is not common to all the people in the vicinity of this road, by reason of the obstruction complained of? It cannot be detected from the complaint that the farm of the plaintiff adjoins the alleged road, or that his only means of access to and from it are over and along said road, or that this road is the only highway which connects the farm of the plaintiff with the school house and store in question. No special injury to his property is averred, nor any personal injury alleged to exist, outside of the inconvenience he experiences from the obstruction of the highway in common with all the people. From his alleged habit of passing over the road to the store or school house, it might possibly be inferred that the plaintiff had more frequent occasion to travel over the road than the public generally, and consequently the inconvenience or annoyance to him was greater, but this would be a difference only in degree and not in kind. Still it is not apparent in this respect, that he suffers any inconvenience from the obstruction not common to all,

certainly no peculiar or special injury to him independent of the general injury to the public.

In *McCowan, et al. v. Whitesides*, 31 Ind., 236, the only averments in any way connecting the plaintiffs with the highway were "that it is their usual, convenient, and necessary route by travel from their houses, which are all on or in the vicinity of the road to Wabash, their market town and usual place of business, and that without greater or less circuity, when the road is so obstructed, they and each of them have no other means, nor have the public wishing to use the road, of going to and fro, as they have a right to do for business, comfort and pleasure"—and upon demurrer, Gregory, J., said: "In the case at bar, if the bill had been filed by some one whose lands bordered on the road, and facts had been averred showing an injury to the lands of the plaintiff by reason of the nuisance, then undoubtedly a remedy would have been afforded. It is averred that the houses of plaintiff are all on, or in the vicinity of the road. Under this allegation they may all be in the vicinity, and not on the road."

In *Dawson v. St. Paul Fire Insurance Co.*, 15 Minn., 138, the court said: "Neither does it appear that the plaintiff is the owner of or in the occupation of any premises fronting upon and adjacent to St. Charles street, from which fact, according to some of the cases, special and peculiar damages, (though nominal in amount,) might be inferred.

In *Houghton v. Harvey*, 33 Iowa, 204, the special injury to the plaintiff occasioned by the obstruction of the highway, distinct from the public, was that "it was the only passable route, at times, from his home to Des Moines and to his timber," and the court held upon demurrer to the complaint that the facts stated a case of injury distinct from

the public, as a consequence of a public nuisance, and that the plaintiff was entitled to an injunction.

In *Pettibone, et al. v. Hamilton, et al.*, 40 Wis., 415, the court say: "If the plaintiffs will suffer private and special injury by the closing up of Darling Place—injury not common to the whole public—they can maintain an action in equity to prevent the threatened injury. And it is the settled law of this state that an obstruction which prevents the lawful use of a public street or highway, besides being a public nuisance, is a special injury to the adjoining lot owners, and when such an obstruction is threatened, they may proceed in a court of equity to prevent it." (*Walker v. Shepardson*, 2 Wis., 384; *Barnes v. Racine*, 4 Wis., 454; *Williams v. Smith*, 22 Wis., 594.)

These cases carry the doctrine of equitable intervention by injunction, for the purpose of preventing or abating a public nuisance at the instance of a private party, to as great an extent as any which have come under our observation, and a glance at the facts stated in this complaint will suffice to show that they do not come within the scope of the principle announced by any of them. Facts must be stated and specifications of the injury made, so that the court may understand how and to what extent there will be injury. Unless this is done, equity will refuse to interfere by the extraordinary remedy of injunction. There is no doubt when the right of the public to the use of the highway is clear, and the obstruction of it seriously affects the value and substance of an individual's estate, or in short, he suffers an injury distinct from the public, as a consequence of such obstruction, equity will afford relief and abate such nuisance. (*Green v. Oakes*, 17 Ill., 249; *The Mohawk Bridge Co. v. The U. and S. R. R. Co.*, 6 Paige, 563; *Jerome v. Ross*, 7 John. Ch., 322; High on Injunctions, sec. 816 and note.)

From these views, it results that the decree is reversed, and the bill dismissed.

Decree reversed.

LONG AND SPAUR v. LANDER.

ATTORNEYS—OPENING STATEMENT TO JURY.—A party may, in the opening statement of his case, designate briefly the particular facts he expects to prove, and the evidence he intends to offer for that purpose; but it is the province of the court to prevent any abuse of this privilege.

DECLARATIONS AS TO TITLE.—Evidence tending to prove a motive for falsehood in making declarations in disparagement of title, is admissible to impeach the credit otherwise due them, as being against the declarant's interest.

WITNESSES—CROSS-EXAMINATION.—It is in the discretion of the court to permit a party to interrogate a witness during cross-examination, as to matters not connected with his direct examination, but relevant to the issue, subject to the same rules as on examination in chief.

HUSBAND AND WIFE—INCOMPETENCY TO TESTIFY.—Neither husband nor wife can be examined as a witness for or against the other, during the marriage or afterwards, without the other's consent, as to any communication made by one to the other during marriage; and the failure of the attorney to make a suitable objection, will not, where such consent is wanting, render the witness competent. But, upon appeal from a judgment in an action at law, it will be presumed, in support of the judgment, that such consent was given, where the record does not show the contrary.

APPEAL from Douglas County. The facts are stated in the opinion.

William R. Willis, for appellant.

Herman & Ball, for respondent.

By the Court, WATSON, J.:

The appellants, claiming title to the land in dispute as heirs of their brother Daniel Carland, Jr., deceased, brought this action to recover the possession of the same against the respondent, who deraigned title under an execution sale

thereof, as the property of Daniel Carland, Sr. The only material issue submitted to the jury was whether a deed executed by Charles Brady for the premises to "Daniel Carland" was intended for the son or father, both being alive when the deed was executed, and bearing the same name.

The jury found for the respondent, and judgment was rendered accordingly. The bill of exceptions shows that respondent's counsel, in making his opening statement in the court below, took occasion to detail the evidence which would be offered by the defense, and the facts it would prove; to which course appellants objected, and their objection being overruled, took an exception. They claim here that this was error as sanctioning an abuse of the privilege conferred by subd. 1, sec. 194, of the civil code, which provides: "The plaintiff shall state briefly his cause of action and the issue to be tried; the defendant shall then in like manner state his defense and counter claim." According to appellants' theory, parties must be confined, in their opening statements, to the general allegations and issues in the pleadings, and not to be permitted to specify the particular facts upon which they rely to establish such allegations, and to which they design to direct their proofs. But such has never been the practice, and cannot be the law.

The manifest object of such statements is to enable each party to direct the attention of the court and jury to the particular facts which he proposes to establish by evidence in support of the general allegations in his pleadings, and to designate the application of the evidence intended to be introduced, to its appropriate issue. Each party does, in this manner, "state briefly his cause of action or defense," as it lies in his proofs, in which form it must be presented to the consideration of the jury. By this means, the jury

are assisted in receiving and weighing the evidence upon each particular issue, and the adversary party is protected against surprise. It is possible that this privilege may sometimes be abused, and matters presented to the jury which the party making the statement either cannot prove, or would have no right to prove, to the substantial injury of the opposite party. But it is the duty of the circuit courts to prevent such abuses, and their power to do so is ample. And every legal presumption will be indulged in here, that such duty has been faithfully discharged. But the record here does not show that the opening statement of respondent's counsel embraced anything which might not properly be stated, and the court below did not err in overruling appellants' objection thereto.

The next exception taken by appellants was to the ruling of the circuit court allowing the respondent to ask J. M. Arrington, a witness introduced by them, the following question, upon his cross-examination: "State what you know of old man Carland conveying his property to young Dan Carland." The ground of appellants' objection to the allowance of this question was, that it was immaterial, irrelevant and not in response to the direct examination. Arrington had testified on his direct examination that he was an intimate acquaintance of both Carlands, and was frequently at their house. That he saw young Carland give Charles Brady a horse, saddle and bridle which he himself had traded to young Carland as a payment on the purchase of the land in dispute; and both before and after this transaction, had heard the elder Carland speak of the land as belonging to the younger Carland. The bill of exceptions states that this and some other evidence of the same character was admitted to show a motive in the elder Carland for making these declarations, to cover up and conceal his prop-

erty from his creditors, and for no other purpose. In answer to the question, the witness stated that about a year after Brady sold the land in dispute, he (witness) drew up some conveyances of land from the elder Carland to the younger, and the former said that Hemeberg was trying to cheat him and collect a debt that had been paid before.

We think this evidence was material and relevant to explain the declarations attributed to the elder Carland, and to enable the jury to determine what measure of credit should be given them. It tended to show a motive for a false statement in respect to the ownership of the land, which, in the absence of any such circumstances, would have appeared to have been against his interest, and therefore entitled to great consideration. The objection that the question was inadmissible on cross-examination, if well taken, will not support the exception. By interrogating the witness as to matters not connected with any facts stated in his direct examination, the respondent made him his own witness, and was subject to the same rules which governed the examination in chief; and it was discretionary with the circuit court whether the testimony should be introduced then, or at a subsequent stage of the trial. Our statute plainly contemplates this course. Sec. 827 of the civil code provides: "The adverse party may cross-examine the witness as to any matter stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination." (*Commonwealth v. Eastman and others*, 1 Cush., 217.)

The testimony of L. F. Mosher, and the records from the U. S. Land Office, produced and identified by the witness J. C. Fullerton, were introduced by respondent for the same

purpose as the testimony of the witness Arrington, in reference to the sale of property from the elder to the younger Carland, and were admissible on the same ground. The last exception to be considered was taken to the ruling of the court below admitting, over the objection of appellants, the testimony of Samuel Fuller, on behalf of the respondent. The respondent called Fuller as a witness, and asked him this question: "State what Mrs. E. J. Long told you that Daniel Carland, Jr., told her in regard to this land." Appellants objected, the objection was overruled and they excepted. The witness answered, "Mrs. E. J. Long, then Mrs. Fuller, my wife, told me, in the year 1863, that Dan. Carland, Jr., told her that Hemeberg had sold all of his father's (Daniel Carland, Sr.) property; that he had even sold the land that he (Dan. Carland, Sr.) had bought of Brady." It does not appear from the bill of exceptions whether Mrs. Long, one of the appellants, was present at the trial or was examined as a witness in her own behalf, or consented that Fuller, her former husband, might be examined as a witness against her. Passing over the suggestion of respondent's counsel, that the objection was too general to form the basis of an exception, if the testimony was relevant in any view, and assuming that it would not have been competent, even if no objection had been interposed without Mrs. Long's consenting to its introduction, we are brought to the consideration of the presumption which is to govern in this state of the record. And we regard the rule to be well settled in this court, that the presumption in favor of the correctness of the ruling in the court below must prevail under such circumstances. We must presume, in support of that ruling, however the fact may have been, that the witness was rendered competent, either by her own examination as a witness in her own behalf, which would have

been equivalent to her consent, under sec. 703 of the civil code, or by her actual consent, express or implied, although not appearing by the record to have been given. The record does not show, at any rate, that her consent was not given, and we must, in favor of the validity of the ruling below, presume that it was given in some of the modes indicated.

This view is not in conflict with the doctrine laid down in *Hubble v. Grant*, 39 Mich., 641. There the entire record was before the supreme court of Michigan on an appeal from a decree in a suit in equity. The case was there for trial *de aovo*, and the court held that as the wife's consent to the examination of her husband as a witness against herself in the case did not appear to have been given, his testimony was incompetent and inadmissible, although her counsel had not objected to it when it was offered.

As to the further objection, that the admission of Mrs. Long, although a party to the record, was incompetent to prove the alleged declaration of Daniel Carland, Jr., deceased, we are satisfied that it cannot be sustained. The fact to be proved was that he made such declaration, and we perceive no reason for holding that her admission that he did make it should not be received as evidence against her. (Greenleaf on Ev., sec. 189; *Edgar v. Richardson*, 33 Ohio St., 581; 2 Wharton Ev., secs. 1075-1077, and notes.)

The conclusion we have reached, upon a consideration of all the points presented by appellants is, that there was no error, and the judgment must be affirmed.

Judgment affirmed.

KEARNEY v. SNODGRASS AND MINOR.

JURY—INSTRUCTIONS—VERDICT.—It is error for the court to instruct the jury to find a verdict for a party to the action, if they determine a particular issue in a certain manner, when other distinct and material issues are presented by the pleadings and controverted by the evidence to such an extent as to render their submission to the jury proper and necessary.

APPEAL from Umatilla County. The facts are given in the opinion.

W. W. Thayer, for appellants.

Lucien Everts, for respondent.

By the Court, WATSON, J.:

The respondent brought this action against T. H. Foster, Benj. Reeves, R. G. Thompson, and the appellants, W. J. Snodgrass and T. F. Minor, in the circuit court for Umatilla county, on a promissory note, of which the following is a copy:

"2608.50. PILOT ROCK, OR., May 26, '80.

On or before November 25th, 1880, after date, without grace, we promise to pay to the order of E. S. Karney, two thousand six hundred and eight and 50-100 dollars, payable only in gold coin of the United States of America, with interest thereon in like gold coin, at the rate of one per cent. per month from date until paid, for value received.

T. H. FOSTER, REEVES & Co.
R. G. THOMPSON."

He alleges in his complaint that said note was made and delivered to him by all of said defendants, and that at the date of the execution thereof, said Foster, Reeves, Snodgrass and Minor "were partners, and doing business in

Umatilla county and elsewhere, under the firm name and style of T. H. Foster, Reeves & Co."

The appellants, Snodgrass and Minor, answered the complaint, denying "that at the time mentioned therein, or at any other time, said Foster, Reeves, Snodgrass and Minor, or any of them except said Foster and Reeves, were partners, or doing business in Umatilla county, or elsewhere, under the firm name of T. H. Foster, Reeves & Co., or under any other name except as hereinafter stated," denying the marking and delivery of the note, and alleging that on March 20, 1880, and long after said Foster and Reeves had purchased the band of cattle from Kearney for which the note in suit was given, they, as partners, under the firm name of Snodgrass & Minor, entered into an agreement with said firm of Foster and Reeves, by the terms of which said firm of Snodgrass & Minor were to, and did thereafter furnish the money for and bear the expense of driving from Umatilla, Grant and Union counties, in Oregon, to Rock creek, in Wyoming, and Fremont, in Nebraska, two herds of cattle, the same including the cattle for which said note was given, for and in consideration of receiving one-third of the net profits arising from the sale of said cattle. And that they had no other business, engagement or relation with said Foster and Reeves, or either of them; never did business under the firm name of "T. H. Reeves & Co.," either with said Foster and Reeves, or otherwise, and never adopted or were known by said firm name, or any other name than that of Snodgrass & Minor. The respondent, in his replication, traverses the material allegations of new matter in the answer, and alleges a subsequent ratification of the note by the appellants.

The case was tried by a jury upon evidence introduced by both parties, who found for the respondent in the amount

of the note, with interest, less a small payment admitted in the complaint. The court gave judgment on the verdict, and from this judgment Snodgrass & Minor have taken this appeal.

It appears from the abstract of the evidence given at the trial, which is contained in the bill of exceptions, that the name "T. H. Foster, Reeves & Co." was subscribed by Foster alone, when the note was executed, in the absence of both Snodgrass and Minor. Thompson signed as a surety merely. Snodgrass in his testimony before the jury denied most emphatically that Foster had any authority from him to sign the note so as to make him liable upon it, and testified that he knew nothing of the note until he reached a place known as Little Camas Prairie, on Wood river, Idaho territory, on his road to Wyoming with the cattle.

Upon this state of the pleadings and evidence, the circuit court gave the jury the following, among other instructions, and the appellants excepted:

"If you find from the evidence that the plaintiff did not sell his cattle to Foster and Reeves, in such a manner that the risk in regard to them was transferred from him to them, prior to or about March 20, 1880, that being the date of the alleged contract between Snodgrass & Minor and Foster and Reeves, to the effect that said Snodgrass & Minor were to furnish money and bear the expense of driving the cattle east, for a share of the profits, then you will find for the plaintiff, unless you also find that there was an agreement between Snodgrass & Minor and Foster and Reeves, by which the first named firm were to be only held responsible for debts and liabilities incurred in driving the cattle east, and that the plaintiff was informed of this fact prior to the execution of the note."

The effect of this instruction was to hang the verdict up-

on the determination of the single question of fact whether the property in the cattle had passed to Foster and Reeves prior to the date of the appellant's agreement with them, March 20, 1880. There was no issue as to notice to respondent, of any limitations in said agreement, prior to the execution of the note sued on. But there were other issues to be determined by the jury upon the evidence, before they could find a verdict for the respondent, which were quite as material as the question of transfer of the respondent's property in the cattle, prior to the execution of the agreement between the firms of Snodgrass & Minor and Foster and Reeves.

Whether that agreement did operate to create a partnership between the two firms or not, so that Foster could have bound such partnership for the payment of the price for the cattle at the time the note was executed, it is quite certain that he did not bind it by the execution of the note itself in the name of "T. H. Foster, Reeves & Co.," unless that was the firm name adopted by the new partnership, either generally or in the particular transaction. If that was not the firm name, and Foster had no authority to bind the partnership under it in the particular instance, and there was no subsequent ratification, then the respondent was not entitled to recover on the note against the appellants, Snodgrass & Minor, in this action. (Story on Partnerships, sec. 102.)

And if, as claimed by the appellants in this case, the purchase was made by the firm of Foster and Reeves alone, and the cattle delivered to them and the note accepted by respondent exclusively upon the credit of such firm and their surety, Thompson, then, unless the name of the new partnership created by said agreement was "T. H. Foster, Reeves & Co.," or Foster had authority to bind it by that name in

the particular case, the appellants could not be made liable to the respondent for the price of the cattle, upon the note or otherwise, in any form whatever. (Story on Partnerships, sec. 154.)

Now we think these questions were all presented by the pleadings, and should have been submitted to the jury upon the proofs introduced. And as the effect of the introduction was to take them away from the jury and make the verdict depend on the decision of another and a distinct issue, it was erroneous, and could hardly have failed to produce substantial injury to the rights of the appellants. Especially does this seem probable when we consider that there is nothing in the other instructions given, although quite numerous, by which the effect of this instruction is qualified or explained in any manner. The judgment is reversed, with costs, and cause remanded for further proceedings.

STATE v. THE DOUGLAS CO. ROAD CO.

TOLL ROADS—PRIVATE CORPORATIONS.—A county court has no power, under secs. 26 and 28, title 2 of chapter 7, of Mis. Laws, to confer the right upon a private corporation to establish a toll gate, and collect toll, upon a public highway, at a point not embraced in the line of its corporate road.

IDEM—HOW ESTABLISHED.—Location by some appropriate act on the part of such corporation is essential to the establishment of its corporate road. The mere execution of the agreement provided for in such sections can have no such effect.

APPEAL from Douglas County.

Wm. R. Willis and R. S. Strahan, for appellant.

N. B. Knight, for respondent.

By the Court, WATSON, J.:

This action was brought in the circuit court for Douglas

county, in the name of the state of Oregon, under the provision of section 353 of the civil code, to annul the corporate existence of the Douglas County Road Company, a private corporation, incorporated under the general law of the state, for the purpose of constructing and maintaining a toll road through the big canyon, in Douglas county.

Several causes of forfeiture are alleged in the complaint, among which is the establishment of a toll gate and the collection of toll, at a point on the public highway leading through said canyon, but not upon any road located by the corporation. The answer simply controverts the allegation that such toll gate is not upon the corporate road, located by the company, and alleges an agreement with the county court of Douglas county allowing it to establish the toll gate and collect the tolls. The erection of the gate and the collection of tolls thereat is not denied. The state in its replication denies the alleged agreement with the county court. As the action of the circuit court on the trial, in admitting evidence and giving instructions to the jury, relating to the issues thus joined, presents the vital question to be determined here, we shall confine our attention exclusively to this portion of the case. Upon the trial in the court below, the respondent offered in evidence certain portions of the journal of the county court of Douglas county, containing the record of an agreement between the county court and the respondent, the material parts of which are as follows:

"This agreement, made and concluded the 10th day of April, in the year of our Lord one thousand eight hundred and seventy-four, between the county court of Douglas county, and sitting as a board for the transaction of county business, and composed of the Hon. Joseph S. Fitzhugh,

county judge, and John Jackson and Levi Kent, commissioners, the party of the first part, and the Douglas County Road Company, a private corporation, formed under the laws of the state of Oregon, on the 20th day of December, 1873, and now composed of the following individuals to-wit: A. A. Fink, James F. Gazley and James F. Gazley, Jr., the party of the second part, witnesseth:

That the party of the first party, by virtue of an act of the legislative assembly of the state of Oregon entitled of private corporations, their formation and the appropriation of land for corporate purposes, hereby agree, for and in consideration of the covenant hereafter mentioned, to allow the Douglas County Road Company to appropriate or use and occupy so much of the public highway as lies between the following points to-wit: Commencing at the northeast corner on the lot on which the former toll house now stands, it being conveyed to the Canyon Road Company by S. Marks, B. J. Sidman and H. Wolleberg, and surveyed by A. R. Flint, it being in Canyonville precinct, Douglas county, state of Oregon, and situated in the southwest quarter of the northeast quarter of section 34, township 30 south of range 5 west, and running thence in a southerly direction on the survey of the county road, as exhibited by the maps of said survey now on file in the clerk's office of and for Douglas county, through what is known as the canyon, and terminating at a point where said county road crosses the south line of section 2 in township 32 south of range 5 west. The party of the first part covenants that the parties of the second part shall occupy said portion of the public highway, with all the appurtenances thereto belonging or in any wise appertaining, as a toll road, and that said Douglas County Road Company shall have the privilege of taking toll from

persons traveling over said road, upon the terms and conditions hereafter mentioned. * * *

J. S. FITZHUGH,
JOHN JACKSON,
Commissioners of Douglas county.

Witness—L. L. WILLIAMS,
County Clerk.

{ SEAL OF COUNTY COURT DOUGLAS CO., OR. }

A. A. FINK,
Pres't and Director of Douglas Co. Road Co.
JAS. F. GAZLEY,
Sec'y of Douglas Co. Road Co."

The appellant objected to the admission of this evidence, for the reason that the same was incompetent; that it was not shown that the county court of Douglas county, Oregon, had jurisdiction or authority to make or execute said writing, or that it ever did become, or was at any time necessary or convenient for the defendant, in the location or construction of its road, to appropriate the county road or any part thereof, mentioned in said writing, and for the reason that said writing conferred upon the defendant no power or authority whatever to erect or establish a toll gate upon or across the public highway mentioned in the complaint. The objection was overruled, the evidence admitted, and appellant excepted.

The following extract from the bill of exceptions in the case is essential to show the full force of the foregoing objection, while it also shows the instructions given and excepted to, which are relevant to the question before us.

There was no testimony offered during the trial tending to prove that the defendant had ever located, adopted or established any corporate road, other than about one-quarter

of a mile of road, and that not upon the county road where the toll gate mentioned in the complaint is established.

Nor was there any testimony whatever offered tending to prove the jurisdiction or authority of the county court of Douglas county, Oregon, to make or execute said writing, other than what appears upon the face of the writing itself.

Before said cause was finally submitted to the jury, the court, among others, gave the jury the following instructions, to-wit:

I instruct you, as part of the law of this case, that the agreement admitted in evidence is valid and binding, and that it confers upon the defendant the right to erect and maintain a toll gate and collect tolls thereat, upon the county road or public highway therein described.

2. It was not necessary for defendant to locate or construct any corporate road other than is admitted in the pleadings, in order for it to make this agreement with this county court, and to acquire the right to use the public highway.

3. It is not necessary that the defendant shall have maintained its gate on the corporate road; it had the right to erect and maintain it on any part of the public highway described in the agreement in evidence.

The admission in the pleadings, referred to in the second instruction, was that respondent located about one-half mile of corporate road, but not upon any part of the public highway spoken of. Under these instructions, the jury found a verdict for the respondent, and judgment was rendered accordingly. The state appeals therefrom to this court. It will hardly be questioned that the matters alleged in the complaint, if established by the proof, would have rendered a judgment of dissolution necessary as prayed for.

Section 32, title 2, of chapter 7, of the miscellaneous

laws provides that "a corporation shall only collect and receive toll on its road, at a gate established thereon," &c. This is a section of the general law under which the respondent was incorporated.

Subdivision 1 of section 353, under which this action was brought, expressly makes an offense against the provisions of the general law under which the corporation was formed, a ground for the annulment of its existence; and subdivision 5 of the same section declares that the exercise of a "franchise or privilege not conferred upon it by law," shall also be a cause of forfeiture. It is quite evident therefore, that the decision here must turn upon the efficacy of the agreement appearing upon the records of the county court of Douglas county, and admitted in evidence on the trial in the lower court, to confer upon the respondent the lawful right to maintain a toll gate and collect tolls in the manner charged in the complaint, and proven on the trial, as certified in the bill of exceptions. The record before us shows affirmatively that no evidence was offered on the trial to prove that respondent ever had located or established any corporate road on the public highway, where it erected its toll gate and charged and received tolls.

It had, therefore, no corporate road at that place, unless the agreement itself created one through its own proper operation, unaided by any act of the respondent, save the acceptance of such agreement.

But section 26, title 2, chapter 7, of the miscellaneous laws, which authorizes such agreement, merely confers upon the county court the power to agree with the private corporation "upon the extent, terms and conditions" upon which such portions of the public highway, as may be necessary or convenient, in the location of the corporate road, may be appropriated or used and occupied by such corpora-

tion. And section 28 of the same title confers upon the county court the power to provide in such agreement for the establishment of toll gates thereon, and the rate of tolls to be collected thereat by such corporation.

Now it seems too plain to admit of discussion that such agreement is permissive merely, and that if it could be legally entered into, in advance of the actual location and establishment of the corporate road, but in contemplation thereof, still there would be no corporate road, until actually located or established by some appropriate corporate act.

The county court is authorized to enter into such agreement only where the appropriation of some portion of the public highway may be necessary or convenient "*in the location*" of the corporate road. Evidently the legislature designed such portions of the public highway as might be found to lie necessary or convenient "*in the location*" of the corporate road, should be *located* and used as a part of such road.

The agreement in any case merely confers upon the corporation the power *to appropriate*, use and occupy to the extent and on the terms and conditions therein prescribed. By its acceptance of the agreement, the corporation acquires the power to do what is by such agreement permitted to be done. The county court does not thereby assume to establish the corporate road, but to give the corporation the power to do so on the terms and conditions inserted in the agreement.

We think it wholly unnecessary to discuss the question whether the county court, under sections 26 and 28 above cited, could authorize a private corporation to erect and maintain a toll gate, and charge and receive tolls thereat, at any point on a public highway beyond the limits of its corporate road, or what is the same thing, without establishing

or possessing any corporate road whatever. The language and manifest object of these sections will not permit such an inquiry, regardless of the direct prohibition contained in section 32, title 2, of chapter 7, of the miscellaneous laws, before cited, which declares that "a corporation shall only collect and receive toll *on its road at a gate established thereon.*"

It seems to us wholly immaterial in the present instance, whether the county court should be deemed to act judicially in such proceedings or not. In either view, the respondent had no right, according to the record before us, to do what he is charged with in the complaint, and is conceded to have done. The county court could not give it the right to establish a toll gate and collect tolls on the public highway, and not on its own corporate road. This is just what the record shows the respondent did do, and its attempted justification under its agreement with the county court must necessarily fail.

It is claimed by respondent's counsel that this question has already been settled by the previous decisions of this court. The last case decided by it, involving the effect of this identical agreement, (*C. & G. Road Co. v. Stephenson*, 8 Or., 263), certainly goes as far as any of its preceding decisions, and that does not determine this case by any means. The court there held that the agreement might be entered into before a location of the corporate road, and still be valid. This was the point presented in that case and decided. The chief justice, in delivering the opinion of the majority of the court, makes use of some expressions, it is true, which would seem to indicate that he entertained the opinion that the agreement alone was sufficient to confer the right to establish a toll gate and collect toll, upon the respondent, in the manner charged here, without any

further act towards locating and establishing its corporate road. In this view we are wholly unable to coincide, and as it was not essential in the determination of the particular case, we feel under no obligation to yield to it as authority. Mr. Justice Boise, however, dissented from that decision, taking the same ground in substance that we have taken here. The conclusion we have reached renders a reversal of the judgment below unavoidable.

Judgment reversed.

STATE v. CARTWRIGHT.

FELONY—WHAT RECORD OF CONVICTION MUST SHOW.—The record of conviction for a felony must show affirmatively that the prisoner was present in person when the verdict was received by the court. But such presence does affirmatively appear when the record shows that he was present in person when the trial commenced, but is silent as to his presence on the day following, when the verdict was rendered, there being no recital of any adjournment or other fact showing any interruption of the proceedings, or interval between the commencement of the trial and rendition of the verdict.

APPEAL from Lane County. The facts are stated in the opinion.

John Kelsay and R. S. Strahan, for appellant.

J. W. Hamilton, district attorney, for respondent.

By the Court, WATSON, J.:

The appellant was indicted by the grand jury of Lane county, of the crime of murder in the second degree, for killing one Frederick Mendee. Upon his third trial on this indictment in the circuit court for that county, he was found guilty of manslaughter, and sentenced to five years' imprisonment in the state penitentiary, and adjudged to pay a

fine of one dollar and costs. From this sentence and judgment he has taken this appeal.

Numerous errors have been assigned by his able and learned counsel, but as they have not offered any oral argument in his behalf, we shall confine our examination to the points made in the printed brief filed by them in the case. The first, second and third objections urged by them have been obviated by filing a complete transcript on behalf of the state, agreeable to the practice of this court in such cases. The fourth objection presents the most important question to be decided here.

The record shows affirmatively that the third trial was begun on Tuesday, November 8, 1881, and that the appellant, as well as his attorneys, were present in court, also that the jury were empaneled and the evidence introduced. That on Wednesday, November 9, 1881, the jury, after hearing the arguments of counsel, and the charge of the court, retired in charge of the sworn officer to consult upon their verdict, and, after deliberation, returned into court the verdict mentioned; whereupon the jury were discharged, and the time for sentence appointed by the court.

The record does not show any adjournment of the court on November 8, 1881, or contain any mention of its reassembling on the day following. It discloses no interval in the proceedings from the commencement of the trial on the 8th of November, 1881, to the rendition of the verdict and appointment of the time for sentence, on the day succeeding. For the appellant, it is contended as propositions of law, that the record must show affirmatively that he was present in person when the verdict was rendered, to sustain his conviction, and that the record before us is insufficient for this purpose. We are convinced that the first proposition is a sound one, and fully supported by the cur-

rent of authority. The distinction adverted to in some of the decisions to which the district attorney has directed our attention, between cases of capital felonies and those not capital, seems to us not to rest upon any substantial basis. And it is not the prevailing doctrine upon the subject. (*State v. Sporse*, 4 Or., 198; 3 Whart. Crim. Law, Sec. 2, 999; 1 Bishop Crim. Procedure, sec. 1,180; *Tubbs v. The State*, 49 Miss., 716; *State v. Smith*, 31 La. Am. 406; *Cole v. The State*, 10 Ark., 318; *State v. Ott*, 49 Mo., 338; *Dougherty v. Commonwealth*, 69 Pa. St. 286.)

These authorities sustain the doctrine contended for by appellant's counsel, as to the necessity of the record of conviction for felony, showing affirmatively the presence of the prisoner at the rendition of the verdict. The right of the prisoner to see whether the verdict against him is sanctioned by all the jurors, and the right of the court to have him, if duly convicted, under its power and subject to its judgment, are the reasons assigned for requiring his presence; and their importance both to the security of the prisoner and the efficient administration of public justice, have been deemed sufficient to justify the exclusion of the presumption of regularity, which is indulged in with respect to the proceedings of courts of superior jurisdiction in civil cases. But it has also been held, as a necessary and wholesome qualification of the general rule, that it is not essential to the validity of the record that it should recite expressly that the prisoner was present at every step in the trial, where his presence is required. It is enough if it can be gathered from the whole record that he was actually present. (*State v. Craton*, 6 Ind., 164; *State v. Schoemoald*, 31 Mo., 160; *People v. Stephens*, 4 Parker Cr. Cos. 510; same, 19 N. Y., 549; *Schirmer v. The People*, 33 Ill., 276.)

The facts disclosed by the record in the case last cited

are very similar to those shown by the record here, and the reasoning of the court in that case, sustaining the sufficiency of the record, is altogether appliable to the case before us. There the record affirmed the presence of the prisoner at the commencement of the trial, on one day, and disclosed the fact that the verdict was rendered on the next, but was silent as to his presence on that day; and the court held that as no interval appeared from the record, between the commencement of the trial, when the prisoner was shown to have been present, and the rendition of the verdict on the following day, it would be presumed that he continued in court all the time.

It is plain that some presumptions must be indulged in favor of the regularity of judicial proceedings, even in trials for crimes of the most heinous character; and we think the rule adopted in the case last considered from 33 Ill., does not go beyond the principle recognized by the other authorities cited with it. We are aware of the decision in *Dunn v. Commonwealth*, 6 Pa. St., 384, where a similar record, in a capital case, was held too doubtful and uncertain to support a conviction for murder in the first degree. In that case, however, the commencement of the trial occurred on November 11, 1844, when the prisoner was shown by the record to have been present in person, and the verdict was rendered on the 13th day of November, 1844. There was nothing in the record tending to show the presence of the prisoner after the first day of the trial. The interval seems therefore to have been one day longer than in the case in 33 Ill., and one day longer than in the case at bar. And yet this decision does appear to us to be opposed to the principle governing the case in 33 Ill.

But we are satisfied to adhere to the rule adopted in the latter, in the present instance, without expressing an opinion

how much farther the presumption of regularity should be indulged, when the jurisdiction of the person of the prisoner is shown affirmatively by the record to have existed at the commencement of the trial in cases requiring his continued presence. It further appears from the record in the case before us, that the appellant did appear in person on Saturday, the 12th day of November, 1881, the time appointed for his sentence, and, although "given an opportunity to make a statement," interposed no objection on account of any irregularity occurring during the trial. It is next objected on appellant's behalf that the record does not show that he was asked, at the time of his sentence, "if he had anything to say why judgment should not be pronounced against him." But it does show he was given "an opportunity to make a statement," and we conceive the objection rests more in form than in substance. But if the record were entirely silent on this subject, the indictment not charging a capital offense, we should not feel justified in holding it fatally defective on this account, although some decisions have been cited for appellant which go to that extent. (Wharton on Criminal Law, sec. 3394; *State v. Ball*, 27 Mo., 324; Bishop's Criminal Procedure, sec. 1118, and cases cited in note 3.)

This brings us to the consideration of the objections urged by appellant's counsel to the ruling of the court below in giving and refusing instructions to the jury. Some ten instructions were asked by appellant, which the court refused to give. We are not advised, from the brief filed by his counsel, as to the nature of the errors claimed in respect to such ruling, and have not been able to discover any from an examination of the instructions themselves. And the objections to the instructions given by the court we are satisfied ought to prevail. The definition of murder in the

first degree, by the court, could not possibly have misled the jury to the appellant's prejudice. But the court below went further and instructed the jury in the same connection, that the crime charged in the indictment was murder in the second degree, and that they could not, in any event, find him guilty in the first degree.

It is contended, however, that the twelfth instruction given by the court and excepted to by the appellant, left it optional with the jury to follow the directions of the court, as to the law, or decide it according to their own individual notions. But we think the duty of the jury to observe the court's instructions as to the law applicable to the case was clearly indicated in the instruction, and that they could not have mistaken what was so plainly intended. There does not seem to us to be any ground for saying that this instruction sanctioned the idea that the jury were at liberty to disregard the directions of the court upon the questions of law involved in the trial. We are therefore of the opinion that there was no error in the proceedings below, as alleged by the appellant, and that the judgment should be affirmed.

Judgment affirmed.

STATE v. DOUGLAS COUNTY ROAD COMPANY.

QUO WARRANTO—PRIVATE RELATOR.—A private relator, whose name may be mentioned in a *quo warranto* information, in a strictly state action, is not a party thereto, and cannot control the proceeding.

DISTRICT ATTORNEY'S POWER.—When a *quo warranto* information is filed by the district attorney, under the code, he has as much the sole control over it as the attorney general would have in a like case at common law.

APPEAL from Douglas County.

After the transcript had been filed in this case, and the cause placed upon the docket, J. W. Hamilton, Esq., district attorney of the second judicial district, appeared and filed a

motion to dismiss the appeal, because, as he alleged, he had not taken the same for the state, or authorized any one to do so for him. Messrs. Wm. R. Willis and R. S. Strahan opposed the motion; contending that the appeal was regularly taken, and that the district attorney had no authority to dismiss it.

J. W. Hamilton, district attorney, for the motion.

Wm. R. Willis and R. S. Strahan, contra.

N. B. Knight, for respondent.

By the Court, WALDO, J.:

The appellant, the Douglas County Road Company, is a private, as distinguished from a distinctly public, corporation. (*Douglas County Road Company v. Abraham*, 5 Or., 518.) Its object, as specified in its articles of incorporation, was "to build and keep in repair, a good and substantial plank, clay and gravel wagon road through the big canyon, in Douglas county, state of Oregon, and to receive tolls for traveling over said road." The object of this action is to annul the existence of the corporation.

Section 351 of the code of civil procedure abolished the writ of *quo warranto* and the *quo warranto* information. But it is only the form of the proceeding that is done away with by that section. The remedies formerly had under those forms are now had under the civil action specified in sections 353 and 354. (*People v. Hall*, 80 N. Y., 119.)

The action lies only for franchises exercised without or in violation of legislative grant, by which, in this country, all franchises are held. (*The People v. Utica Insurance Co.*, 15 John, 358; *Bank of Augusta v. Earle*, 13 Pet., 595; Aug. and Ames on Cor., sections 731, 737; *United States v. Lockwood*, 1 Pinney's Rep. [Wis.,] 363; *Territory v. Lockwood*, 3 Wall., 236; Cole on Informations, 111.)

In England, the attorney general could file *quo warranto* and other informations at his discretion. But in practice, he seldom did so, except where the prerogatives of the crown were specially concerned. Where the interests of individuals were intermingled with those of the crown, the master of the crown office in king's bench was the usual officer to exhibit informations. In the exercise of this function, he stood in a relation to individuals similar to that of the attorney general to the crown. (Cole on Informations, 110; *Goddard v. Smithett*, 3 Gray, 116.) But in 1693, the statute of 4 and 5 Waud M., c. 18, relating to trespasses and batteries, and other misdemeanors, was passed, for the purpose, as Mr. Justice Wilmot says, in *Rex v. Marsdon*, 3 Burr, 1817: "To prevent the master of the crown office from vexing and oppressing the subject, and entrusted this court with the power of inspecting the filing of informations, and seeing that he did not exercise his power to the oppression of the subject, or without sufficient ground and foundation; so that the act was made to check and control the power of the master of the crown office; not to give him a right to exercise a power which he never exercised before; quite the contrary." After this act, the master of the crown office could not file an information without leave. This statute has been shown to govern *quo warranto* informations by the master of the crown office, the filing of which by that officer was not introduced but only regulated by the statute of 9 Anne. (Cole on Informations, 126.)

This act required the relators name to be mentioned in the information, and this, and the previous act of W. and M., requiring the person at whose suggestion the suit had been instituted, to give an undertaking for costs, should prosecution fail, gave rise to the practice of filing *quo warranto* informations, entitled on the relation of private per-

sons—the relator being altogether the creature of statute. (Aug. and Ames on Cor., sec. 733; Cole on Informations, 127.)

But an information against a corporation as a body, to annul its corporate existence, could not be filed by the master of the crown office. Such informations were filed by the attorney general; and leave was not required—he was the sole judge of the propriety of filing the information. The law requiring leave of the court before an information could be filed applied only to the master of the crown office. (*Rex v. Carmarthen*, 2 Burr, 869; *Murphy v. Farmer's Bank*, 20 Penn. St., 415; *Commonwealth v. Turnpike Co.*, 6 B. Monroe, 397.)

With us, the filing of *quo warranto* information, the several district attorneys possess the powers as well as those usually exercised by the attorney general, as by the master of the crown office; but the statute preserves, with few exceptions, the distinction between actions by them, acting *ex-officio* in the former capacity, and *ex-relatione* in the latter. (*Attorney General v. Railroad Co.*, 9 Vroom, 282; *The State v. Stewart*, 32 Mo., 379.)

Our statute limits the power of the district attorney, acting *ex-officio*, in requiring him to get leave. But when leave has been granted, the discretionary power of the court has been expended. (*The State v. Brown*, 5 R. I., 6.)

The district attorney is the law officer of the state, within the limits of his district, with the powers, in the absence of statutory regulation, of the attorney general at common law. (Constitution of Oregon, art. 7, sec. 17.) Therefore, when, as in the case before us, the district attorney files a *quo warranto* information in a distinctly state action, he has as much the sole control over it as the attorney general would have in a like case at common law. A relator cannot be a

party to the proceeding—is a mere stranger—and if his name is put in the information, it is surplusage. (*Rex v. Williams*, 1 Burr, 408; *The People v. The Trustees of Geneva College*, 5 Wen. 219.)

The reason is plain: the state, out of its sovereign power, has created the corporation for the purposes declared in its charter, and the same power must preside at its dissolution. The state may waive the forfeiture of the charter, and its power to do so, acting through its attorney, cannot be controlled by the court. (*State v. McConnell*, 3 Lea., [Tenn.,] 339; *Commonwealth v. Union Insurance Co.*, 5 Mass., 232; *The People v. Attorney General*, 22 Barb., 117; *The People v. Tobacco Co.*, 42 How. Pr., 162; *The People v. Fairchild*, 8 Hun., 334; S. C., 67 N. Y., 334.

CAPITAL LUMBERING CO. v. HALL.

PERSONAL PROPERTY—PRACTICE.—Where after the delivering of the property to plaintiff, in an action to recover personal property under the statute, he fails to prosecute the action, the defendant is entitled to a judgment of dismissal with costs; but he will not be allowed judgment for a return of the property, or for its value, if a return cannot be had without affirmatively showing his rights thereto.

IDEM.—The defendant must prove the affirmative allegations in his answer which would entitle him to such judgment, where they are denied by the replication. The facts rendering such a judgment proper must be plead, and if controverted must be proved, to enable the defendant to obtain such relief.

APPEAL from Polk County. The facts are stated in the opinion.

R. S. Strahan and J. W. Rayburn, for appellant.

J. A. Stratton and C. B. Moores, for respondent.

By the Court, WATSON, J.:

The appellant, as sheriff of Polk county, Oregon, seized

the property in controversy (2,000,000 feet of saw logs) under a writ of attachment, issued in an action brought in the circuit court for said county, by Conner and Crosno, against J. L. Smith, for the recovery of the sum of $1,345.44. The respondent claimed the property from the sheriff, and a jury was empaneled under sec. 283 of the civil code to try the validity of the claim. The jury found against the claimant. The respondent thereupon brought this action against the appellant to recover possession of the logs, alleging ownership, right to possession, value and wrongful taking by appellant.

Appellant answered, denying the ownership or right of possession in respondent, admitting a value of $8,000.00 and denying the alleged wrongful taking. As a separate defense he plead the levy under the writ of attachment in the action of Conner and Crosno against Smith, and averred that the logs were, at the date of such levy, the property of, and in actual possession of said Smith. And further plead the proceedings had before the sheriff's jury and that the logs were replevied from his possession. The respondent denied in its replication that the logs were, at the time of the levy, or ever, owned by or in the actual possession of Smith.

The respondent, on motion, obtained an order of the circuit court striking out all that portion of the answer relating to the proceedings before the sheriff's jury, as constituting no defense to the action. Upon a trial of the remaining issues, the jury found for the respondent, and judgment was rendered accordingly. This judgment was subsequently reversed by this court for error in sustaining said motion to strike out, and the cause remanded for further proceedings. When the case was again called for trial in the court below, the respondent not being able to controvert the allegations in the answer, regarding the decision of the sheriff's

jury adverse to its claim to the property, moved the court for a nonsuit, which was opposed by the appellant, who asked for a judgment for the return of the property, or in the event that a return could not be had, for the value of his special interest therein, under his levy—being the amount specified in the writ of attachment, and costs. The court overruled respondent's motion for a nonsuit, and upon its failure to further prosecute the action, ordered it dismissed, with judgment for appellant for a return of the property and costs; but refused to render judgment in the alternative for the value of the property, if a return could not be had. The appellant has again appealed to this court, assigning such refusal as error.

The only provisions of our code which have any bearing on the question involved here are contained in secs. 211 and 259, which are as follows:

"Sec. 211. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, that he is entitled to a return thereof, and may, at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."

"Sec. 259. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention thereof. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return

cannot be had, and damages for taking and withholding the same."

There can be little doubt as to the proper practice under these sections. The intention is quite apparent that the defendant shall not only claim a return of the property in controversy where it has been delivered to the plaintiff, but shall also allege in his answer the facts entitling him thereto, and prove them if put in issue, if he would have a judgment for a return or for the value where a return cannot be had. And such we understand to be the general rule, without regard to special statutory provisions. (Wells on Replevin, section 487.) The judgment for a return, or in the alternative, for the value of the property, where no return can be had, does not follow as a necessary consequence of a determination of the action in his favor. Judgment for the return of the property, or its value, is affirmative relief, and the defendant must allege and prove himself entitled to it, if his right is put in issue, or it will not be awarded him. This view offers an easy solution of the question involved in the case at bar. The respondent was compelled to abandon the further prosecution of the action. It failed to prove any of the allegations in the complaint which were essential to a recovery. It was barred from asserting any claim to a judgment against the appellant as the effect of the proceedings before the sheriff's jury, plead in the answer.

Appellant was entitled to judgment of dismissal with costs. This much followed as a necessary consequence of the respondent's inability and failure to proceed to the trial of the case. But his right to judgment for a return of the property, or for the value, if a return could not be had, was not established by such failure on the part of the respondent. It was incumbent on him to establish such right

affirmatively. In this respect he was the actor, and inasmuch as no proof was offered by either party, this question must be determined upon the pleadings alone. In fact the appellant's motion is virtually for judgment upon the admissions in the pleadings. Every allegation in the answer, relating to the ownership or possession of the property in dispute, is denied by the replication, except one. It is not denied that the property was in his possession when it was replevied by the respondent. His right to a judgment for a return, or the value if no return could be had, depended on this fact alone.

From the pleadings, and the motion was based upon them exclusively, after respondent's default, it did not appear to have any right or interest whatever in the property replevied. The appellant appeared to have had possession alone at the time the same was taken and delivered to the respondent. Ordinarily the presumption would be that the possessor was also the owner, and entitled to a judgment of return under such circumstances. But the appellant virtually disclaims any ownership in himself by justifying under the process against the property of L. S. Smith, and alleging that at the date of his levy upon said property it was in the actual possession of and belonged to said Smith. We think, therefore, that his possession thus explained in his answer, affords no ground for the presumption of ownership in himself, which would entitle him to the judgment asked. And as the allegations in the answer as to the ownership and possession of Smith were denied by the replication, and no proof was offered to maintain them, the appellant was not entitled to the judgment for the value, which he demanded from the court below, and consequently its refusal to grant such relief was not error.

Judgment affirmed.

LADD & BUSH v. RAMSBY.

SERVICE BY PUBLICATION—INSUFFICIENCY MUST BE SPECIFICALLY ALLEGED.—Where garnishees seek to restrain an execution because the judgment on which it was issued was void, and for the further reason that no process of garnishment had been served upon them, the facts must be fully and unequivocally stated. Thus, when service was had by publication, it is not enough to allege that the affidavit for the order was insufficient; it must be shown wherein it was insufficient.

ALTERNATIVE PLEADING—INJUNCTION.—Alternative pleading, as that the judgment debtor was either dead when the proceedings were commenced, or else resided in Umatilla county in this state, is bad. An injunction can be granted only upon positive averments.

SEMBLE.—That if the proceedings were void, there is an adequate remedy at law against the sheriff as a trespasser.

APPEAL from Marion County. The facts are stated in the opinion.

J. A. Stratton, for respondent.

N. B. Knight, for appellant.

By the Court, WALDO, J.:

This is a suit to enjoin an execution issued on a judgment had against A. H. Simmons as judgment debtor, and sought to be enforced against the respondents as garnishees. The complaint alleges that on or about the 20th day of September, 1880, Thomas Cann deposited at the banking house of the respondents the sum of $532.33, to the credit of A. H. Simmons, of Simmon's landing, in Umatilla county, Oregon, where said Simmons at that time lived. That he had since, as respondents are informed and believe, died; that on or about the 16th day of December, 1880, an action was brought in the circuit court for Marion county against the said A. H. Simmons by F. W. and J. G. Paine, partners under the firm name of Paine Brothers, in which they alleged that said Simmons was indebted to them in a sum

named; that said F. W. and J. G. Paine undertook to obtain service of summons on the said Simmons by publication, but that said proceedings were irregular and void on their face, because there was no sufficient affidavit for an order of publication. That at about the same time said Paine Brothers wrongfully had a writ of attachment issued and placed in the hands of R. C. Ramsby, sheriff of Marion county, which said writ they pretend has been served upon the respondents as garnishee. That on said pretended service a judgment was had against said A. H. Simmons. And respondents allege that said judgment is wholly void, for the reason aforesaid, and further that if said defendant therein is intended as the Simmons to whose credit said deposit was made, then the said judgment is absolutely void for the reason that the Simmons last referred to was dead at the time of the filing of the said complaint and the rendition of said judgment, and if the said Simmons to whose credit said money was deposited, were alive, it would be void for the reason that the said court did not obtain jurisdiction over him, as his place of residence was in Umatilla county, in which county the venue of said action should have been laid, nor could service on Simmons in such case have been made by publication.

An injunction will only be granted in a clear case, and upon an unequivocal statement of the facts constituting the grounds therefor. The allegation of the insufficiency of the affidavit for publication of summons—if of any importance, when other statements in the complaint are considered—is defective, since it is for the court and not the pleader to say that the affidavit is insufficient. The facts showing the insufficiency must be set out.

The alternative allegation that Simmons was either dead when the action was commenced, or at that time resided in

Umatilla county, is bad, and affords no ground for relief. (Gould's Pleadings, p. 55, note 14.) The respondents in the first part of their complaint allege that they have been informed and believe that Simmons was dead when the action was commenced.

Appellant's counsel cite *Armstrong v. Sandford*, 7 Minn., 49, to show that an injunction will not be ordered on facts stated only on information and belief. At all events, the effectiveness of this allegation is overthrown by the subsequent allegations which involve the question of death in uncertainty. It is also alleged that respondents were never garnisheed, which, if true, would make the sheriff a trespasser. But it is alleged that a writ of attachment was wrongfully sued out, and that said sheriff did, by virtue of said writ, pretend to garnishee the respondent. After this, a bare allegation "that the said Ramsby never did garnishee the said $532.33, or any part thereof," is pleading what the pleader thinks to be the effect of the proceedings of garnishment, and not the want of any actual service of process upon the garnishees. If the proceedings against Simmons were void, as the respondents had already endeavored to allege, then the garnishee proceedings were also void, however perfect in themselves, and it cannot be said that the complaint intends more. But admitting that the proceedings against Simmons, exclusive of those on the attachment, are valid, then if the plaintiffs wished to allege that they had never been garnisheed, they should have alleged the nonexistence of facts fatal to a valid garnishment. It is not sufficient that the pleader thinks there has been no garnishment. He must state fully the facts from which the court can see that there has been no garnishment. (*Sawer v. City of Kansas*, 69 Mo., 46; *Brundage v. Candle*, 25

Texas, 387; *Buntain v. Blackburn*, 27 Ill., 406; *Tye v. Catching*, 78 Ky., 469.)

Also, a statement may be sufficient to invite an issue in a mere pleading, and yet insufficient to warrant an injunction. (*Redfield v. Middleton*, 7 Bosw., 649.) It follows, therefore, that conceding that the ruling would have been otherwise had the invalidity of the judgment or of the garnishment been shown by proper allegations, there is no sufficient statement of facts in the complaint to authorize a court to order an injunction, and the demurrer to the complaint should have been sustained.

But if the facts were sufficiently alleged, and the judgment against Simmons on the garnishee proceedings were void, it is doubtful if a cause of suit could be stated. The position of a garnishee is one of embarrassment. As a mere stake-holder he is entirely innocent in the controversy between the original parties, and yet liable to be subjected to expense to protect himself. (*Moore v. Railroad Co.*, 43 Iowa, 385; *Walters v. Washington Ins. Co.*, 1 Iowa, 411.)

Hence, it seems he should not interfere in the controversy between the original parties, or plead other defenses than those necessary to protect himself. Any attack he may make on the judgment against the judgment debtor, must be a collateral attack, (*Peters v. League*, 13 Md., 58,) and consequently he should be protected in making payment where such judgment can only be attacked directly. But if the judgment against Simmons is void on its face for the want of a sufficient affidavit, or because of the invalidity of the attachment, it does not follow that the garnishees are entitled to an injunction. The void execution may be quashed on motion. (*Sauchey v. Carriaga*, 31 Cal. 170.) Besides, if the judgment is void, or the plaintiffs had never been garnisheed, they would not be in any degree

charged by the proceedings. They would seem to stand in a position similar to that of a party whose property has been levied on to satisfy the debt of a third person. In theory, the purpose of an injunction is to stay irreparable mischief; it stays a threatened evil, the consequences of which cannot adequately be compensated, were it suffered to happen. (*Edwards v. Albany Mining Co.*, 38 Mich., 49; *Hawley v. Beardsley*, 47 Conn., 571.)

The respondents, therefore, cannot have an injunction if they have an adequate remedy at law, as it will be presumed they have, unless the contrary is specially shown. In *Baker v. Rinehart*, 11 West Va., it is held that an injunction will not be granted to stay the sale of the personal property of a third person levied on by the sheriff, unless a case of irreparable injury is made out. The party will be left to his remedy at law. The court goes on to show what is meant by an adequate and complete remedy at law. (See also *Frazer v. White*, 49 Md., 1; *Thorn v. Sweeny*, 12 Nev., 251, 256; *More v. Orr*, 15 Cal., 206; *McCreery v. Sutherland*, 23 Md., 471; *Richards v. Kirkpatrick*, 53 Cal., 433; *City of Portland v. Baker*, 8 Or., 356; *Cooper v. Hamilton*, 8 Blackf., 377.)

But suppose the invalidity of the judgment consists of matters to be established by extrinsic evidence, as, that Simmons was dead when the process of garnishment was served, or was a resident of Umatilla county? In the former case, *Loring v. Folger*, 7 Gray, 505, is authority that the judgment is absolutely void. In such a case the judgment affords no authority for any proceedings against the garnishee. He can attack the judgment collaterally, and as well in a court of law as in a court of equity. The same reason for refusing an injunction would still seem to exist. Be this as it may, for reasons heretofore stated, the demurrer

should have been sustained, and consequently the judgment must be reversed.

Judgment reversed.

OCTOBER TERM, 1882.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OREGON,

OCTOBER TERM, 1882.

EDWARD B. WATSON, *Chief Justice.*
WILLIAM P. LORD, } *Associate Justices.*
JOHN B. WALDO, }

STATE *v.* BROWN.

CLAIMS AGAINST STATE—ALLOWANCE BY SECRETARY.—The decision of the secretary of state upon a claim against the state, presented to him for allowance, is not conclusive upon the rights of the parties in a collateral proceeding. Such decisions are neither judicial determinations, nor invested by law with the effect of such determinations.

IDEM.—The presentation of a claim against the state, and its allowance by the secretary, do not constitute an account stated so as to preclude an inquiry as to its correctness, in an action at law, brought by the state for a sum of money alleged to have been unlawfully allowed in said account, and paid through mistake.

APPEAL from Marion County.

This was an action at law, brought by the state, against Mart. V. Brown to recover the sum of $18,295.66 alleged to have been overpaid him through mistake, on account of materials furnished and printing done by him for the state, during his official term as state printer, from September, 1874, to September, 1878. The complaint contains sixty-seven different counts, each expressing a distinct cause of

action, but as they are all in the same form, the citation of a single one, for example, will suffice. The first count in the complaint, following the allegation of the defendant's official character, is as follows:

"2. That between the 14th day of September, 1874, and the 31st day of October, 1874, said defendant, in the discharge of his official duties as such state printer, printed for said plaintiff, and furnished paper for 100 copies each of the following named bills, to-wit: Senate bills numbered respectively 1, 2, 3, and house bills numbered respectively 10, 15, 16, 18, 21, 23, 24, 26, 27, 29, 34, 42, and 111, of the eighth regular session of the legislative assembly of the State of Oregon, each of said bills consisting of one printed page. That said work done and material furnished consisted for each of said bills of the following named items, and defendant thereby became entitled to receive from the plaintiff for each of said bills, the amounts named opposite the several items, as next hereinafter specified, and no more; that is to say:

3496 ems composition, at $1.25 per 1000 ems.....	$4 37
11-100 of one ream of paper, at $10 per ream.....	1 10
1 token (of 240 sheets) of presswork, at $1 per token	1 00
Folding	
Stitching	

Amounting in all to the sum of $103.52.

"3. That said defendant, on or about the 26th day of October, 1874, presented his bill to plaintiff for said work and material, in which he charged therefor the sum of $204, which said sum this plaintiff, being then ignorant of the facts hereinbefore alleged, and acting under a mistake as to the amount actually due, allowed and paid."

The defendant demurred to the complaint on the grounds:

"1. This court, as a court of law, has no jurisdiction of

the subject matter of the action or complaint. 2. The plaintiff cannot, in a court of law, surcharge, falsify or open up an account which has been stated or settled between the parties. 3. The complaint does not state facts sufficient to constitute a cause of action."

The demurrer was overruled and the defendant answered. After denying the material allegations in each count, the answer concludes with the following: "And for a further and separate answer and defense herein, defendant avers that each and every item allowed, and each and every dollar paid to him by the state of Oregon for work done, or for material furnished, in the public printing, as set forth in the complaint, was duly audited and paid to him by the warrants of the secretary of state drawn upon the treasury of said state."

The state replied as follows: "Denies that each and every item allowed, or any item allowed, or that each and every dollar to him paid by the state of Oregon, or any amount to him paid by the state of Oregon for work done or for material furnished in the public printing mentioned in the complaint, was duly audited or allowed or paid by the warrants of the secretary of state, drawn upon the treasurer of said state, or otherwise." The issues thus presented were tried by the court below, whose findings and judgment were as follows:

"The court finds as matters of fact:

1. That the defendant at all the times mentioned in the complaint was the duly elected, qualified and acting state printer of the state of Oregon.

2. That in doing the work mentioned in plaintiff's complaint the defendant furnished for the use of plaintiff only 323.56 reams of paper, which at ten dollars a ream, the price allowed by law, amounted to $3,235.60. That the defend-

ant, in the bills presented to the state, received pay for 1292.26 reams, and received from plaintiff therefor the sum of $12,922.60.

3. So far as the amount of composition is concerned, the court finds that the work was reported to be done by the expert as done by BROWN, and I allow for this work as so found.

4. As matter of law, the court finds that the finding of the secretary of state as to the amount of work done was a matter on which he was called upon to use his discretion, and such determination in the absence of fraud is binding on the state.

5. That the amount of paper furnished is charged by the ream, and more reams were charged for than were actually furnished. For this excess, the defendant should not be allowed.

6. What constitutes a ream of paper is a question of law, to be determined by the definition of the word, and was not a matter to be found by the secretary of state.

7. It is therefore considered and adjudged by the court that plaintiff have and recover of the defendant the sum of $9,687 and his costs and disbursements."

The appeal was taken by the defendant Brown from this judgment. No exceptions appear to have been taken during the progress of the cause through the court below; but appellant relies upon the record set forth above as disclosing the errors assigned in the notice of appeal. The errors assigned are. 1. Overruling defendant's demurrer to the complaint. 2. The 2nd finding of fact; and the 5th and 6th findings of law, above set forth. 3. Rendering said judgment in favor of the state.

Bonham & Ramsey, for appellant.

W. G. Piper and J. A. Stratton, for respondent.

By the Court, WATSON, C. J.:

We have first to determine the nature and effect of the decisions of the secretary of state upon claims against the state, which have been presented for his allowance. Appellant contends that they should be regarded as judicial determinations, and conclusive as to the rights of both the claimant and the state, in all collateral proceedings. This proposition involves the assumption that the secretary, in auditing claims against the state, exercises judicial power. Power vested in an administrative officer to act, at his discretion, is not necessarily judicial. Mr. Starkey thus clearly defines the distinction between them:

"There is a wide distinction between a special authority to act, under particular circumstances, and a judicial authority to act in particular cases. So long, in either case, as the party acts within the limits of his authority, he is of course justified in what he does, and in either case if he plainly exceed the limits of his authority he is without justification; the material difference is this, that in the former case, *i. e*, where he has a mere authority to execute, it is open to inquiry whether facts existed which warranted his act; in the latter, where he acts judicially, in a matter within his jurisdiction, his adjudication is usually conclusive upon the question whether the particular facts warranted that judgment, and to protect him from an action of trespass." (3 Stark. Evid., 1,150.)

But under the constitution of this state, the secretary cannot exercise judicial functions. Art. 3 provides for the distribution of the powers of government into the three great departments—the "legislative, the executive, including the administrative, and the judicial;" and declares "that no person charged with official duties under one of the departments, shall exercise any of the functions of another, except

as in this constitution expressly provided." The office of secretary of state is provided for in art. 6, which creates the administrative department, while by art. 7, creating the judicial department, all the judicial power of the state is vested in a supreme, circuit and county courts, with authority to the legislature to invest justices of the peace with limited judicial powers, and to create municipal courts to administer the regulations of incorporated towns and cities.

There is nothing in the constitution expressly authorizing the secretary to exercise any of the functions of the judicial department, and, in the face of the inhibition just cited, the legislature is incapable of conferring any such power upon him. (*People v. Draper*, 15 N. Y., 532; *State v. Hastings*, 10 Wis., 532.)

But if the correctness of this construction of the constitutional provisions above referred to could be deemed at all questionable, still we should feel compelled to hold that neither by the constitution nor laws has the secretary of state been clothed with any judicial power whatever. By sec. 2 of art. 6, above referred to, he is declared to be, by virtue of his office, "auditor of public accounts." Sec. 11 of the act of June 2, 1859, entitled "An act to regulate the treasury department," is as follows:

"Sec. 11. The secretary of state shall superintend the fiscal concerns of the state, and manage the same in the manner prescribed by law; * * * To examine and determine the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law, and to endorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant on the treasury for the same; and he shall report to the legislature, at the commencement of each regular session, a complete list of all ac-

counts so audited, together with a general statement of the fiscal concerns of the state; *Provided*, that no account shall be so audited, except the same be duly verified by the oath, affidavit or affirmation of the claimant or his agent, and all accounts shall be kept on file in his office; to enter in a book, to be kept for that purpose, an abstract of all warrants drawn on the treasury, showing the date, number, name of claimant, the amount claimed, the amount allowed thereon, and from what fund to be paid."

"Sec. 12. Whenever any account shall be presented to the secretary of state for settlement, he may require the person presenting the same, or any other person or persons, to be sworn before him touching such account, and when so sworn, to answer orally, or in writing, as to any facts relating to the justice of the account. If any person interested shall be dissatisfied with the decision of the secretary, on any claim, account or credit, it shall be the duty of the secretary, at the request of such person, to refer the same, with his reasons for his decision, to the legislative assembly, and all persons having claims against this state shall exhibit the same, with the evidence in support thereof, to the secretary, to be audited, settled and allowed within two years, and not afterwards. And in all suits brought in behalf of the state, no debt or claim shall be allowed against the state as a set off, but such as have been exhibited to the secretary, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant, at the time of trial, is in possession of vouchers which he could not produce to the secretary on account of absence from the state, sickness or unavoidable accident."

These are the provisions of law upon which appellant claims that the decision of the secretary of state in allowing or disallowing a claim against the state, is a "judicial deter-

mination of such a claim, and as binding upon the parties as the judgment of any court."

It will hardly be contended that his designation in the constitution, as "auditor of public accounts," by itself, confers any judicial power on the secretary of state. Abbott defines the powers of such an officer as follows: "An officer of government, whose function it is to examine, verify and approve or report accounts of persons who have had the disbursement of government moneys, or have furnished supplies for government use." (1 Abb. Law Dict., 111.)

Burrill's definition of the term "auditor" is this: "An officer or person whose business is to examine and verify the accounts of persons entrusted with money. A person appointed to examine a particular account and state or certify the result; in doing which he is said to audit the account." (1 Burrill Law Dict., 163.)

In every organization of government, the office of public auditor is to be found in the administrative department, and even where he is empowered to act, upon his official judgment, his functions are only *quasi* judicial. If his determinations upon issues properly presented to him are in any case to be held conclusive upon the parties in collateral proceedings, it is not because they involve the exercise of judicial power or absolute discretion, but because such conclusive effect has been imparted to them by competent constitutional provision or legislative enactment. Without his allowance, the claimant cannot obtain payment of his demand; but the rejection of his claim does not determine his right to payment, unless declared to have such effect by competent authority.

Many decisions are to be found in the reports of the several states, which hold that mandamus will lie to compel a public administrative officer, charged with the duty of aud-

iting the public accounts, to allow claims, where the undisputed facts show a clear legal right in the claimant to have the same allowed and paid out of the public treasury. (*McCauley v. Brooks*, 16 Cal., 11; *Smith v. The Controller of the State*, 18 Wend., 659; *People v. Stout*, 23 Barb., 339; *Agricultural Society v. Bates & Lippincott*, 61 Ill., 490; High's Extraordinary Legal Remedies, secs. 104-6, and cases cited.)

This doctrine is fully sustained by the decision of this court in *Burch v. Earhart*, 7 Or., 58. These decisions are irreconcilable with the idea that the determinations of such officers, in auditing claims against the public, are of the same nature, and have the same force, as the judgments rendered by judicial tribunals, in proceedings of a judicial character. Mandamus will lie, in some instances, to compel the exercise of judicial functions, but not to control the free operation of judicial discretion. When the public auditor has exercised his discretion and pronounced his decision, then, if his action is to be regarded as judicial, his power is ended, and even though his decision appear to be clearly erroneous, he cannot be compelled to correct it by mandamus. (*Ex parte Taylor*, 4 How. U. S. R., 3.)

In the case of the *State v. Hastings*, 10 Wis., 525, it was held that the state treasurer might lawfully refuse to pay a warrant drawn on him by the secretary of state, for a sum audited and allowed by the latter, upon an illegal demand. The constitution of Wisconsin, like our own, declared that the secretary of state should be "*ex-officio*" auditor. In *Wall v. County of Monroe*, 13 Otto, 74, the supreme court of the United States held, that to an action against the county, upon certain county warrants, issued upon claims audited and allowed by the county court, brought by a *bona fide* holder for value, any defense might be set up by

the county, which would have been available if the action had been brought by the original payee, and allowed an offset against such payee. Justice Field concludes the opinion in the case with the following observation:

"The cancellation of the warrants originally issued, and the substitution of others in their place, did not change their character. Neither that proceeding nor the original auditing of the claims of Gallagher had the force of a judicial determination, concluding either him or the county. There was no litigation on the subject between adversary parties, which could give to the result any greater efficacy than the award of an ordinary board authorized to audit claims against a municipal body." Citing *Shirk v. Pulaski County*, 4 Dill., 209. In the case of *The County of Marion v. Phillips*, 45 Mo., 75, the court held that the action of the county court in allowing a claim of the county collector against the county, through a mistake of fact, was not *res adjudicate* so as to bar a suit by the county to recover back the amount allowed. That in such cases the judges of the county court act merely as the fiscal agents of the county, and their mistakes can be inquired into and corrected, as well as those of individuals acting in their own behalf. Judge Bliss, in the course of the opinion, says: "The county judges are in most matters the agents and representatives of their respective counties. As a board called the county court, they audit claims against it, make appropriations, assess taxes, loan and distribute the school fund, take charge of its poor, direct the building and supervision of roads and bridges, erect and take charge of the public buildings, look after, and settle with its financial agents, and in general transact the county business. Many of their acts, as in auditing claims, and settling the accounts of treasurer and collector, have been sometimes called judicial, because it is incumbent on the court to decide—to ad-

judicate as it were—upon the claim or account. But this decision is more like that of a party or agent, than of an impartial tribunal with the parties before them. They decide very much as every private person or financial agent of a firm or corporation decides upon an account presented. They decide as all public auditors decide when claims or accounts are presented for adjustment, and if their action is judicial, then our auditor of public accounts is so far a judge, and holds a court of record; for in auditing claims his duties are precisely those of the county court. * *

I have thus spoken of the action of the court upon claims against the county because it is clearly analogous to its action in settling with collectors, &c. This settlement of accounts with collectors lacks one of the essential elements of ordinary judicial action, there being no parties litigant, no adverse interests to be adjusted, no one to be heard but the officer; and it also possesses one of those elements, inasmuch as it is to be made and the accounts adjusted according to law. But so are all settlements and adjustments between parties. The rules that govern do not so much decide the question, as the relation of the body, whether it is to adjust controversies between the parties, or whether it represents one of the parties."

In the case of *Washington County v. Parlier*, 5 Gilman, 232, the supreme court of Illinois, in discussing the same question, use language equally strong and explicit. They say: "In making this settlement the commissioners act as agents of the county, and do not adjudicate as a court. They could enter up no judgment against the defendant for the balance found due, nor have they any means of enforcing payment of such balance except by a resort to the ordinary courts of law. As the fiscal agents

of the county, their mistakes may be inquired into and corrected, as well as those of an individual acting in his own behalf." To the same effect are the decisions in *State v. Roberts*, 62 Mo., 388; *Cumberland Co. v. Edwards*, 76 Ill., 544; *Commissioners v. Keller*, 6 Kansas, 510.

In the case last cited, the supreme court of Kansas held that it was error in the lower court to instruct the jury that the allowance of the claim in controversy by the board of county commissioners, "is an adjudication as binding on the parties as the judgment of a court." The same doctrine is maintained in the decision of this court, in *Grant County v. Sels*, 5 Or., 243. It was held in that case that money claimed by and paid to the county judge as a part of his salary, which he was not entitled to, could be recovered back in an action brought by the county against him, although his claim therefor had been audited and allowed by the county court.

A careful examination of the provisions of the statute above quoted, relating to the powers and duties of the secretary of state, must, we think, inevitably produce the conviction that the legislature, in enacting them, neither intended nor attempted to confer judicial authority on that officer in the matter of auditing claims against the state, or to make his decisions in relation thereto final and conclusive upon the rights of the parties, as it possibly had the power to provide. By these provisions the secretary is charged with the superintendence and management of the fiscal concerns of the state; and the examination and allowance of claims against the state are enumerated in a subdivision of the same section, as duties falling under this general head. It is plainly the intention of the subdivision that the secretary is to examine, determine, &c., the claims presented to him against the state as the superintendent and manager

of its fiscal concerns—in other words, its financial agent—and in no different character.

The accounts presented must be verified, and the secretary may, in his discretion, require the claimant or other persons to be sworn touching the account. But it does not follow that he is confined to the sworn testimony in determining whether the account should be allowed. The claimant has no voice in the matter, except in being permitted and required to verify his claim. He cannot insist that any further testimony shall be taken; or if the secretary elects to hear other testimony, the claimant cannot dictate what or how many witnesses shall be examined.

The statute, by providing for a reference of the claim to the legislature when the claimant is not satisfied with the secretary's decision, plainly indicates the sense of its framers as to the administrative character of his functions. But this is not all. The statute expressly recognizes the right of a claimant to set-off a claim, otherwise proper, which has been disallowed by the secretary in any suit brought against him on behalf of the state. And under the peculiar circumstances enumerated in the statute, he is allowed to set-off claims never presented to or acted on by the secretary.

We fail to discover any intention on the part of the legislature to give the secretary's decisions the final and conclusive character which belongs to judgments pronounced by the ordinary judicial tribunals, or to impart such conclusive effect to them by mere statutory enactment; and it is not to be presumed that the courts have been divested of their ordinary jurisdiction. Nor should the fact that the secretary is an administrative and not a judicial officer be lost sight of. In the matter of the application of Hervey W. Cooper, 22 N. Y., 67, Judge Selden expresses the following views upon this subject:

"Although in the general distribution of po
duties among the great departments of the go
many are found, the characteristics of which are s
that they can with certainty be referred to the ap
department, yet this is by no means the case with
lines between the various departments are not a
well be very precisely defined, and there are ma
which may with equal propriety be referred
Duties of this class, and they are very numerous, n
take their character from the departments to which
respectively assigned. The same power, which, w
cised by one class of officers not connected with the
would be regarded and treated as purely admi
because at once judicial when exercised by a
justice." See also *The State ex rel. Drake v.*
Wis., 188.

We therefore conclude that the decision of the
in the case at bar, by which Brown was allowed t
nine thousand six hundred and eighty-seven dolla
per which he never furnished, as found by the circ
was neither a judicial determination nor conclus
the rights of the parties by virtue of any provisio
and constituted no bar to the recovery by the sta
action. We hold that the secretary of state is inve
a certain measure of official discretion in the matte
iting claims against the state. That while he ac
its proper sphere, he is not only justified, but exe
judicial control. But that the rights of the parti
in relation to the particular remedy he is authoriz
minister, are in no wise determined or affected b
cisions, except so far as they may afford a presu
being in accordance with the facts.

Another point contended for by the appellant

the auditing and allowance of a claim by the secretary should be deemed to be of no effect as a judicial determination, still it would operate to convert the same into an account stated, and bar any recovery in an action at law where mistake only is alleged. But a stated account in this sense, derives all its force from the agreement of the parties, express or implied. It is, in effect, a new contract in writing, and is equally conclusive in an action at law. But it presupposes parties capable of making a written contract, which will bind them in the absence of fraud and mistake, although one or both may have relinquished valid demands to secure the settlement, which, if they had been allowed, would have sensibly affected the final balance. (*Homes and Drake v. D'Camp*, 1 Johns., 34.)

In the case here, there was no opportunity for any agreement. The secretary did not and could not have entered into any contract with the claimant. He was authorized to allow just what was due the claimant, according to his judgment, and was not justified in allowing anything beyond. If the state had contracted to pay so much, the secretary's power to audit the claim and allow what should appear to be due thereon, did not authorize him to enter into a new contract with the claimant through the form of a stated account, by which the latter might assert a claim to a greater amount than should be found due him under his original contract with the state.

We think the secretary has no power to state an account with a claimant which will bind the state in this manner. But if we were at all inclined to the opposite view, we should feel bound to disregard the objection upon the authority of *Grant County v. Sels, supra*, which unmistakably holds that an action like the present in effect, for money had and received, will lie to recover back money so

paid out of the public treasury. Indeed, we regard cision as virtually settling all the points in this cas the one first considered. We are fully satisfied th was no error as alleged by the appellant in the judg the circuit court, and it must be affirmed with cos respondent.

Judgment affirmed.

CLINE AND NEWSOME *v.* GREENWOOI SMITH.

OFFICERS—POWER OF GOVERNOR TO APPOINT.—Under the ac providing for election of supreme and circuit judges classes, the election was postponed until the next genera By virtue of an emergency clause, the act took effect from its approval by the governor. In the meantime, the offices the act were filled by appointment by the governor, as p the act. *Held,* that that portion of the act authorizing the to appoint the judges during the interim, was not in co the constitution—that the offices came into legal existe the act took effect, and *ipso facto* became vacant at their and that an existing vacant office, without an incumbent, within the meaning of section 16, article 5 of the constit can be filled by the governor by appointment.

STATUTE—CONSTITUTIONALITY OF.—Before a statute is declare repugnancy to the constitution ought to be clear and pal free from all doubt. The rule is rigid that every intendm be in favor of its constitutionality.

Geo. W. Lawson, for appellants.

J. A. Stratton and Thayer & Williams, for respor

By the Court, LORD, J.:

This is a suit in equity to impeach and set aside in equity. The decree was rendered, in a suit i wherein J. W. Greenwood and Eliza J. Smith we tiffs, and Mary C. Cline and Olive Newsome were ants, commenced in August, 1876, in the Marior

court, to invalidate and set aside the will of Elizabeth J. Greenwood, and to have distribution of her estate made according to law instead of by the terms of said will. The county court decided the will to be invalid, and the defendants therein appealed to the circuit court, and a decree was rendered reversing the county court and sustaining the validity of the will. From this decree the plaintiffs appealed to the supreme court of Oregon, and at the January term, 1879, the decree of the circuit court was reversed by the decree of the said supreme court, and its mandate sent to the court below, whereby it was decreed that said will was invalid, and the same was set aside and the property of said estate was distributed according to law among the heirs of said estate, instead of by the terms of the will, among the legatees and devises thereof. To impeach and set aside this decree of the supreme court, and the mandatory decrees thereunder, is the object of the present suit.

The only point relied upon and discussed in the briefs of appellants is, that the supreme court before whom the suit was tried at the January term, 1879, and a decree rendered annulling the will, was not organized in conformity to the constitution, because the judges who presided were appointed by the Governor instead of being elected by the people. In October, 1878, an act was passed by the legislature for the election of supreme and circuit judges in distinct classes, under which the governor was authorized to appoint, and did appoint, three judges of the supreme court and five judges of the circuit courts, who were to hold their offices until their successors were elected and qualified as provided in the act. (Session Laws of 1878, p. 31.) It is insisted that so much of this act as provided for the appointment of the judges of the supreme and circuit courts by the governor, until the general election next ensuing, is in direct vio-

lation of section 10, article 7 of the constitution, and
fore, void. Prior to the act of 1878, there were
dicial districts in the state, in each of which was ele
the voters thereof, a supreme judge, who held the
court in the counties composing such district. Ori
and on the adoption of the constitution, there were b
of such judicial districts, but in 1862 the legislature
and added another judicial district to those already e
and provided for the election of a judge for such
and thus there became five supreme judges. The c
tion vests the judicial power in a supreme court,
court, &c., (sec. 1, art. 7), but the judicial power ap
to the courts above named was exercised by these
preme judges in the following mode: When sitting i
a supreme court, and when holding a court in any
in their district, separately, a circuit court. Al
called supreme judges, they were not elected by the
body of voters from the state, but by the voters fro
judicial district from which they were chosen. The
"justices of the supreme court"—five in number—
offices they held were of such character and like
for it was as justices of the supreme court that the
holding a circuit court in each county in their judic
tricts devolved upon them under the constitution.
art. 7.) While this system of judicature was to co
the constitution provided, under circumstances
enumerated, that the number of justices of the s
court could be increased until the limitation of sev
consequently, new districts might be created, and w
organization of such new district, another justice of
preme court would be added. Such is a brief outline
judicial system designed by the framers of the const
to exist until the population should reach two h

thousand, when the legislature was authorized and empowered to change or reorganize the existing judicial system, by the enactment of a law providing for the election of supreme and circuit judges in distinct classes. (Sec. 10, art. 7.) This section provides that "when the white population of this state shall amount to two hundred thousand, the legislative assembly may provide for the election of supreme and circuit judges in distinct classes, one of which classes shall consist of three justices of the supreme court, who shall not perform circuit duty, and the other class shall consist of the necessary number of circuit judges, who shall hold full terms without allotment, and who shall take the same oath as the supreme judges." This section of the constitution can only be made operative by legislative action. It is in anticipation of a condition of things, which, from the salubrity of our climate, the fruitfulness of our soil, and the extent and variety of our resources, as inducements to emigration and settlement, it was reasonable to presume would soon come to pass.

When the white population of the state is two hundred thousand, the legislative assembly is not required absolutely to provide for the election of supreme and circuit judges in distinct classes, in any event. The language of the constitution is that they *may* do it; but when done, it is not an unreasonable presumption that that condition of things existed which authorized the legislature to exercise the power confided to them, and put an end to the existing system of judicature. At any rate, the right to exercise this power when the white population attains the requisite number, resides in the legislature, and when exercised in the mode prescribed by the constitution, the reorganization of the courts is effected; for such must be the inevitable result of any legislation making operative this section of the consti-

tution. The former system by which supre
elected by districts, and as such officers di
circuit duty, must necessarily cease to exist,
lature passes a law providing for the elect
and circuit judges in distinct classes, and
carries that law into effect. The moment
effect, a new supreme court is constituted
circuit courts as legislative wisdom may s
judicial districts.

In 1878, the legislature, conceiving the
requisite population, and that the time had
public interests required them to put an end
judicial system, and to provide, in conform
10, article 7, of the constitution, for the elec
and circuit judges in distinct classes, did
heretofore referred to, entitled "An act to
election of supreme and circuit judges in d
in which they provided that there shall be
next general election on the first Monday
three justices of the supreme court, whose
shall commence on the first Monday in J
that there shall be elected on the first Mo
1880, a circuit judge in each of the judic
they now exist in the state, whose terms of
mence on the first Monday in July, 1880
until their successors are elected, etc., an
twenty days from the taking effect of the ac
shall appoint three judges of the supreme
judges of the circuit courts, who shall, withi
receiving notice of their appointment, qua
upon the duties of their offices, and who sh
hold their offices until their successors are el
ified as provided in this act, and also provide

clause which put the act in effect from and after its approval by the governor. Here, then, is an act providing for the election of supreme and circuit judges in distinct classes. For the circuit judges, it created the judicial districts according to the boundaries as they then existed, and, when the law took effect, the office of circuit judge in each judicial district came into existence, and *ipso facto* became vacant at its creation. Nor was the legislature required in the exercise of its power in rendering operative sec. 10, of art. 7 of the constitution by legislative enactment, to pay any attention to existing judicial districts—they might have cut and carved them up in providing the "necessary number of circuit judges," as in their legislative wisdom the public exigency might have required. Instead of adopting the boundaries of the districts as already divided, they might have divided up the state into ten judicial districts in order to provide the "necessary number of circuit judges," which would have effectually blotted out every trace of the judicial districts then existing. And is it not manifest that a legislative act which should create these ten judicial districts and provide for the election of the circuit judges to hold the circuit courts in such districts, that the moment the act becomes a law, the ten judicial districts came into existence, and were legal entities, and the five old districts from which the former supreme judges were chosen were extinguished, and there were then existing ten offices, awaiting the election of ten circuit judges, which, until such election could take place, were existing vacant offices. The creation of five judicial districts as provided in the act according to the old boundaries produced the same effect. It is true, the act provides in the meantime that the governor should fill by appointment the offices created by the act, which *ipso facto* became vacant at their creation; but as applied to vacancies

in office this precaution was wholly unnecessary,
constitution invested him with that power. Given
isting office vacant, and under our constitution the g
is authorized to fill it. (Sec. 13, art. 5, const.) T
no basis for the distinction that it applies only t
vacated by death, resignation or otherwise. The
true of the supreme court created by the act. W
legislature provided in the act for the election o
supreme judges, to be elected at the next general
and the act took effect, then there were three supren
cial offices created, which three supreme judges wer
when elected, and until that election took place, thes
were vacant, unoccupied. An interval necessarily
between the taking effect of the act and the electio
judges, which, in the nature of things, rendered vac
offices the act created. The vacancy flowed as a
consequence of doing what the legislature had a righ
to create a separate supreme court, and as many
districts as the public interests required, and to prov
the election of the judges.

Although invested with the same supreme judicial
it is not the same supreme court which existed prio
act of the legislature. It differs in its composition,
number of its offices and officers, their election and
The fact is that the offices of the former supreme cou
the officers of that court, went out in the re-orga
which the act effected. The power given by the c
tion to the legislature to constitute a supreme cour
composed of three members, whose tenure of office
be derived from the voters of the state, when exercis
an end to the former judicial system. The old
could not exist when the new was brought into ex
By force of the act, the new supreme court was con

and its offices were vacant. A legislative act, in effect providing for the election of supreme and circuit judges in distinct classes, implies the existence of the offices which they were to fill. An office must exist before it can be provided with an incumbent by election, or otherwise. The moment, therefore, the life of the court began by force of the legislative enactment, there came into being the offices which the three supreme judges to be elected were to fill. It is true they were elective, but they were none the less vacant after the act took effect. Under our constitution, the governor is invested with the power to fill vacancies as well to places which have never before been occupied as to a place which has been previously occupied. An office is just as vacant which has never been filled as an office vacant by death or resignation. In either case, the office is empty, unoccupied, without an incumbent. It is a mistake to suppose the filling of a vacancy in office until the period of the next general election is opposed to the constitutional requirement that such officer should be elected. The exercise of this power is essential to prevent great and obvious injury to the community. Section 16, of art. 5 of our constitution is a transcript of section 18, article 5 of the constitution of 1851, of Indiana. In *Stocking v. The State*, 7 Ind., 327, David M. Stocking was indicted for the murder of John Rose. The result of his trial was a verdict of murder in the first degree, and that he suffer death, and judgment of the court was entered accordingly. A motion for a new trial was interposed, overruled and exceptions taken, etc.

The objection made was that the court trying the cause was not organized in conformity to the constitution. In February, 1855, an act was passed by the legislature, creating the twelfth judicial circuit, and it was claimed that this act was in conflict with section 9, article — of the constitu-

tion, which, among other things, provided that "*a j*
each circuit shall be elected by the voters thereof
court say: "It is objected that the judge who presi
not properly the judge of that circuit, because appo
the governor instead of being elected by the peopl
objection is not well taken. The act creating the
was declared in force from and after its passage, a
of emergency. (Sec. 28, art. 4.) We lay no stres
declaration of the legislature that there was a vac
the office of circuit judge of the new circuit. If th
a vacancy, it existed independent of that declarat
there was no vacancy, that body could not create c
declaratory enactment. The vacancy flowed as a
consequence of doing what they had a right to do—
a new circuit. There is no technical nor peculiar
to the word "vacant," as used in the constitution. I
empty, unoccupied; as applied to an office withou
cumbent. There is no basis for the distinction urg
it applies only to offices vacated by death, resigna
otherwise. An existing office without an incum
vacant, whether it be a new or old one. A new hou
vacant as one tenanted for years, which was abando
terday. We must take the words in their plain
sense. (2 R. S., pp. 339, 223, 341.) The emergenc
created the office would imply that the vacancy in t
of judge of the new circuit should be filled imme
The 18th section, article 5, provides that the governo
by appointment, fill a vacancy in the office of judge
court. We think this appointment well made und
section." This case was sustained in *Rice v. The*
Ind., 332; *Driskell v. The State*, 7 Ind., 338, and
v. The State, 8 Ind., 350.

In the *State of Missouri ex rel. Henderson v.*

urt of Boone Co., 50 Mo., 324, the court say: "The
xt question is, was there such a vacancy in the office of
lge of this court as to authorize the governor to exercise
power of appointment? The act vests the exclusive
isdiction of probate matters in this court, and it took
ect the first day of June, 1872, but postpones the election
a judge until the general election in November. Who
to transact the probate business in the meantime, unless
udge be appointed to fill the vacancy? The language of
constitution is, 'when any office shall become vacant,
.,' the governor may fill the vacancy. This is a new
ice created by this act, but *ipso facto* becomes vacant in
creation. An existing office, without an incumbent, is
ant within the meaning of the constitution, and can be
ed by the governor by appointment, unless an election,
some other mode is plainly indicated." (*Stocking v.*
e State, 7 Ind., 326; *State, ex rel. v. Boeker*, 56 Mo. 21;
rk v. Irwin, 5 Nev., 118; *Welch v. Commonwealth*, 89
nn., 424.)

In October, 1862, the legislature passed an act, entitled
n act to create the fifth judicial district, and to increase
number of supreme judges," in which it was provided,
the first general election after the act (first Monday in
ne, 1864,) a justice of the supreme court shall be elected
the qualified electors of said district to serve for the
m of six years, and until the commencement of such full
m, the said vacant office shall be filled by the governor."
ring the interval between the taking effect of the act by
ich such judicial district was created, and the election of
reme judge at the ensuing general election, the office of
reme judge was vacant, and the governor of the state
pointed the Hon. Joseph G. Wilson supreme judge during
h interim, to fill the vacancy. As was said in the case of

Stocking v. The State, *supra*, we lay no stress
ation of the legislature that there was a vacancy
If there was a vacancy, it existed independent
laration. If there was no vacancy, the legislat
create one by a declaratory enactment. The va
as a natural consequence of their doing what
right to do—to create a new judicial district.
the act created was elective, for the constitutio
imperatively in that case as in this, that the ju
supreme court should "be chosen in districts by
thereof," but it was vacant, and the governor w
to fill it until the electors expressed their choic
general election. Nor was the constitutionality
pointment, so far as we are advised, ever doub
tioned. The people acquiesced in it, and the
other departments of state have recognized and
legal and obligatory. At the last session of th
(1882) a sixth judicial district was created, a
being vacant, the governor has filled it, until th
select a circuit judge at the next general ele
pendently of judicial authority, we have thus,
of years, concurring legislative expositions of
of this power, which although not obligatory u
ciary, is nevertheless entitled to great respec
least, a strong and pursuasive argument in its

In *Kendall v. Kingston*, 5 Mass., 534, (
Parsons said: "But every department of gov
vested with certain constitutional powers, must
instance, but not exclusively, be the judge of it
it could not act. And certainly the constructio
stitution by the legislature ought to have g
and not be overruled unless manifestly erro
certainly ought not to presume that the leg

ignorant of the right of the people to elect their judges, and of the constitutional provisions guarding that right. We should rather presume that the legislature intended that the act of 1878, to be in harmony with that right and these provisions, and if such a harmonious construction can be given to it, that construction should be applied. This, we think we have done, both upon principle and judicial authority. We do not think, therefore, that that portion of the act authorizing the governor to appoint the judges during the interim preceding the next general election, is in conflict with section 10, article 7 of the constitution investing the legislature with the power to provide for the election of supreme and circuit judges in distinct classes. But did we entertain any doubt whether the legislature had exercised its power in the mode prescribed by the constitution, we should be compelled to dissolve that doubt in favor of the constitutionality of the mode which the legislature had adopted. Before a statute is declared void, in whole or in part, its repugnancy to the constitution ought to be clear and palpable and free from all doubt. Every intendment must be given in favor of its constitutionality. Able and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject. Chief Justice Marshall, in 5 Cranch, 128; Chief Justice Parsons, in 5 Mass., 534; Chief Justice Tilghman, in 3 S. & R., 72; Chief Justice Shaw, in 13 Pick., 61, and Chief Justice Savage, in 1 Cowen, 564, have, with one voice declared, that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts be considered void. The opposition between the constitution and the law should be such that the people feel a clear and strong conviction of their incompatibility with each other." The offices came into legal

existence when the act took effect, and were vac
it was competent for the governor to fill. A
office, without an incumbent, is vacant within th
of section 16, article 5, and can be filled by the g
appointment. The decree of the court below is
Decree affirmed.

CITY OF PORTLAND *v.* BESSER, ET

OFFICIAL BOND.—Delivery and acceptance of an official bon
ferred from circumstances, where no particular mode is
statute. The possession of such a bond by the co
whose favor it is drawn, accompanied by possession
the exercise of its powers, and the receipt of the salary
it from the corporation, by the officer making such b
cumstances from which its delivery and acceptance may

COPIES—SEVERAL MAY BE CERTIFIED TOGETHER.—Several dif
may be certified together by the legal custodian of
records, under sections 734 and 738 of the civil code,
tificate, properly annexed, and referring to all such co
entitle them to admission as evidence. It is not nece
distinct certificate should be attached to each copy.

PRESUMPTION.—Where county orders, drawn in favor of
person, have been issued by the county clerk, and ar
found in the possession of the county treasurer, endor
name of such person, and canceled as required by la
redemption by such treasurer, a presumption arises th
received and endorsed by such party, in the usual co
ness; and that payment thereof has been made to the p
thereto.

IDEM.—And where bills against a county and in favor of
person, are found on file in the county clerk's office,
been allowed and orders drawn therefor, and delive
person, who has obtained payment thereof, the presum
he filed such bills, or caused them to be filed, and ha
of their contents.

COMPENSATION OF PUBLIC OFFICERS.—The power of the leg
the subject of compensation for public officers, in the ab
stitutional restrictions, is unlimited. It may provide
or measure it will, and in making such provision, is
no principle of uniformity or equality.

APPEAL from Multnomah County.

W. S. Beebe, for appellant.

J. C. Moreland, for respondent.

By the Court, WATSON, C. J.:

This action was brought by the respondent, the city of Portland, upon the official bond given by the appellant, L. Besser, as chief of police, with his co-appellants, as sureties, to recover the sum of nine hundred and thirty-seven dollars and twelve cents, alleged to have been collected by him, in his official character, for the respondent, and not paid over or accounted for as his said bond obligated him to do. After the issues had been made up, the cause was referred, in accordance with a written stipulation of the parties, to Hon. James K. Kelly, to take and report the testimony, together with his findings of fact and conclusions of law. The referee reported a balance due the respondent of two hundred and thirty-five dollars and forty-two cents, and recommended judgment for that amount. Appellants thereupon filed a motion to set the report aside, which was overruled, and judgment entered in accordance with the recommendation of the referee. From this judgment they have brought this appeal, assigning several errors in respect to such ruling.

The admission of the bond sued on in evidence, at the trial before the referee, against the objection interposed by the appellants, presents the first question to be disposed of here. They claim, through their counsel, that the delivery and acceptance of the bond were in issue under the pleadings, and that there was no evidence on either of these points introduced before the referee. Besser's appointment as chief of police, on July 3, 1877; his duly qualifying therefor; the making of the bond in question, and his con-

tinuance in such office until October 27, 1879
expressly or impliedly admitted by the ple
bond, which was produced at the trial by the
the lawful custodian of official bonds executed
the respondent, was identified by him, as the
his office on July 5, 1877, while he was a depu
predecessor in office; and he also testified to
ness of Besser's signature thereto. There was
dorsement on the bond as follows:

"Approved by the board of police commissi
day of July, 1877.

"M. S. BUR
"WILLIAM C
"R. R. RILE

Were these facts sufficient evidence of the
acceptance of the bond to justify its reception
by the referee? Sec. 174 of the charter of the
land, in force then, as at present, provides that
police, before entering upon the duties of his
file a bond," etc. We have not been able to fi
vision in the charter declaring, in express ter
with whom such bond should be filed. But
of the legislature which enacted the city cha
should be filed with some officer of the corpo
parent; and we have no doubt, in view of the g
of the duties appertaining to the office of city
under general usage and the specific provision
charter, that the legislature intended that such
be filed in that office.

Sec. 63 of the charter declares, "That the a
accounting and clerical officer of the city;" a
the official oaths of all elected officers are re
taken before, and filed with the auditor. But i

be any doubt as to the city auditor being the proper officer to file said bond with, or as to such filing, if properly made, being considered a delivery under the statute (and we have none on either point) still the fact is admitted and proven beyond all controversy, that appellants made the bond; that it came into the actual possession and custody of an officer of the corporation, and was filed by him in his office, as a record of such corporation at the commencement, and so remained until the end of Besser's official term; and that he was permitted to enter upon the discharge of the duties of his office, and to continue to exercise its functions and receive its emoluments, during the whole period embraced in such term, without filing any other bond, and without any objection or opposition from the corporation or any of its officers, all taken together, in the absence of any explanation from the appellants, not only made a *prima facie* case for the admission of the bond by the referee in evidence but a conclusive one, we think, both as to the delivery of the bond by the appellants and its acceptance by the respondent.

The charter does not provide how such bonds may be delivered, unless it be by filing, nor how, nor by whom they may be accepted. In this condition of things, a delivery and acceptance might either be proven by parol evidence, or inferred from the conduct of the parties, as similar facts are established between private individuals. The charter not requiring any formalities in such transactions, it would be absurd to say that their validity in any way depended upon the observance of any. Where no forms are prescribed for the exercise of corporate powers of this nature, any act or course of conduct, on the part of the corporation, which justifies a legitimate inference of the exercise of such pow-

ers, is sufficient to bind both the corporation and t
dealing with it. (*Springfield v. Harris*, 107 Mass

The second exception which appellants rely up
based upon the admission, at the trial by the r
copies of some 348 county orders of Multnomah c
tached together as one package, by ordinary bra
ers, and having but one certificate of the county cle
county attached thereto, to authenticate all of said
evidence for the respondent. Each of these orders, a
from the certified copies, was drawn upon the tre
Multnomah county, and payable to L. Besser, or o
except in some three instances, expressly shows o
that it was drawn for his services as chief of polic
the three excepted instances, for services in makin
in criminal actions. Each is endorsed with the
Besser," and bears upon its face the date of its re
over the signature of the county treasurer, as pr
sec. 6 of chap. 9 of Mis. Laws, showing that it has
out of the county treasury. The first of these o
dated August 8, 1877, and the last November 6, 1
objections interposed by the appellants, to the rec
this evidence by the referee, were quite numerou
we deem important will be disposed of in the
which they were presented, as shown by the tran

Their first ground of objection was that the cop
county orders were not properly certified, becaus
copies were authenticated by a single certificat
county clerk, instead of each one being certified s
as they insisted the statute of the state requir
cite *Newell v. Smith*, 38 Wis., 39, cited and app
Sherburne v. Rodman, 51 Wis., 474, which certa
to sustain their position, on principle, although t
the two cases are quite different. The general

aid down in that case is, without doubt, that under a pro-
vision like that contained in sec. 738 of our civil code, each
opy must be certified separately, to entitle it to be used as
vidence. To this doctrine we cannot yield our assent. It
as, we believe, never been the practice in this state for the
ustodian of such records to certify to each copy separately,
where transcripts of several records, of the same class, are
pplied for at the same time, by a party for use as evidence
n the same cause; and yet, we are unaware of a single
nstance in which the evils so forcibly depicted by the
earned judge who delivered the opinion in the Wisconsin
ase, above cited, as the inevitable consequences of such a
practice, have resulted from it. On the other hand, the
doption of the rule laid down in the case in 38 Wis.,
upra, would add most materially to the inconvenience and
xpense of procuring such evidence, without, as we think,
romising any corresponding benefit. The case at bar
ost forcibly illustrates the hardship which the adoption of
uch a practice must inevitably produce in many cases.
Nor, in our judgment, does the statutory provision under
xamination require such a construction. It provides that
Whenever a copy of a writing is certified to be used, in
vidence," etc. Now it seems to us that a copy may just
s properly be said to be "certified," when attached to a cer-
ificate referring to it, in connection with other copies also
ttached and referred to in the same manner, as though it
lone were attached, and solely referred to, in the certificate.
nd if a copy can be thus "certified" in connection with
ther copies, under the statute, it is admissible in evidence.
uch is our view, at least, and the rule we feel compelled to
The appellants also objected to the admission of these
opies, on the ground that no evidence had been offered to
y down in this state.

show that the orders had ever been delivered to
that he had ever endorsed them; or received a
money paid upon them by the county treasurer
mah county. There is no controversy as to th
been drawn in his favor, payable to him, or o
they were issued; endorsed with his name; and
paid off and canceled by the county treasurer. I
absence of all evidence to the contrary, as was t
this instance, the objections last mentioned are
swered by the legal presumptions arising upon the
state of facts. It must be presumed that the co
did his duty in issuing the orders to the person
them; that Besser, being the person thus entitle
and endorsed them in the ordinary course of bus
that either he or his endorsee received the am
upon them from the county treasurer, as the par
to such payments. (Civil Code, sec. 766, subdivis
15, 19 and 20.)

The objections of appellants to the admission
hibits "K," "N," "O" and "P" are met in the sam
They purport to be certified copies of bills, f
clerk's office in said county, at different times d
ser's term of office as chief of police. These bill
from the certified copies, were all in the name o
of police, and in his favor, and were claims fo
rendered by such chief of police, in criminal acti
cuted by the state and were allowed by the count
Multnomah county; and the orders therefor form
of the number in litigation, and were received
Evidently these bills were filed in the interest
and, in the ordinary course of business, must
filed by him, or by some one who had authority
to do so; and he must have had knowledge of

tents. At least such was the presumption of law, and it justified their admission as evidence by the referee. (Subd. 20, sec. 766, Civil Code.)

We are unable to coincide with counsel for appellants in the proposition advanced by them, that if Besser acted as a constable, in performing the services for which he received the county orders, and not as chief of police, then he would be entitled to retain all the fees thus collected by him for such services, upon the ground of the provision in the city charter requiring him to pay such fees over to the city treasurer being unconstitutional. The prohibition, in subd. 1, sec. 23 of art. 4 of the state constitution, applies only to local or special laws affecting the "*jurisdiction or duties*," and not to those which may affect the compensation of "justices of the peace and constables." We conceive that the compensation of all public officers, whether provided for in the form of fees or salaries, is subject to legislative control—except in instances where the power has been withheld by the fundamental law—and that insufficiency or inequality in the legislative provision for such compensation is no ground for holding it invalid. The officer, at least, has no legal ground for complaint. The law must certainly be regarded as settled upon this point. We have no disposition to discuss the question of the power of the legislature, where there is no constitutional restraint, to provide different modes and measures of compensation for public officers of the same class, in different localities; or having different claims for compensation—of which the legislature to judge. Besser was plainly required to pay the fees collected by him while he held the office of chief of police, to the city treasurer, by sec. 173 of the city charter, and for any balance so collected and not paid over this action would lie.

We have carefully examined the testimony to whether it sustained the finding of the referee amount due, and are satisfied that his conclusion respect, were entirely correct, and that the court fully justified in confirming the report, and rende ment therein.

The judgment is affirmed with costs to the resp

WALSH v. OREGON RAILWAY AND NAVI CO.

NEGLIGENCE—ACTION FOR—BURDEN OF PROOF.—In actions gence, the burden of proof always rests upon the party He must prove that the act was caused by the wrongfu sion, or neglect of the defendant, and that the injury complains was not the result of his own negligence and proper care and caution.

ORDINARY CARE.—What is "ordinary care" is of difficult de is said to have relation to the situation of the parties a ness in which they are engaged, and varies according ticular circumstances under which it is to be exercised.

COMMON KNOWLEDGE—JUDICIAL NOTICE.—Courts take not which is common knowledge and experience, and when t facts disclose a case which the general knowledge and of men condemn at once as careless, it is the duty of declare it negligence in law. But when the facts, the puted, do not fall within the range of ordinary observat perience, they are plainly to be submitted to the jury u instructions from the court.

EVIDENCE—JURY TO WEIGH.—When the evidence stands a uncontroverted, it concedes to the plaintiff every prope deducible from it—anything which he may fairly claim evidence. He has a right to ask the jury to believe the presented it, and however improbable some portions o mony may appear to the court, the court cannot say th may not give it full credence, and it is for them and court to compare and weigh the evidence.

IDEM—ORDINARY CARE.—Where the evidence tended to sl brakeman, in looking from a car window, received an i a water-tank left recently, by widening of the track, a distance from the side of the car, was in the performanc

arising out of the particular circumstances of his situation and connected with his employment, the question whether he exercised due care and caution and conducted himself in the usual way similar acts are done by persons in like employment, and other considerations of like character, do not fall within the range of ordinary observation and experience and should be submitted to the judgment and experience of the jury, under proper instructions from the court.

IDEM—JURORS THE BEST JUDGES.—Twelve men drawn from the body of the community, comprising men of various occupations and grades of intelligence, better represent that average judgment which it is the aim of the law to obtain, and, which the law assumes, better understand the ordinary affairs of life, and can draw safer and wiser conclusions from admitted facts thus occurring than can one man, or a single judge.

APPEAL from Multnomah County. The facts are stated in the opinion.

C. B. Bellinger, for appellant.

E. C. Bronaugh, for respondent.

By the Court, LORD, J.:

This is an action brought by the plaintiff, Walsh, to recover damages for an injury alleged to have been caused by negligence of the defendant. In the answer, negligence denied by the defendant, and negligence of the plaintiff, which contributed to the injury, is averred. The evidence admitted by the defendant tended, substantially, to establish the following facts: That at the time of the injury, plaintiff was in the employ of the defendant in the capacity of brakeman on one of its railroad trains running between Walla Walla and Wallula; that a short time before the injury complained of, the track was narrow guage, had recently been widened into standard gauge; that effect of this was to place the rails of the widened track proportionally nearer the water tank located on said road, that the window sills of the cars in passing were vari-

ously estimated to be from six to eighteen inches
timbers supporting the water-tank; that water-tan
and constructed along the line of defendant's roa
quired to be 3½ to 4 feet distant from the side of
that the plaintiff had no knowledge of the pro
this tank to the windows, or side of the cars, occa
the widening of the track from a narrow to a
gauge, and that the injury occurred to the plaint
night-time, as the train was passing by this tank;
before the accident to plaintiff happened, he was
the front seat of the car, nearest to the brake; h
noise which impressed him that something wa
that he immediately left his seat and looked out of
dow from the right side of the car for a moment,
passed back to the seat he before had occupied an
head about eight inches out of the window for th
of seeing whether the noise he heard was caused
thing being the matter with the train, and whil
position he received the injury complained of, w
conceded was occasioned by his head coming in
with the timbers supporting the water tank; that
was in the passenger car of the freight train, and
instruction of the conductor; that plaintiff had r
copy of the rules and regulations, and had read t
that portion requiring of freight conductors to kn
a reliable brake is on the rear car, and that a bra
kept at it while the train is running." There was
dence tending to show, as occasion might requir
was usual for brakemen to look out of the car wi
observe the running of the train. Upon this evid
plaintiff was nonsuited.

The code provides that a judgment of nonsuit
given against the plaintiff on motion of the d

when, upon the trial, the plaintiff fails to prove a cause sufficient to be submitted to the jury, and that such cause exists where it appears that if a jury were to find a verdict for the plaintiff upon any or all of the issues to be tried, the court ought, if required, to set it aside for want of evidence. The particular question, therefore, presented by the record in this case is, whether the facts submitted in evidence by the plaintiff showed such a clear case of negligence on his part as left nothing to be passed upon by the jury, and rendered it the duty of the court to pronounce upon such facts as matter of law that the plaintiff could not recover, and, consequently, that the defendant was entitled, on his motion, to a judgment of nonsuit. In reaching the determination of this question, it must be borne in mind that the facts submitted in evidence by the plaintiff are not disputed, but stand admitted and concede to him every just inference which he could fairly claim from that evidence, and that the defendant, granting all this, nevertheless claims that the plaintiff is still shown by that evidence to be guilty of such a want of ordinary care as the law declares a bar to any recovery by him. In actions for negligence, the burden of proof always rests upon the party charging it. He must prove that the accident was caused by the wrongful act, omission, or neglect of the defendant, and that the injury of which he complains was not the result of his own negligence and the want of ordinary care and caution. Although the evidence may disclose the defendant to have been guilty of negligence, it will not excuse negligence or the want of proper care and precaution on the part of the plaintiff. The law will not permit a recovery where the plaintiff, by his own negligence or carelessness, has contributed to produce the injury from which he has suffered. To entitle, then, the plaintiff to recover (conceding the negligence of the de-

fendant in not removing the water-tank to the p
tance after widening the track) it was incumbent
prove, when the accident occurred, that he exerc
ordinary care which a party ought to observe und
ticular circumstances in which he was placed.
"ordinary care" is of difficult definition, but is
erally to have relation to the situation of the parti
business in which they are engaged, and varies
to the particular circumstances under which it is
ercised. (*Fletcher v. Boston & Maine R. R. Co*
9.) This shows how difficult, if not impossible, i
down any general rule of easy application to
which may arise. What might be accepted as a
to indicate the want of ordinary care in the act of
ger alleged to have contributed to his injury, mi
an extremely unjust standard to indicate the wan
nary care in an employee doing the same act in pe
of his duty, or under the particular circumstances
uation. There is, however, a class of cases where,
disputed facts, the courts have held as matter of
the act alleged to have contributed to the injury
such a want of ordinary care as to be negligence
to preclude the plaintiff from recovery, and it is
ciple or standard applied in this class of cases u
the defendant relies to sustain the nonsuit in
The defendant claims that a person who allows h
limbs to be extended outside of the window of
car, while in motion, does so at his peril, and
by reason thereof, it is held in law to have c
directly and immediately to the inflicting of su
and precludes all right of recovery. To sustain
osition, he cites and relies upon the following a
Todd v. Old Colony Railroad Co., 3 Allen, 18; 7

Pittsburg R. R. Co. v. McClurg, 56 Penn. St., 294; *Indianapolis R. R. Co. v. Rutherford*, 29 Ind., 82; *Louisville R. R. Co. v. Sickings*, 5 Bush, 1; *Telfur v. Northern R. R. Co.*, 30 N. J. Law, 190; *The Pittsburg, &c., R. R. Co. v. Andrews*, 39 Md., 329. On the other hand, the doctrine of these cases has been stoutly contested in *Spencer v. Milwaukee R. R. Co.*, 15 Wis., 509. See also *Chicago R. R. Co. v. Pondrom*, 51 Ill., 333. The former case is directly in point, and presents the opposing view ably and forcibly. But let it be conceded that the decided weight of judicial authority maintains that where a passenger projects his arm, elbow or head out of a car window, voluntarily, and without any qualifying circumstances impelling him to it, that it must be regarded as negligence *in se*, and when that is the state of the evidence it is the duty of the court to declare the act negligence in law, would the test of common observation and experience as applied by the court in such cases be applicable to the facts under consideration? It should be noticed in the cases cited that it is passengers or travelers who are not engaged in the performance of any special or particular service, whose act or conduct, judged in the light of common knowledge or experience, of which the courts take notice, is declared negligence in law. "Courts must take notice," says Mr. Justice Colt, "of that which is common knowledge and experience, and when the plaintiff's own case fails to disclose the exercise of ordinary care, as judged of in the light of such knowledge and experience, he shows no right of recovery. Ordinarily, however, it is to be settled as a question of fact, in each case as it arises, upon a consideration of all the circumstances disclosed, in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common prudence

usually exercise in positions of like exposure an
When the circumstances under which the plaintif
complicated, and the general knowledge and expe
men do not at once condemn his conduct as carel
plainly to be submitted to the jury. What is ordi
in such cases, even though the facts are undisput
culiarly a question of fact to be determined by
under proper instructions. It is the judgment an
ence of the jury, and not the judge, which is to be
to." (*Gaynor v. Old Colony & Newport R. R*
Mass., 210.) It is only where the admitted or uncon
facts show a case within the general knowledge an
ence of men, which at once condemns the act as
that it is the duty of the court to declare the
ligence in law. When the facts, though undisp
close a case not within the common observation
perience of men, they are plainly to be submitt
jury, under proper instructions. In *Stone v. H*
R. R. Co., 8 Allen, 448, the court say: "Generall
the admitted or uncontroverted facts of a case show
acts and conduct of a plaintiff at the time of an al
jury, and contributing to produce it, are such as to
according to the common experience and observ
mankind, a want of due and reasonable care adapt
circumstances in which he is placed, he does not s
legal cause of action, and it is the duty of the cour
a state of the proof, to direct a verdict for the de
Of this character are all the cases heretofore decide
court where such a course has been pursued." I
court cites several authorities illustrative of this p
and which are identical in character with those c
relied upon by the defendant in this action. Con
the court says: "But the case at bar falls within

ent category. The plaintiff, when the accident occurred, was in the performance of a duty, or service, which required him to step between the cars and the engine of a train for the purpose of uncoupling them by drawing the bolt which held them together. * * * A case of this sort is not within the common observation and experience, and cannot be judged by the ordinary rule or standard applicable to persons who are only passengers or travelers who are engaged in no special or particular service. * * * But as the plaintiff was in the discharge of his duty in placing himself in a perilous position—a duty the performance of which was known to and sanctioned by the defendant—the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which he performed the duty incumbent on him—whether he acted with due care and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment, and on other considerations of like character which do not fall within the range of ordinary observation and experience. The question of negli- was therefore a proper subject of evidence, and have been submitted, with proper instructions to the for their determination."

too, the case before us is not that of a passenger or er, but of an employee of the defendant, injured in an act which he claims by his evidence was required by the duties of his service, and the particular cir- ances of his situation at the time, and in respect to he introduced some evidence tending to show it was and ordinary for persons to do in like employment in performance of their duties. His evidence is that at me of the injury the train was running on a curve,

that he heard a noise of such a character as led him
pose that something had gone wrong with the train,
discover what was the matter, he did what was usua
under such circumstances, looked out of the car win
it was less perilous to make an observation of the
ment of the train from that position than the platf
the car. The facts of his case are admitted, and con
him every just right or inference fairly deducib
them; and as Mr. Justice Cooley says: "He had
to ask the jury to believe the case as he presented
however improbable some portions of his testimon
appear to us, we cannot say that the jury might n
given it full credence. It is for them, and not fo
compare and weigh the evidence."

It seems to us, then, if he thought from the peculi
the noise he heard, that there was some difficulty w
imminent danger to the train, and it was in the lin
duty to ascertain that fact, and to act as the neces
the occasion and the duties of his service required, th
tion whether he exercised ordinary care depends
manner in which he discharged that duty; whether h
with proper care and caution and conducted himself
the circumstances in the usual way similar acts are d
persons in like employment; but considerations of th
acter, growing out of the duties of a particular emplo
do not fall within the range of common observation
perience, and are better addressed to the judgment a
perience of a jury. Twelve men, drawn from the b
the community, comprising men of various occupatio
grades of intelligence, better secures that average ju
which it is the aim of the law to obtain, and which t
assumes, better understand the ordinary affairs of li
can draw wiser and safer conclusions from admitte

thus occurring than can one man, or a single judge. (*Railroad Co. v. Stout*, 17 Wallace, 657.) "They are always competent to take into consideration the hazardous nature of the work in which brakemen are employed, their means of knowledge, what they are reasonably required to know, in the nature of their calling, the thought and reflection demanded or expected of such persons, their just expectation that the company will exercise due care and prudence in protecting them against injury, and to give due weight to those instincts which naturally lead men to avoid injury and preserve their lives." (*Greenleaf v. Illinois R. R. Co.*, 29 Iowa, 36.)

We do not mean to assert that a railroad employee receiving an injury when voluntarily acting without the scope of his employment, and doing that not required by the circumstances of his situation, or of his employment—an act clearly and manifestly dangerous, and such as the general knowledge and experience of men would at once condemn as careless, or negligent, but what the court would be authorized to pronounce such act, as matter of law, negligence *per se*. When the standard of duty is fixed, when the measure of duty is defined by law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court, and likewise, when there is such a manifest disregard of duty and safety as amounts to misconduct. (*West Chester v. R. R. Co.*, 67 Pa. St., 315; *McCully v. Clark*, 40 Pa. St., 399.) So, too, it is said when there is no controversy about the facts, and from them it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law, (*Fernandez v. Sac. R. R. Co.*, 52 Cal., 50;) but whether the facts be disputed or undisputed, if different minds might honestly draw different

conclusions from them, the case must go to the
troit & W. R. R. Co. v. Van Steinberger, 17 M
The cases where the court withdraws the questi
jury are comparatively rare, and are generally t
shock the mind as thoroughly inconsistent wit
care. Hence the question of negligence is usual
fact for the jury. (2 Stark. Ev., 973.)

As a general rule, Mr. Justice Cooley says, it
doubted that the question of negligence is a
fact and not of law, and cites numerous authorit
port of the rule. (*Detroit, &c., R. Co. v. S*
supra.) In the case of *Ireland v. Oswego R.*
Y., 533, Mr. Justice Johnson says: "The fact of
is very seldom established by such direct and p
dence that it can be taken from the considerat
jury and pronounced upon as matter of law. O
trary, it is almost always to be deduced, as an i
fact, from several facts and circumstances disclo
testimony, after their connection and relation to
in issue have been traced, and their force and w
sidered. In such cases the inference cannot be
out the intervention of a jury, although all th
agree in their statements, or there be but one
which is consistent throughout. Presumptions of
their nature are not strictly objects of legal s
presumptions of law. That the care exercised by
tiff at the time of the injury and the negligence
fendant were both questions for the jury to deter
not admit of any doubt. (*Oldfield v. N. Y. &*
14 N. Y., 310; *Ernst v. Hudson R. R.*, 35 N
Nor is the refusal of the judge to take the case
jury to be construed as an indication that in his
it is the duty of the jury to find a verdict for th

He should submit it to the jury if there is any evidence to justify a finding, although, in his opinion, its preponderance should be against the plaintiff. (*Gaynor v. Old Colony & N. R. R. Co.*, 100 Mass., 212.) Whether it is usual for brakemen to look out of the car window in the course of their employment, to note the movement of the train, or whether the duty of doing so originated in the circumstances of his situation, as connected with his employment, and whether, in the performance of it, he exercised proper care and caution and conducted himself in the usual way under the circumstances, these, and other considerations of like character, not falling within the range of common observation and experience, seem to us to be more properly addressed to the sound sense and temperate discretion of the jury under proper instructions from the court. In cases of this sort, where the facts, though admitted, are debatable, and necessarily create doubt and hesitation, it is safer for the interest of the parties and more consistent with the ground upon which the right of trial by jury rests, to submit them to the jury to resolve such doubts, than the court to dispose of them upon its own responsibility.

The judgment is reversed and a new trial ordered.

INVERARITY v. STOWELL, ET AL.

MECHANICS LIEN.—The failure of the plaintiff, in a suit to foreclose a mortgage admitted to be a prior lien, to reply to the separate answers of a portion of the defendants, setting up subsequent mechanics liens upon a dwelling house, and a portion of the land, subject to the mortgage lien upon which it stands, together with a designated space around the same necessary to its use and occupation, and alleging the owners insolvency, and the sufficiency of the mortgage security, apart from the building and parcel of land on which the mechanics liens are claimed, does not justify a decree for the sale of the building separately from the land, and the application of the proceeds to the satisfaction of such mechanics liens, before the mortgage debt has been satisfied.

IDEM—BUILDING PART OF FREEHOLD.—A building erected of the freehold becomes a part of it as soon as annex chanics lien act of October 28, 1874, has not changed law rule on this subject.

APPEAL.—Suing out an execution on such a decree does plaintiff from taking an appeal under the statute.

PRESUMPTION.—Where error is shown, injury is presum presumption controls, unless the record affirmatively s injury could have resulted from the error.

APPEAL from Wasco County.

W. Lair Hill, for appellant.

Watkinds & Bennett, for respondents.

By the Court, WATSON, C. J.:

This was a suit to foreclose a mortgage, brou appellant, Inverarity, against the mortgagor a spondents, as subsequent lien holders, under t October 28, 1874, providing for liens in favor of and others, and certain other parties having mortgages on the same property. The mortgag as the subsequent mortgagees, made default, a spondents only, as holders of mechanics liens, ap defended against the suit. Each of the latter fi rate answer, but it is conceded that they are su alike, and raise the same questions.

The material allegations in the complaint are in the separate answers, but respondents set fo affirmative defense, that subsequent to the exe recording of the appellant's mortgage, Geo. R mortgagor and owner of the four lots covered by gage, commenced the construction of the dwell upon the premises, and personally superintended struction, and contracted for and received the materials from the respondents, for which their claimed, and expended the same in the constructi

dwelling house; that said Reader is insolvent, and that said liens are their only security for obtaining the amounts severally due them for their said labor and materials; and that the lots covered by the appellant's mortgage are amply sufficient to satisfy the amount secured thereby, together with her costs and disbursements of suit, after setting apart and reserving the building and portion of said lots on which it is erected, and a convenient space around the same, necessary to its use and occupation, (which convenient space is designated in the answers with certainty;) and the answers conclude with a prayer that such portion of the premises, together with the building, be set apart and sold, and the proceeds first applied to the payment of expenses of the proceedings and the remainder to the satisfaction of their liens, in preference to the appellant's mortgage. No reply was filed, and the cause was submitted to the court, on the complaint and answers, without any evidence having been offered on either side.

The court decreed that the building be sold separately from the land, with the right of removal by the purchaser, and the proceeds applied first to the satisfaction of the mechanics liens held by the respondents. The land was ordered sold, in several different parcels. The case is now before us, on appeal from this decree.

The most important questions thus presented are, whether the court erred in directing a sale of the building separate from the land; or, in deciding that the respondents should be first paid out of the proceeds of such sale. The pleadings show that Reader was the owner of the mortgaged premises, and built the dwelling house himself; that respondents performed the labor and furnished the materials, for which they claim liens under contracts with him; and that no work was commenced, or material furnished, or

contract made, in reference thereto, until after t
lant's mortgage had been duly executed and recor

At common law, the building in question, whic
from the record to have been a large and expensive
house, and to have been erected on the premise
owner of the freehold, would plainly be held a pa
freehold as soon as it was annexed, and subject t
of appellant's mortgage. The respondents claim,
that the passage of the mechanics lien act of 18
referred to, had the effect of changing the commo
upon the subject, so far as the lien is concerned
the act provides. Reference is made to recent s
some of the states, where such change has been
express terms, or by necessary implication. (Rev
utes of Illinois, 1874, sec. 17, page 667; Revised
of Missouri, 1879, sec. 3174.)

But there are no such provisions in the mech
act of this state, and as the intention to give a lie
the superstructure as well as the land, to the exte
interest of the person erecting, or procuring the e
the same, is apparent, we have no doubt it should
a lien on realty, and upon buildings or superstru
constituting part of the realty, wherever that woul
status under the common law doctrine. (Phillip
chanics' Liens, sec. 176; *Belding v. Cushing*, 1 G

The provisions, in the second section, for the en
of the lien against buildings or superstructures co
altered or repaired, under contracts with the
leasehold interests merely, must, we think, so f
power of removal is concerned, be construed to
buildings or superstructures of that class only w
lessee himself might, at common law, remove at
during his term, before surrendering possession, a

fairly regarded as an exception to the general scope and purpose of sections 1, 2 and 15 of the act, to give a lien only on the realty. But conceding all this, respondents insist that the new matter set up in their separate answers, being taken as admitted, for want of reply, and therefore true, fully supports the decree rendered, in the matters objected to by the appellant, upon the equity doctrine of marshalling securities. But we are aware of no case where this doctrine has been carried so far, and fail to perceive how it can be successfully invoked to sustain the decree in this case. Such admission might warrant a decree for the sale of the building and lot of ground upon which it stood, including a convenient space about it, as described in the separate answers of the respondents, separately from the remainder of the premises covered by the appellant's mortgage, and that the proceeds of sale of such remainder should be first exhausted towards payment of the expenses of the proceeding to foreclose, and the debt secured by such mortgage, before any portion of the proceeds of sale of such building, and lot connected with it, should be so applied; but surely it could give the court no power to postpone the payment of the amount due on the mortgage, to the payment of the amounts due upon the liens of the respondents, absolutely and finally, as the decree attempts to do in this instance, as to the proceeds of sale of any portion of the property upon which the mortgage was a prior lien.

The respondents claim further, that as the record shows the appellant appeared by attorney in the circuit court, after the decree was entered, and obtained an order for the issuance of an execution thereon, she cannot now be permitted to prosecute this appeal for a reversal of such decree. The principle, as we understand it, which the respondents seek to have applied here, is that where the provisions of a judg-

ment or decree are so closely connected and mutu
pendent, that a reversal as to one would render n
the reversal of the others, then a party cannot take
efit of some of such provisions and still retain his
appeal. (*Moore v. Floyd*, 4 Or., 261; *Kelly v. B*
Abb. Pr., 229; *Bennett v. Vansycle*, 18 N. Y., 484.)

But such is not the case here. The decree for th
the property, except as to the sale of the dwellin
separate from the freehold, which was beyond the p
the court to direct, in our opinion, may well stand
enforced, and yet the portion directing the applic
the proceeds, be reversed or modified. But the resp
assume that even though the circuit court did err, as
by appellant, still she does not appear to have suff
injury in consequence, and hence has no right of
But the general rule is, that when error is shown, i
presumed, unless the contrary affirmatively appea
the record itself. It cannot, we think, be asserted w
cerity, that the errors found to exist in the decree
case, may not, so far as anything disclosed by the r
concerned, injuriously affect the appellant's sub
rights. On the contrary, the possibility of such a
quite apparent.

The decree of the circuit court, so far as it dir
sale of the building separately from the ground upo
it stands, and the application of the proceeds, mus
versed, and said decree so modified as to direct the
said building and parcel of ground on which it stan
posed of the remainder of lot 11, after disposing of
off the east side thereof, and the remainder of the
12, after disposing of a like number of feet off the
thereof, as per the decree of the circuit court, si
block No. 3, in Bigelow's addition to Dalles city,

and described in the separate answers as "a strip 28 feet wide and 100 feet long, extending through the center of said lots," together, and the application of the proceeds as follows: 1. To any sum remaining unpaid on appellant's decree against Geo. Reader, after the proceeds of the sales of the two lots and two fractions of lots, directed in the decree of the circuit court, to be first sold, have been applied towards the satisfaction thereof; 2. To the satisfaction of the liens of the respondents, in full, and if not sufficient for this purpose, *pro rata;* 3. The application of the remainder, if any, upon the amounts determined by such decree to be due the subsequent mortgages respectively, according to priority; and, 4. Any balance remaining, to the judgment debtor, or his assigns. And the decree of the circuit court as thus modified to stand and have effect as the decree of this court, with costs to appellant.

STATE EX REL. WILSON AND WAKEMAN v. SHIVELY.

STATE NOT TO BE MADE A PARTY TO ACTIONS OR SUITS BETWEEN PRIVATE PARTIES.—When a remedy is provided, either at law or in equity, complete and adequate, by which matters in dispute between private parties may be adjusted and settled, that remedy must be pursued by them. The state cannot lend the power of its name, or assume the cause of one private citizen against another, for the purpose of settling rights or titles in controversy between them.

APPEAL from Clatsop County.

Sidney Dell, for appellants.

Wm. Strong & Sons, for respondents.

By the Court, LORD, J.:

The object of this suit is to have decreed the legal title, held by the defendant, J. W. Shively, to block 11 in the

city of Astoria, to be in the relators—to have
ent to block 139, which was tide lands, and al
been procured by fraudulent representations, f
by the said Shively, cancelled and annulled, a
a conveyance of the title held under the pater
fendant Shively to the relators. From this s
the objects of the suit, it is manifest that all t
the relators are purely equitable, and of equi
zance only. And the question which confront
threshold of our inquiry, is the right of the rela
on a litigation in the name of the state for
sought by the suit, and the authority of the co
so constituted, to adjudicate upon it. For it
be asserted, if the subject matter of the litigat
the rights of private parties only and exclusiv
state has no direct interest in the prosecution
the suit, that state interference in such contro
not to be countenanced, or tolerated, either dir
the relation of private parties. When a rem
vided, either at law or in equity, complete a
by which matters in dispute between private
be adjusted and settled, that remedy must be
them; the state cannot lend the power of its
vidiously assume and champion the cause of
citizen against another for the purpose of settl
titles in controversy between them, when each
zens are equally entitled to its protection. To
what relation the state bears to this suit, or w
it has in it, and the necessity of state interfe
protection of the state's rights, it is necessary
the facts, and ascertain the nature or compos
claim upon which the state has assumed to b
of interference in the subject matter of the litig

In 1844, the defendant Shively surveyed and laid out the town of Astoria, in which block 11 was included. At that time, the land claim upon which the said town of Astoria was laid out was in the joint occupancy of the said Shively and one Welch. In April, 1845, the said Welch executed to the defendant Shively a power of attorney to bargain and sell any lot or lots owned by the said Welch and Shively jointly in the town of Astoria, and that pursuant to said power of attorney, the said Shively did, for himself, and as attorney in fact for the said Welch, on the 3d day of June, 1845, execute to one General John Wilson a deed of conveyance to said block 11. On the 24th day of January, 1866, a patent from the United States was issued for all of said lands so originally and jointly occupied and possessed by the said Shively and Welch, to the said Shively, and Susan, his wife, the west half thereof, embracing said block 11, being set off in said patent to the said Susan Shively. That on the 7th day of March, 1871, the said Shively and Susan, his wife, conveyed said block 11 to one Milton Elliott for a division and settlement, and on March 8, 1871, the said Elliott conveyed said block 11 to said John M. Shively, whereby it is claimed that the title to said block 11 inured to the benefit of the said John Wilson. Subsequently John Wilson died, and the relators are his heirs. Upon this state of facts, let it be conceded that the relators are the owners of the equitable title, and that Shively holds the legal title in trust for them, and that the relators would be entitled in equity, upon a proper showing, to a decree transferring the legal title from Shively to them (*Wilson v. McEwan*, 7 Or., 96; *Lamb v. Davenport*, 1 Sawyer, 609; *Parker v. Rogers*, 8 Or., 188) what possible ground do these facts exhibit which would authorize state intervention as a party to the proceeding. The state cannot lay

hold of these facts as its own, or acquire an i
them upon the relation of private parties claim
aggrieved, and make them the basis of a claim o
the state to invoke the jurisdiction of equity to c
transfer of the legal title to the equitable owners.
of the state is affected, either directly or indirec
any matter of public concern involved, by whi
particular circumstances, a right of action or sui
the state, or the state is authorized or induced t
party, or upon the relation of some private pers
enforcement or protection of such public inte
matter, exhibited by the facts, is wholly and enti
troversy between private individuals, for which a
and adequate remedy exists in equity, in a sui
them. And whatever equity exists in these facts
of the relators which would make Shively a trus
legal title of block 11 for their benefit, that equi
enforced by a proper proceeding in equity by the
Shively, by which the legal title to block 11 would
ferred from Shively to the relators. To this poin
as thus constituted by the facts, furnishes no aut
the proposition that the state, on its own behalf
the relation of private parties, can sue in equity
a transfer of the legal title from Shively to th
To work out that end is the exclusive business o
tors, and not of the state, who is not a real party
in any aspect of the case.

But the object of securing and the essentiali
legal title of this block to the relators, will bec
apparent in the consideration of the next matter
relief is prayed in this suit, viz.: to have the st
to block 139, which is tide lands, and alleged to
procured by fraudulent representations from th

Shively, cancelled and annulled, and to compel a conveyance of the title held under the patent by Shively to the relators. The statute of 1874 (p. 77) provides that "the owner or owners of any land abutting or fronting upon, or bounded by the shore of the Pacific ocean, or of any bay, harbor or inlet of the same, and rivers and their bays in which the tide ebbs and flows, within this state, shall have the right to purchase all the tide land belonging to this state in front of the lands so owned." The situation of the property is in this wise: Block 11 is situated on the banks of the Columbia river, and block 139, which is tide land, lies immediately in front of it. It is alleged in substance that said block 11 abuts and fronts upon the shore of said river at ordinary high tides, and extends the whole width of the tide land embraced in block 139; that the said Shively, well knowing the title of the said John Wilson—the ancestor of the relators—in block 11, and without any notice whatever, as required by law, to him, in May, 1876, made application to the board of school land commissioners for the purchase of said tide land in front of block 11, in which is included block 139, and in which he fraudulently concealed the fact of the title and ownership of the said Wilson, and by means of fraudulent suggestion of title in himself, and fraudulent concealment of the title of said Wilson, procured to be issued to him the state patent to said tide land included in block 139, wherefore the relators claim that said patent to said tide land ought to be cancelled and annulled, and the fee to the same decreed to be in the relators.

At the outset, let it be noted that the object of the suit at this state of the proceeding is not to annul the patent to reinvest the title in the state of the tide lands in question, in order that thereafter the state may sell it to the adjacent

owners of blocks abutting or fronting it, but t
vacate it, and declare the fee in it to the relat
therefore essential to the relators to have the le
block 11 declared in them, for it is only as ow
owners we apprehend—they are entitled to avail
of the provisions of the act of 1874 to purchas
lands adjacent to said block 11. As before obse
conceded for the purposes of the case, that th
equitable owners of that block, the legal title be
defendant Shively; but to transfer that legal t
him into the relators, so as to make such title av
the purpose of acquiring the tide lands in dis
the statute of 1874, can only be accomplished th
instrumentality of a decree obtained in a suit by t
against Shively. It thus appears that all the ri
relators which are sought to be maintained and
this suit are equitable. The board of school lan
sioners, among other duties imposed upon them b
authorized to sell to the owner or owners, of any
ting or fronting, &c., and such owner or owners
right to purchase all the tide lands belonging t
in front of the lands so owned. In the exercise o
tions confided to them, it does not include any
power or authority. When, by means of an a
the fact is made to appear that a party is the own
bounded by tide lands, his right to purchase such
under the act is invested, and the duty of the boa
sue the patent to such tide lands. It cannot inquir
equities which may exist—that jurisdiction is c
courts of equity—they act upon the application
proofs supporting it, showing the applicant to be
and when satisfied of this fact, issue the patent
the tide lands abutting his property. But a pat

lands procured by fraudulent suggestions, or the concealment of material facts, may be cancelled and vacated. The code provides that an action at law may be maintained in the name of the state for the purpose of vacating or annulling letters patent, issued by the state, against the person to whom the same was issued, or those claiming under him as to the subject matter thereof, in the following cases: 1. When such letters patent were issued by means of some fradulent suggestion, or the concealment of a material fact, by the person to whom the same were issued, or with his knowledge and consent, or, &c. (Code, sec. 355.) By the code of procedure, the writ of *scire facias*, &c., are abolished, and the remedies heretofore obtainable in these forms may be obtained by civil actions under the provisions of title 5, chap. 4, sec. 351. It is only the form, however, that is abrogated. "The jurisdiction and power of the courts are not touched by that section, even if they could be by legislation; nor the right to seek and reach through them all the remedy that writ of *scire facias* once afforded." (*People ex rel. Hazel et al. v. Hall*, 80 N. Y., 119; *People ex rel. v. Thatcher*, 52 N. Y., 528, 529.) The object of the action is "for the purpose of vacating or annulling such letters patent," that the state may reinvest itself with the title to the thing, or lands, improperly granted. And it may be, under the broad language used in the latter part of section 357, that such action may be maintained in the name of the state upon the relation of a private party, when some claim or right of such private party is involved, upon giving satisfactory security to indemnify the state for costs and expenses. A patent for tide lands issued by the state to one who was not the owner of the adjacent lands, would be in derogation of the true owner's preferred rights to purchase, and to enjoy the benefits of such tide lands, and he

would have an interest in the subject matter of
which was to annul such patent, and it is not pe
he might not be conjoined in such action with
relator, to cancel and annul the patent whi
juriously affects his rights. But the case of th
different in the matter before us. Their rights
in the tide lands depend upon the ownership of
lands; that ownership is in dispute, and is a
of purely a private character between them and
which the state has no interest, and to which i
a party. That ownership, too, needs first to be
or adjudged in a suit between them as against
fore any rights of the relators exist in the a
lands, such as would authorize them to ask, in
the state, to cancel his patent. Originally, the
repeal letters patent was by the writ of *scire fac*
on the part of the government, or some one pr
its name. Being founded on some matter of re
in chancery, for the patent, being enrolled, is
that court. The power of the chancellor to
king's letters patent under the great seal is co
highest attribute of his jurisdiction, for the pro
particular manner is derived from the great s
end of the judgment is to recall the letters pate
may be cancelled—the great seal taken off
Abridgement, *scire facias;* 3 Blackstone's Co
261.) When the patent is granted to the preju
subject, the king's right is to permit him, on
to use his name for the repeal of it by *scire faci*
Ab., *idem;* 2 Saunders, note 72, t.; 3 Blackst
261.) The object of the action and the end o
ment is to vacate the patent, that recalls, or r
right or thing in the king, and removes the prej

jury to the subject. It does not reach beyond this, nor extend to matters and things outside of and not included in the patent, only as such matters and things may be affected as an inevitable consequence of vacating the patent. Nor is it intended to determine rights or title to lands not included in the patent, and which must be settled by them. The patent must work a prejudice to some existing, determinate, legal right, to furnish a ground for the issuance of the writ. In addition to the remedy by *scire facias*, there is another by bill on the equity side of the court of chancery. (*Jackson v. Lawrence*, 10 Johns., 23.)

It seems, in England, in chancery, there are two courts. The ordinary, where the chancellor or keeper proceeds according to the *common law*—and it was out of that court that the writ of *scire facias* issued, and in that court all the proceedings were had upon such writs (2 Com. Dig., tit. Chancery C. 1; 1 Daniels' Chancery Pleading and Practice.) The other was a court of equity, the proceeding in which was by English bill. The false suggestion for which the king might have a *scire facias* to repeal his own letters patent, must appear upon the face of the patent, otherwise the letters patent must be vacated upon a bill in equity. (*Attorney General v. Vernon*, 1 Vern., 277, 281, 283.) In this case last cited, the proceeding was upon information of the attorney general to repeal letters patent to crown lands which the defendant had obtained by surprise and false representation, and the object of the suit was to annul the patent that the state might reinvest itself with the title to the lands improperly granted. And the same end was sought in the action brought under the code of procedure in the case of *The People v. Clark*, 9 N. Y., 364, cited by counsel for relator, in which the court say: "It is true it is not technically an action to recover the possession of land. It

merely seeks to annul the only title which the
has to the premises patented, and the only eff
plaintiffs prevail, will be that the land will bel
state in its political and sovereign capacity as ov
the ungranted lands, and the commissioners of
office will be bound to sell it to any one who will
price."

In England, when the suit immediately con
rights and interests of the crown, the public offi
his own official name without uniting that of any
son. But when the suit does not immediately c
rights and interests of the crown, but only those
take of its prerogative or are under its peculiar
the officer sues at the relation of some person wh
as relator in the bill, and who becomes thereby
for the costs. It sometimes happens that the rela
interest in the matter in dispute in connection
crown, of the injury to which he is entitled to com
such case, his personal complaint is joined to
porated with the information given to the court
cer of the crown, and then they form together an
tion and bill, and are so termed. (Story Eq. Ple
8; 1 Daniel's Chancery Practice, 10.) And t
position now assumed by counsel for the relators
plemental brief filed since the argument, in wh
sists that the facts make it a bill and informat
what he conceives to be the equity of sec. 3
Taken as an information and bill, it is not perc
the case is to be aided by that view. The first
the complaint, upon the successful establishment
all subsequent matter or claim is based, involve
upon which an information can be founded. It
and exclusively a matter of private right in dispu

private individuals, which can be settled by a suit between them, in which the state has no interest, or right to interfere, and ought not to be allowed to intrude with its name and the influence of its officers to assist one citizen in the prosecution of a private right as against another. Block 11 is not land patented from the state, or which the state ever owned, or in which it has any interest whatever. It is land to which Shively has the legal title, and to which the relators claim the equitable title, which Shively denies, and conceding to the relators the rights they claim, it is not the duty or right of the state to interfere or to establish such claim, but the duty and business of the relators solely. Although, thus far we have only been considering the matter alleged by the state at the relation of the relators, the record discloses that the defendants not only deny the equitable rights of the relators to block 11, but deny that it is adjacent to the tide lands in question, and set up as a separate defense that other lands owned by the defendants intervene between block 11 and block 139, which are bounded by the ordinary high tides, and which are adjacent to block 139. So that the state is engaged through its officers, not only in assisting to establish the private ownership of the relators to block 11 as against Shively, but in the further task of establishing that block 11 is adjacent to the tide lands in question, to fix some right or interest of the relators to such tide lands, and the inevitable consequence of litigating the existence and title of Shively to the intervening land, claimed to be adjacent to block 139, not simply to annul the patent to block 139, but to decree the title of the same in the relators. It seems to us in facts thus constituted, in the irrelation of the state to them, and in the consequences to be apprehended from such state interference, are objections of too serious a character to maintain this suit. The

complaint is dismissed, and the judgment of the cou
low is modified in accordance with this opinion wi
prejudice.

BRANSON, ET AL. v. THE OREGONIAN RAIL
CO., AND OTHERS.

CORPORATIONS—STOCKHOLDERS' LIABILITY.—The provisions, in th
stitution and statutes of Oregon, creating the liability of
holders in private corporations, for the indebtedness of suc
porations, apply to such only as are, or have been, holders
legal title, in unpaid stock.

CONTRACT—RATIFICATION—INFERENCE.—The ratification of an una
ized act or contract, professedly done or entered into on bel
a corporation, may be inferred from its subsequent conduct
spect thereto, the same as if it were a natural person. The a
specified in contracts, to pay definite sums of money, with a
rate of interest, on or before stated periods, in freight and p
over the promisor's railroad, become due, together with th
ulated interest, at once in money, upon the failure of the pr
to comply with the terms of its agreement, and its deprivin
of the power to comply with it, by the sale and disposal of i
road.

MISTAKE—SURPRISE—INADVERTENCE.—The supreme court has
under sec. 100 of the civil code, to entertain an application
lieve a party from a decree taken against it "through its m
inadvertence, surprise, or excusable neglect" and appealed be
has had an opportunity to make the application to the lower
by which the decree was rendered; and upon setting such
aside, upon such application, it is also within its power to r
the cause for further proceedings, in accordance with its deci

APPEAL from Yamhill County,

Effinger & Bourne, for Oregonian R'y Co.

Ellis G. Hughes, for himself and co-defendants.

James K. Kelly, for respondents.

By the Court, WATSON, C. J.:

This suit was brought by the respondents, Branson

to establish the liability of the appellants upon certain alleged contracts of the Dayton, Sheridan and Grand Ronde Railroad Company, of the character generally denominated "freight receipts," or "freight script." This company was duly incorporated under the laws of Oregon, November 14, 1877. Its object was the construction and operation of a narrow gauge railroad from the town of Dayton to Grand Ronde, in Yamhill county, with suitable branches and extensions. Its capital stock was fixed at $200,000, divided into 2,000 shares of $100 each. Joseph Gaston subscribed for 1,000 shares, and other parties also subscribed to the aggregate amount of 51½ shares more of the capital stock of the company. At a meeting of the stockholders, held March 22, 1878, B. B. Branson, W. S. Farrell, Ellis G. Hughes and Sylvester Powell were elected directors; and thereafter, and on the same day, the company was duly organized by the election of Hughes as president, and Beach as secretary. After the incorporation of the company, however, but previous to its organization, certain sums had been subscribed by residents along the route of the proposed railroad, and as an inducement to its construction, payable in installments, at specified stages in the progress of the work, according to certain forms previously devised and authorized by the incorporators, by the terms of which the amounts so subscribed and paid, were to be repaid by the company in three equal payments, on the first day of November, in each of the years 1880, 1881 and 1882. The forms so authorized concluded thus: "Payment of the said subscriptions to be evidenced by suitable freight orders, or script, to be issued to said subscribers." On the same day the company was organized, viz.: March 22, 1878, it entered into a written contract with Gaston, under the name of "J. Gaston & Co.," for the construction and equipment of that

portion of its proposed railroad extending from D
point on the south side of Yamhill river, opposite
of Sheridan. By the terms of this contract, Gast
construct such portion of the company's railroad
with a dock at Dayton, a station house at Sherid
and other suitable station houses, side tracks, wa
&c., and equip the same with a specified number o
tives, engines, freight, passenger and section cars,
it in operation by September 1, 1878. The con
its part, was to secure the right of way; turn over
the installments becoming due on the subscript
tioned, and the amounts paid on stock, and, in the
of the contract itself, "as a further consideratio
construction and equipment of said railroad *
to issue to said Gaston & Co. certificates entitlin
fifteen hundred shares of the capital stock of sai
company, which shares shall be by the said constru
equipment of said railroad from Dayton to She
tion, paid for in full, and thereafter to be free fr
sessments."

The amounts evidenced by the "freight receip
form the basis of the respondents' claims in this
received by Gaston, under his contract with the
and seem to have been expended by him in the co
of the railroad. At the April term, 1881, of t
court for Yamhill county, the respondents severa
ered judgments, in actions at law, against this co
certain of these "freight receipts" held and owne
respectively, and inclusive of costs, amounting, in
gate, to the sum of $35,664.52. They afterwar
executions to be issued upon these judgments, w
returned wholly unsatisfied. They then resorte
suit to compel the payment of their judgments b

pellants. The circuit court rendered its decree in their favor, and directed that the execution issued thereon be enforced against the property of the appellants, in the order following: 1st, the Oregonian Railway Company, limited; 2d, the Oregon Railway Company, limited; 3d, Wm. Reid, Ellis G. Hughes and J. B. Montgomery; 4th, J. Gaston.

After an appeal had been taken from this decree, and the cause brought into this court, the Oregonian Railway Co., limited, appeared by its duly authorized attorneys and moved that other attorneys be substituted in the place of Ellis G. Hughes, Esq., its attorney of record, on the ground of a conflict of interest between him and his client, in the result of the suit. The motion was allowed, and thereupon said company appeared by its attorneys so substituted—Messrs. Effinger & Bourne—and filed a motion for an order remanding the cause to the circuit court, with leave to amend the separate answer of such company in several particulars alleged to be material. This motion, with the proofs in support of it, was submitted, at the hearing upon the merits, and will be considered and determined after the errors alleged to appear by the record of the cause in the court below have been disposed of.

The case made for the respondents, in their amended complaint, is, that the "freight receipts" upon which their judgments at law were recovered, were valid contracts of the Dayton, Sheridan & Grand Ronde Railroad Company, which, upon its failure to redeem, in freight or passage over its railroad, according to their terms, became at once due and payable in money; that Gaston's stock in said company was never paid up; that Gaston afterwards subscribed for 5,000 shares of the capital stock of the Willamette Valley Railroad Company, of $100 each, which was never paid up; that Gaston, Hughes, the Oregon Railway Company, limited,

and the Oregonian Railway Company, limited,
took and held the legal title to all of said stock,
of their enumeration, through voluntary sales an
that the Willamette railroad company, in consid
conveyance to it by the Dayton, Sheridan & G
Railroad Company, of the railroad and propert
ter, lawfully assumed and bound itself to pay
the debts and liabilities of the latter, including
due, or becoming due, on said "freight receipts
companies are both wholly insolvent; and,
Reid, Montgomery and Hughes, as sureties of
Railway Company, limited, for a sufficient co
obligated themselves to Gaston to indemnify, a
harmless from all liability on account of his o
said stock.

The pleadings, on the part of Reid, Mont
Hughes, the Oregon Railway Company, limit
Oregonian Railway Company, limited, raise iss
of these matters, except as to Gaston's subsc
stock, the successive ownership of all the stoc
by Gaston in both companies, in the order desi
the insolvency of the Dayton, Sheridan & G
and Willamette Valley railroad companies.

As to whether the "freight receipts" were a
the Dayton, Sheridan & Grand Ronde Railroa
and are legally binding upon it, it does not
ought to be much question. If the incorpora
power to authorize the subscriptions, upon accou
they were afterwards issued, in advance of the c
ganization, or, if the president and secretary ha
authority from the corporation, after it was o
issue them pursuant to the terms of such subscri
action on the part of its incorporators and office

wards ratified in the most ample and satisfactory manner. The very first act, on the part of the company, after its organization—its contract with Gaston of March 22, 1878—contained an implied ratification of the action of the incorporators authorizing such subscriptions, and fully sanctioned the subsequent execution of the "freight receipts" by the president and secretary. Besides, there is abundant evidence, of the most conclusive character, in the record, showing that the company ever afterwards recognized and treated them as valid and binding obligations. The principle that a corporation is bound by its conduct and representations, in the same manner and to the same extent as a natural person would be, will hardly be questioned.

Upon the legal proposition advanced by the respondents, that whenever the company failed to perform its agreement to pay, in freight or passage over its railroad, and put it beyond its power to perform, the amount specified in the "freight receipts" became due in money, there is some conflict among the adjudications in this country; but, in our judgment, the weight of authority and the better authority supports it. (*Roberts v. Beatty*, 21 Amer. Decis., 410, and cases cited in note; *Wolf v. Marsh*, 54 Cal., 228.)

The "freight receipts" in question were, in form, promises by the company to pay so many dollars on or before certain specified dates, in freight or passage over the company's railroad, and come, we think, clearly within the principle of the foregoing decisions. The proofs introduced upon the issue, as to whether Gaston's stock in the Dayton, Sheridan & Grand Ronde Railroad Company was paid up, or not, "by the construction and equipment" of the company's railroad from Dayton to a point on the south side of Yamhill river, opposite Sheridan, according to the terms of his contract with the company, of March 22, 1878, conclusively

show that they were not so paid up. It is tru
road was constructed, properly equipped, and i
by the time agreed on; but the grading was n
the station houses not built—except one at Dayto
track, fixtures and bridge-bolts used in the cons
the railroad not paid for, but incumbered with
for their purchase price, and there were failur
other minor particulars. Nor was Gaston able t
his engagements under this contract. Neverth
meeting of the directors, held November 5, 187
were present Hughes, W. S. Farrell and F. E.
no others—the full board consisting of five me
following resolution was adopted:

"It is further resolved that the president an
issue and deliver to J. Gaston & Co. shares of
stock of the company, fully paid up, and free f
ment, which they are entitled to by virtue of the
for the construction of the company's railroad fr
to Sheridan and from Junction to Dallas, amount
shares in all."

It is contended, on behalf of the appellants, th
issued to Gaston, under this resolution, must
and treated as paid up stock. Assuming that
tion means to declare that Gaston is entitled t
shares of paid up and unassessable stock, under
with the company for the construction and eq
its railroad, still it would not protect subsequent
with notice of the actual facts. (Thompson's
Stockholders, sec. 201.)

Hughes was a director, the president and the
this company throughout; and afterwards a d
the attorney of the Willamette Valley Railroad
director and the attorney of the Oregon Railway

limited; and lastly, the agent and attorney of the Oregonian Railway Company, limited. We are speaking now solely from the record brought before us by the appeal. As president of the Dayton, Sheridan & Grand Ronde Railroad Company, and on its behalf, in connection with Beach, its secretary, he executed the contract with Gaston for the construction and equipment of its said railroad, and is chargeable with knowledge of its contents. And from the very nature of Gaston's engagements, and Hughes' threefold official relations to the company, and his duties arising therefrom, it would seem that he ought to be charged also with knowledge that those engagements had not been fulfilled when such resolution was adopted. He tacitly admits, in his cross-examination, when testifying as a witness on behalf of the appellants, that he knew the iron used in the construction of the railroad had not been paid for by Gaston, but states that Gaston's contract "did not require him to pay for the iron." If Hughes had actual notice of the fact that Gaston had not complied with his contract, and was therefore not entitled to receive any shares of paid up stock, when this resolution was adopted, his co-appellants, who afterwards took transfers of the legal title in such stock to themselves, by virtue of the relation which he sustained to each of them respectively, at the time such transfers were taken, are chargeable with notice to the same extent. But it is neither essential, nor as it seems to us very important, in determining whether the decree appealed from should be sustained or not, whether Hughes had such notice, or whether there is any liability on the part of any of the appellants on account of past or present ownership of this stock. There is no pretense that the 5,000 shares of capital stock subscribed by Gaston in the Willamette Valley Railroad Company has ever been paid, and this stock

has passed through the same hands and by the sam
fers as the former. We think the undertaking on t
of the Willamette Valley Railroad Company to assu
pay all the debts and liabilities of the Dayton, She
Grand Ronde Railroad Company, including its liabi
"freight receipts," fully made out by the proof
proposition of the former to the latter was to purc
railroad and other property, and upon a complete
and conveyance thereof to the former, it would assu
pay "all" the latter's debts, "both secured and un
amounting in the aggregate to about one hundred an
thousand dollars, with some accumulated interest.
proposition, which was in writing, and duly subscrib
presented to the directors of the latter company, and
ed as a whole by a resolution, which after reciting
ceptance, undertook to enumerate the various debts
latter company included in the proposition, and pr
form for the conveyance to be executed by its presid
secretary, in the event of the action of the directo
ratified by the stockholders, which also included a
mention of debts to be assumed and paid as the consid
of such conveyance. In this enumeration various
amounting to $8,564.65, are mentioned as debts of th
pany. Then follows an account of what is styled "
debtedness or obligations on the part of Joseph Gast
tractor, for labor, material or property actually used
ployed in the building of the road," amounting in the
gate to $23,643.48. Then follows this declaration:
also to pay, in freight, all of the obligations of this c
tion, which by their terms are so payable." In th
provided for the conveyance this last provision is no
but, in its place, the following: "And also all indeb
or obligations on the part of the company or Joseph

contractor, for labor, material or property actually used or employed in the building of the road, including claims for right of way, or in operating the said road, in the way of warehouses," etc. There is no mention, in this description of debts, either in the resolution itself or the form provided for the conveyance of any secured debt, although secured debts are expressly included in the proposition, and must have made up the greater portion of the sum of $130,000 stated therein as the approximate amount of "all debts, both secured and unsecured." The stockholders of the Dayton, Sheridan & Grand Ronde Railroad Company duly ratified the acceptance made by the directors, and the conveyance was made in the form authorized, omitting the last clause thereof, above quoted.

The contract between the two companies was consummated when the proposition of the one was duly and fully accepted by the other, and it would seem strange if its operation could be narrowed down by an imperfect or mistaken recital of its terms, in the deed subsequently executed to carry out the stipulations of one party to the contract, as between the parties themselves, or others occupying no better positions. Besides, it appears from the proofs that afterwards, on December 20, 1879, the Willamette Valley Railroad Company solemnly alleged, in its answer to a complaint filed against it and others, in the circuit court of the United States for the district of Oregon, by the Pacific Rolling Mills Company, that the sum of $130,000, named in its said proposition, as the probable amount of debts of the Dayton, Sheridan & Grand Ronde Railroad Company, and which it assumed and undertook to pay, was made up of about $35,000 "freight script" issued to the citizens of Polk and Yamhill counties, for cash advanced, in the construction of said railroad; about $35,000 of floating debts

of the Dayton, Sheridan & Grand Ronde Railroa
and Joseph Gaston, contractor; and "the $60
between said companies to be justly due to the co
But without any explanations of this characte
lamette Valley Railroad Company became liable,
terms of its engagement, to pay these "freight
they came within the definition of "debts" of t
Sheridan & Grand Ronde Railroad Company,
did beyond all question. Upon the acceptance
veyance from the latter company of its railroad
erty, the former became liable to the holders of t
receipts" for the amounts due thereon accordi
terms, and in the event of its insolvency (which
in this case) every holder of its unpaid stock be
to the extent of the unpaid balance thereon, as w
previous holder, having made a voluntary sale a
thereof. (Chap. 7, title 1, sec. 14, Mis. Laws.)

This virtually disposes of the objections to th
the court below, as to all the appellants excep
Montgomery. It is admitted by the pleadings t
Hughes, the Oregon Railway Company, limited,
egonian Railway Company, limited, took and he
title to the 5,000 shares of unpaid capital stock,
to $500,000, of the Willamette Valley Railroad
successively, in the order in which they are nan
their liability on this ground alone the decree o
court may well be sustained. But neither Reid
gomery is alleged to have ever held the legal titl
this stock. Their liability depends upon the c
to be given a certain undertaking of indemnity
them, Hughes, and the Oregon Railway Compa
to and in favor of Gaston, on April 2, 1880. H
and since December 29, 1879, had been, holdin

title to the stock before mentioned, and all other rights, interests and claims belonging to Gaston, in, to, or against either the Dayton, Sheridan & Grand Ronde Railroad Company, or the Willamette Valley Railroad Company, in trust, under certain written assignments, executed to him by Gaston, to dispose of or transfer to any person or corporation who or which might provide the means to pay off, or the indemnity against, certain debts and liabilities of Gaston's, in such written assignments specified, and also make some other payments and provisions not material to be considered here. The undertaking of indemnity, after reciting the terms and object of the assignment to Hughes, and that the Oregon Railway Company, limited, had been incorporated and organized by Reid, Montgomery and Hughes, for the "express purpose of receiving a transfer, assignment and conveyance" of said capital stock, &c., from Hughes as such trustee, and complying with the terms (specifying them) upon which Hughes was authorized to make such transfer; and that Hughes, in pursuance of his trust, and "at the special instance and request," and for the "joint and several personal interest, benefit and advantage" of said Reid, Montgomery and Hughes, had "by a deed of assignment of even date," "duly assigned, transferred and set over to the said Oregon Railway Company, limited, all and singular, the said railroad capital stock, rights, interests, claims and demands," &c., and declaring that, in the execution of such undertaking of indemnity they act "as private individuals acting for" themselves, "and to promote" their "private and personal interests, in the said Oregon Railway Company, limited," &c., proceeds as follows:

"We do hereby contract and agree to pay off and discharge all the debts and liabilities of the said J. Gaston and J. Gaston & Co. which may have been incurred for or aris-

ing out of the construction of the said Dayton, Sh
Grand Ronde railroad, and its Dallas branch, an
ton and the Dayton, Sheridan & Grand Ronde
Company, incurred for labor or material furnishe
in the construction or operation of the said Dayto
dan & Grand Ronde railroad and its said Dalla
* * * so as to save harmless, in all respects, th
Gaston and J. Gaston & Co., from all pecuniary
whatever upon all and every matter or thing, of
scription, incurred for, or arising out of the constr
operation of the said Dayton, Sheridan & Gran
railroad and its Dallas branch."

This undertaking also contains an express de
that all the covenants and agreements therein on
of Reid, Montgomery and Hughes, "are made fo
behalf of the Oregon Railway Company, limited."
the purport of the obligation upon which the co
decreed the liability of Reid, Montgomery and H
guarantors of the Oregon Railway Company, limit
spect to the covenants therein expressed in Gaston
This portion of the decree is, in our judgment, e
Gaston's having at one time been the legal owne
unpaid capital stock before mentioned, and havin
voluntary sale and transfer thereof, constitute
grounds of his liability for the demands of the res
in this suit. There is no provision in this oblig
demnifying him against such a liability. The
Sheridan & Grand Ronde Railroad Company be
debted individually for the amounts subscribed a
for which the "freight receipts" were issued. As
the amounts subscribed became payable, under the
subscription, by the progress of the work of con
it belonged to Gaston under the stipulations in his

with the company, and never became a debt against him, or against him and the company, "arising out of the construction of said railroad." It never was a debt or liability of his own individually, or of his and the company's together, against which only the obligation undertakes to indemnify him. And if the money so received by him and expended in procuring "labor and material" used in the construction and equipment of the railroad, could, by any possible interpretation, be held to be included in the description, "labor and material used in the construction and equipment of said railroad," still it would avail him nothing; for it is evident that he incurred no indebtedness or liability on account of it. Such being our view of the effect of this undertaking of indemnity, it follows that the decree against Reid and Montgomery should be reversed.

We come now to the consideration of the motion to remand. Hughes, as the attorney for the Oregonian Railway Company, limited, appeared for it in this suit, and filed its answer herein to the complaint, verified by himself as its attorney, for the reason, as stated in his affidavit of verification, "that none of the officers of said company, either the president, secretary, treasurer, or any of the directors, are now within the state of Oregon." This answer was filed July 21, 1882. It contained an express admission of the truth of the allegation in the amended complaint, that "said capital stock was transferred to said company on December 11, 1880, and did not controvert the further allegation in such amended complaint in respect to such stock that such corporation is now the owner thereof." As we have already said, these admissions in the pleadings exhibit this company as the legal owner and last holder of said unpaid capital stock, and establish its primary liability as fixed by the decree of the circuit court. On the same day the answer

was filed, a stipulation also was filed, subscribe
spondents' attorney, and by Hughes as attorn
company, containing the same admission, in su
the joint and several answer of Reid, Montg
Hughes, and the separate answer of the Oreg
Company, limited, both of which were filed in
Hughes as attorney, the transfers of this stock
as trustee, and then to the Oregon Railway Co
ited, alleged in the amended complaint, are adm
both said answers the claim is set up that said
and said corporation were acting throughout su
tions merely as the agents and sureties for thei
ant, the Oregonian Railway Company, limited,
in no event be held liable for the demands of the

It appears from Hughes' own deposition take
of the appellants in the suit, as well as by the t
conveyance from the Oregon Railway Company
gonian Railway Company, limited, of Decemb
that these admissions of the transfer of stock t
from the former company, in the separate answe
lation referred to, were incorrect, and untrue i
the equitable owners of the stock merely, the
Railway Company, limited, would not be liable
ute to the payment of the respondents' demand
Currie, 2 Barb., 294; *Adderly v. Storm*, 6 Hill, 6
son's Liability of Stockholders, secs. 178-9.)

Still, if Hughes was the duly authorized ag
company, in taking the legal title to this stock
name, acting in good faith, and with such a de
and prudence only as was required of him in
nature and terms of his employment, as the com
be liable over to him for any loss sustained by
son of having taken and held such legal title f

pany, by its direction, and all parties being before the court, it would seem entirely within the rules of equity to make the company liable, in the first instance. But the principal, in such case, can be reached only through its implied indemnity to its agent. If no agency existed, or if existing, it has been exceeded or abused to such an extent as to preclude any recourse on such implied indemnity, by the agent himself, third parties claiming through him are equally precluded. But it is obvious that the alleged principal should be allowed an opportunity to make its defense before being adjudged liable. The pleadings in this suit presented no such issue, neither was there any evidence introduced that had any bearing upon the question, save that given by Hughes himself. On the motion to remand, the Oregonian Railway Company, limited, strenuously contends that Hughes was not its agent in the matter of taking and holding the legal title to this unpaid capital stock, and that whatever authority he did have to act as its agent, in purchasing such stock for it, was exceeded and abused to such an extent as to preclude any recourse he might otherwise have had against it; and particularly in this: that such purchase was authorized only on the condition that such stock was wholly and absolutely free from "all mortgages, debts, claims and encumbrances whatsoever, according to the laws of Oregon;" that Hughes and Reid, upon whom it relied, in the transaction, with full knowledge of all the facts, did represent the stock to it as being thus free and unencumbered and thereby induced it to take whatever action it did take in the premises. If this state of facts were established, it would constitute—assuming that the company never held the legal title in the unpaid capital stock—a good and complete defense for it, in this suit. And whatever the actual facts may be, which a regular trial would develop, it is sufficient

to say, in this place, that the party moving to
presented *ex parte* proofs in support of its m
in connection with facts appearing in the reco
itself, in our judgment, clearly entitle it to be
its liability is finally determined—if it be not
to let in a defense on the merits.

The Oregonian Railway Company, limited, w
corporation, incorporated and organized under
the United Kingdom of Great Britain and Irela
ing its principal place of business at Dunde
Service of the summons in this suit was made
its managing agent in this state, June 13, 188
its regular attorney, being absent, Reid procur
torneys who appeared for it and filed a dem
complaint and continued to manage its de
Hughes' return. On this motion, the compa
that it never had any notice of this suit, except
be implied from the knowledge of Reid and H
managing agent and attorney, until after the d
circuit court had been rendered against it. T
on this point is conflicting. That it had no a
of the character of the defense made for it by
of the admissions made in its answer in respect
fer to it, and its ownership of said unpaid capit
on the proofs offered upon the motion to rema
us pretty well established. From the time it
have obtained actual notice of these facts, it is
able with any laches in making efforts to hav
opened up, and to be let in to make its defense
its. The case was already appealed and pen
court, and the company embraced its first op
appear in court by other attorneys than Mr.

make its application for such relief, by filing its motion to remand, together with the proofs in its support.

Assuming that this court has the power to grant the relief sought by this motion, which we do not doubt in the least, in view of the provisions made in secs. 100 and 534 of our civil code, the most serious objection to its exercise, in the present instance, is the fact that the party making the motion was represented by its duly authorized attorney in the suit when the damaging admissions, which it seeks to be relieved from, were made, and it has not been shown that he is insolvent or unable to respond in damages, if found to be in fault in the matter, to the full amount of the decree against his principal. The rule seems to be pretty well settled, upon the decisions, that where an attorney appears for a party without authority, and fails to present his case properly; or, having authority to appear, suffers judgment to be taken against his client by default, through negligence or misconduct on his own part, and the adverse party has acquired rights thereunder, and such attorney is able, pecuniarily, to respond for any damage or loss occasioned by his wrongful interference, or misconduct, the court will not interfere to grant relief to the injured party in a summary manner, on motion, but leave him to his recourse against the attorney individually. (*Denton v. Noyes*, 6 Johns, 296; *Meacham v. Dudley*, 6 Wend., 514; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Thomas v. Jorden*, 57 Pa. St., 331.)

But the facts in the case before us are not, in all respects, similar to those reported in any of the foregoing cases, or any other we have examined on the subject. In the case here, the respondents could not have been ignorant of the facts disclosed by the record itself, in the testimony given by Hughes, and in the terms of the conveyance of Decem-

ber 11, 1880, from the Oregon Railway Compan
to the Oregonian Railway Company, limited, th
missions in the separate answer of the latter, a
stipulation filed at the same time, and by whic
ground of the latter's liability, alleged in thei
complaint, was established, were not true in fact,
ally fixed its liability on a ground which did not
are chargeable with the knowledge that if these
were not justified by the facts, Hughes, as attorn
for the Oregonian Railway Company, limited, wi
ther express direction, or under peculiar circums
claimed to have existed in this case, had no au
make them, and that under such circumstances h
in this regard were necessarily inimical to tho
clients. The same may be said concerning the
agency set up in the joint and several answer of R
gomery and Hughes, and the separate answer of t
Railway Company, limited, so far as it may be su
have influenced the course taken by the responde
case. They are chargeable with the knowledge tha
as attorney merely, had no right to thus place his
tween them and himself, and make it primarily
without special authority to do it—it having no
resentative in the suit besides himself. At most
ents, in equity and good conscience, which we u
furnishes the rule in such cases, can only clai
Oregonian Railway Company, limited, has made
this matter, while the causes of such default and
excusing it have been all along known to them.
parties" could hardly "acquire rights" under suc
stances that should preclude an innocent party
laches, from having the default set aside, and bei
a hearing upon the merits, upon such terms as jus

demand. Besides, the large amount of the decree—in this instance over $35,000—in view of the fact that there has been no showing before us as to Mr. Hughes' ability to respond for so large a sum, with accumulating interest and costs of litigation, if he should ultimately be adjudged liable therefor in a separate action between the Oregonian Railway Company, limited, and himself, prevents us from presuming that, in such an event, the company would have ample recourse.

Whatever doubts we may have entertained, at any time, as to the propriety of making the remand, have been, in no inconsiderable manner, relieved by the declared willingness on the part of Mr. Hughes, for himself and co-defendants for whom he appeared on the appeal, that such order, if within the power of the court, should be made, with leave to all parties to reframe their pleadings so as to present the real merits of the case as between the appellants. It is therefore our opinion that the decree in this cause should be set aside, with leave to all parties to amend their pleadings, in accordance with the views hereinbefore expressed, and upon such terms and under such directions as the circuit court shall order.

Respondents to have costs and disbursements of appeal.

By WALDO, J.

I am of the opinion that the Oregonian Railway Company, limited, would be liable under the law, to contribute towards the satisfaction of the judgments of the respondents which form the basis of this suit, by reason of having been the holder of the legal title, in the unpaid stock, subsequent to the recovery of such judgments, whether the "freight receipts" are to be deemed contracts to pay, in money, after failure to pay in freight and passage, according to their

terms, or simple contracts to carry freight and p
—as I am inclined to think they are.

WRIGHT AND JONES v. EDWARDS

COUNTY COURTS—JURISDICTION IN PROBATE MATTERS STATUTO
the constitution provides that the county court shall h
diction pertaining to probate courts, its authority to ord
of real property of an intestate is derived entirely from t
The proceedings are required to be in writing and the po
court is brought into action by means of a verified petit
administrator.

ADMINISTRATORS—SALE OF REAL PROPERTY BY.—When the p
the sale of personal property are exhausted, and claim
main unpaid, a condition of things exists which authoriz
to the real property to discharge them. But the mere ex
such facts do not confer jurisdiction—they only prese
which authorizes the administrator to invoke the juris
the court.

IDEM—PETITION FOR SALE.—To confer actual jurisdiction, th
tional power of the court must be brought into action by
of necessary facts in the petition which exhibit the nec
the sale.

IDEM.—Where a petition omits wholly to allege material fact
to confer jurisdiction, the court is without authority to a
proceedings are a nullity, and confer no right or title.

IDEM—JURISDICTION MUST AFFIRMATIVELY APPEAR IN PETITIO
there is matter of substance upon which jurisdiction c
mere errors or defects, although material in some res
which might have been avoided by appeal, cannot avail to
a judicial proceeding, when by lapse of time an appeal
which has become the foundation of title to property. Bu
is different when there is an entire want of facts, prere
jurisdiction, disclosed upon the face of the petition—then
of jurisdiction affirmatively appears upon the face of th
and the court being without authority to act, its proceedi
no validity, and can be collaterally assailed.

IDEM.—No court, no matter how general its jurisdiction may
proceeds without jurisdiction in the particular case, ca
valid record, or confer any right or title.

APPEAL from Umatilla County.

Bonham & Ramsey, for respondents.

Lucian Everts, for appellant.

By the Court, LORD, J.:

This is an action of ejectment brought by the heirs at law of one Joseph Wright to recover certain real estate in Umatilla county, Oregon, of which Joseph Wright died seized. The appellant, Hollis Edwards, lessee of N. G. Blalock, claimed title for his lessor under an administration sale after the death of said Wright, to pay debts due from the estate. The facts were stipulated, and to be tried, without the intervention of a jury, by the court. As conclusions of fact, the court found the death of Joseph Wright, the appointment of W. C. White as administrator of the estate, his acceptance of the trust, the execution of the proper undertaking and the taking of the required oath of office, &c., that on or about the 5th day of October, 1874, the said administrator duly presented to the county court of Umatilla county, sitting in probate, a petition for leave to sell the real property belonging to the estate; that the petition for the order of sale did not state the amount of sales of personal property, the charges, expenses, or claims still unsatisfied, did not describe the real property to be sold, its condition or value, and the same was not verified by the administrator or any one on his behalf; that notwithstanding these defects of substance, the court entertained said petition and ordered a citation to be issued to the heirs of said Wright; that on the 5th of April, 1875, by the consideration of said court, it was ordered that the real estate belonging to the estate be sold; that N. G. Blalock became the purchaser. And as conclusions of law, that the county court did not have jurisdiction to order the sale of the real estate described in the complaint in this action; that the heirs at law, by the acceptance of service, did not waive their right to question the jurisdiction of the court; that

the administrator's deed conveyed no title to N
the purchaser at the administrator's sale; th
tiffs are the owners in fee of said property, a
the immediate possession of the same, and
against the defendant for the immediate reco

No bill of exceptions accompanies the recor
any evidence in the record, except the facts s
show the basis of the findings of the court
record of the proceedings of the county cour
ordering the sale, which constitutes the grou
to this action, we can only know from the fi
regularity of the appointment of the admi
found by the court, and was not questioned at t
The point of dispute was upon the sufficiency o
to give the court jurisdiction to make the ord
appellant claiming that the want of such fact
tion as found by the court, although specified
as matter to be alleged in the petition, was no
jurisdiction, and the respondent insisting tha
were material, and that without them, or at le
equivalent in substance, the court was without
make the order of sale, and consequently, tha
ceedings thereunder were *coram non judice*,
vested in the purchaser. The findings show t
tion for the order to sell, upon which the cou
exercise jurisdictional power, did not state th
sales of personal property, the charges, expens
still unsatisfied, nor describe the real estate to
its condition or probable value, and that the
not verified.

While the constitution provides that the
shall have jurisdiction pertaining to probate
authority to order the sale of real property of

derived wholly from the statute. The proceedings are required to be in writing, and the powers of the court are brought into action by means of an affidavit or verified petition of the administrator. (Code, sec. 1046.) But the cases in which the power of the court may be exercised to order the sale of real property are specially designated in the statute, and the implication is, it can be exercised in no other. When the proceeds of the sales of personal property have been exhausted, and the charges, expenses, and claims specified in section 1110 have not all been satisfied, the administrator shall sell the real property of the estate, or so much thereof as may be necessary for that purpose. (Code, sec. 1113.) but no sale of the real property of an intestate is valid without an order of the court, and the application for an order of sale shall be by petition of the administrator, and a citation to the heirs and others interested in such property. (Sec. 1109.) The petition for such order of sale of real property shall state the amount of sales of personal property, the charges, expenses, and claims still unsatisfied as far as the same can be ascertained, a description of the real property of the estate, the condition and probable value of the different portions or lots thereof, the amount and nature of any liens thereon, the names, ages and residences of the devisees, if any, and of the heirs of the deceased so far as known. (Sec. 1114.) Upon filing the petition, a citation shall issue to the devisees and heirs therein mentioned, to appear at a term of court therein mentioned, to show cause, if any exist, why an order of sale shall not be made as in the petition prayed for. (Sec. 1115.) If, upon the hearing, the court finds it necessary that the real property, or any portion thereof, should be sold, it shall make the order accordingly, and prescribe the terms thereof. (Sec. 1117.) The order thus made, after due notice to all parties inter-

ested, and after an examination of the proofs at th
is an adjudication by the court that the sale of th
described is necessary. When such an order is m
jurisdiction has attached, it cannot be questione
ally, whatever errors or irregularities may interv
after. Such errors or irregularities can only b
and corrected by some direct proceeding before
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cannot be regarded as a nullity and cannot, the
collaterally impeached. When, therefore, an ord
is relied upon as a defense in a collateral proce
authority of the court to make the order must ex
it act without jurisdiction, its order or decree is
it confers no right or title, and cannot be asserte
fense to bar a recovery. "No court, no matter ho
its jurisdiction may be, which proceeds without ju
in the particular case, can make a valid record,
any right or title."

The statute points out with great particularity
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the court. To confer actual jurisdiction, the jur

power of the court must be brought into action by the averment of necessary facts in the petition which exhibit the necessity for the sale. "How did the court get jurisdiction?" asks Mr. Justice Sawyer. "Not merely by the actual existence of the jurisdictional facts, but by their averment in the petition." (*Holmes v. Or. & Cal. R. R. Co.*, 7 Saw., 387.) "Now," says Mr. Justice Deady, "upon filing the petition—*it being a sufficient one*—the county court was called upon to proceed to act, to make an order prescribing what and how notice should be given. In *Felch v. Miller*, 20 Cal., 381, the court say: 'In order to make the sale effectual to confer a valid title, the probate court must have acquired jurisdiction of the case by the presentation of a proper petition.'" (*Gager v. Henry*, 5 Sawyer, 244.)

In *Stuart v. Allen*, 16 Cal., 501, the court say: "It will be remarked that it is immaterial, so far as the question of jurisdiction is concerned, whether the statements of the petition are true or not, the jurisdiction resting upon the averment in the petition, and not upon the proof of them." In *Haynes v. Meek*, 20 Cal., 312, Mr. Justice Field says: "When an order of sale is relied upon, the question is, was the order made in the case provided by the statute? To determine this, we must, in the first instance, look to the petition for the sale which is the foundation of the order; assuming, of course, that the court acquired jurisdiction originally to grant administration upon the estate. The proceeding for the sale, though made in the general course of administration, is a distinct and independent proceeding, in the nature of an action, of which the petition is the commencement, and the order of sale is the judgment. We must then examine the petition, to ascertain whether a case is presented by its averments within the statute upon which the court can act." As the statute contemplates the ex-

haustion of the personal property before a resc
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petition" named in the statute is undoubtedly su
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The cause becomes *coram judice* only when th
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Looking, then, at the petition in the light of th
and testing it by these principles, it is not merely
but deficient in the statement of any facts necessa
jurisdiction. None of the facts required by the
substantially, or at all, incorporated in the p
means of which jurisdiction is acquired. The
sales of personal property, the charges, expenses
still unpaid are not stated, nor any equivalent f
this subject, nor is any property described, nor

tion or probable value. The petition is barren of essential facts, and not even verified. It is said that proceedings of this character are in the nature of actions *in rem*, that in all courts which have power to sell the estate of intestates their action operates upon the estate, and not upon the heirs of the intestate. (*Grignon's Lessees v. Astor*, 2 How. 338.) Upon this, it is insisted that the land being the subject matter upon which the jurisdiction operates, the necessity for a description is not absolutely essential. It is certainly difficult to understand the application of this argument. But, conceding *in some sense* the proceeding is in the nature of an action *in rem*, how can the jurisdiction of the court operate upon the lands of the intestate when none are described—none identified upon which such jurisdiction can operate; or how can it operate to divest the title of heirs by a sale of their lands for which sale no lands are described and petitioned to be sold, and for which, consequently, there is no petition. (*Townshend v. Gordon*, 19 Cal., 208; *Haynes v. Meek*, 20 Cal., 314.) By describing the land—the other material facts appearing by sufficient allegation—it is identified and subjected to the jurisdiction of the court. It is true that vagueness, inaccuracy, or mistake in the description of lands will not vitiate the proceeding and render the sale a nullity when collaterally assailed, and rights of property have attached. The courts very properly hold, when jurisdiction has attached by the statement of proper facts, although defectively alleged, and by some inadvertence the lands are imperfectly described, the sale cannot be collaterally attacked and the rights of innocent purchasers imperiled. In such case there is matter of substance to challenge the jurisdiction of the court, and to cause it to deliberate and act. But that is not this case. Here, it is not the defective statement of material facts, or

a petition in some material respect defective, but a total want of statement of any essential facts necessary to give jurisdiction. The difference is, between a petition with facts and one without them—or, in other words, no petition at all. Nor do any of the authorities to which we have had access undertake to uphold sales against collateral assault when the petition affirmatively discloses an entire want of any statement of facts essential to give jurisdiction.

In *Overton v. Johnson*, 19 Mo., 400, it was held that the omission to file the accounts, lists and inventories, as required by the statute, was not necessary to give the court jurisdiction when their substance was incorporated in the petition itself; for the court say: "In the body of the petition the general amounts of the different lists and inventories are stated." In *Bryan v. Bander*, 23 Kansas, 97, the petition fully set forth all the facts required by the statute, except that the description of the land was subject to the objection of vagueness, or indefiniteness, and the court say: "When a petition contains sufficient matters to challenge the attention of the court as to its merits, and such a case is thereby presented as authorizes the court to deliberate and act, although defective in allegation, the cause is properly before the court, and jurisdiction is not wanting. The allegation that the land was situated in Miami county was some description, and no property was ordered sold but what was in that county. Hence the order to sell really described the property in the petition, and in such a manner that it could be identified." (*Reed v. Howe*, 39 Iowa, 559; *Montgomery and wife v. Johnson*, 31 Ark., 80; *Iverson v. Loberg*, 26 Ill., 187.)

These authorities are cited to illustrate the extent to which the courts have gone "to avoid the evils and hardships, affecting titles injuriously, which would result from

holding probate courts to too great strictness of procedure, and it is undoubtedly more reasonable, whenever it can legally be done, to give a fair and liberal construction to their acts." (*Stuart v. Allen, supra.*) Where there is matter of substance upon which jurisdiction can hinge mere errors or defects, although material in some respects, but which might have been avoided on appeal, cannot avail to condemn a judicial proceeding when, by lapse of time, an appeal is barred, which has become the foundation of title to property. But the case is different where there is an entire want of facts, pre-requisite to jurisdiction, disclosed upon the face of the petition. Then the want of jurisdiction affirmatively appears and the sale cannot be upheld when collaterally assailed. In such case there is no room to indulge presumption. The petition is not silent—it speaks for itself. It shows what was required to be done to give jurisdiction was not done, and it is useless to look beyond. The authority of the court to act is wanting and the proceedings are a nullity. The distinction between inferior and superior courts have no application here, for all courts, before their proceedings can have any validity, or can confer any rights, must have jurisdiction to act. The proceeding is in derogation of common law—statutory alone, with its boundaries mapped out and ascertained. With a just regard for the protection of estates, the statute has, with precision, specified the facts essential to authorize the court to exercise its jurisdiction, and a petition without such facts, or, at least, something in substance equivalent, cannot confer jurisdiction without ignoring the statute altogether.

Judgment affirmed.

LADD & TILTON v. MASON, ET AL.

JUDGMENTS, ORDERS AND DECREES MAY BE VACATED.—Every court possesses the inherent power to vacate entries, in its record of judgments, decrees or orders, rendered or made without jurisdiction, either during the term at which the entries are made, or at any subsequent term.

DEMURRER—WILL NOT LIE TO IMPERFECT DESCRIPTION OF LAND.—A demurrer will not lie to a complaint, in a foreclosure suit, on the ground of insufficiency of description of the mortgaged premises, where such description purports to refer to natural objects, not judicially cognizable, and apparently includes a definite tract of land.

TENDER IN WRITING.—An "offer in writing," under sec. 816 of the code, to pay a definite sum of money, or to deliver a particular thing, takes the place of the actual production and proffer of the money to be paid, or thing to be delivered, but does not dispense with readiness and ability on the part of the person making the offer, to pay or deliver, at the time the offer is made.

IDEM—BURDEN OF PROOF.—The burden of proof, in establishing such readiness and ability when put in issue, is on the party claiming the benefit of the tender.

FORECLOSURE SUIT—MORTGAGOR ENTITLED TO ANSWER CO-DEFENDANTS.—A mortgagor, or his successor in interest, made a defendant in the suit to foreclose, is entitled to answer the affirmative matter set up in the respective answers of his co-defendants, showing liens in their favor upon the mortgaged property, and to have the same determined, in the original suit. As to such matter his co-defendants are to be deemed plaintiffs, and their answers complaints.

IDEM.—No order of the court that the defendants interplead, is necessary in such cases, and it is error in the court to disregard such an answer when seasonably filed.

IDEM.—Misapprehension on the part of some of the defendants as to the correct practice in such cases, preventing them from properly presenting the merits of their claims upon the record; *Held,* Under the peculiar circumstances, to justify remanding the case after reversal for a new trial in the lower court upon issues properly framed.

APPEAL from Multnomah County

O. P. Mason, for appellants.

J. W. Whalley, for respondents.

Opinion by WATSON, C. J.:

This suit was brought in the circuit court for Multnomah county by Ladd & Tilton against Geo. W. Johnson and M. E. Johnson, his wife, DeLashmutt & Oatman, and several other parties, to foreclose a mortgage given by Johnson and wife to Ladd & Tilton, to secure the payment of a certain promissory note, dated March 31, 1876, for the sum of six hundred dollars, executed by Johnson to Ladd & Tilton as agents. The mortgage was executed contemporaneously with the note and contained the following description of the property intended to be mortgaged:

"Situate, lying and being in Multnomah county, state of Oregon, and being the undivided half of the following land, to-wit: Beginning on the north line of Thos. Carter's land claim, at the northeast corner of the John Kenneth claim, thence running south twenty-nine chains to the middle of King's creek, in a northerly direction, to A. N. King's land claim; thence westerly, leaving the creek, to the place of beginning—containing twenty-two acres, more or less—less a lot fifty (50) feet by one hundred (100) feet, deeded to a Mr. Zistellins by Carter, which last named lot is thus described," &c.

The complaint, filed January 4, 1877, alleges in respect to DeLashmutt & Oatman that they "have or claim some interest in, or lien on said mortgage premises, accrued since the lien of plaintiffs' mortgage." DeLashmutt & Oatman answered admitting the priority of Ladd & Tilton's mortgage lien, setting forth the facts to show a subsequent mortgage lien on the same premises, in their own favor, and asking that any surplus after satisfying the amount due on the prior mortgage of Ladd & Tilton, be applied towards the payment of the debts secured by their subsequent lien on the premises.

Only one of the defendants, Elizabeth Johnson, appeared

in the circuit court and defended against the foreclosure of Ladd & Tilton's mortgage. She was represented in such suit by her attorney, O. P. Mason, one of the appellants, and then as now the husband of Mary Mason, his co-appellant. On June 19, 1877, such proceedings had been taken in the cause that a decree was rendered foreclosing the Ladd & Tilton mortgage, and directing a sale of the mortgaged property, and the application of the proceeds. On June 26, 1879, Ladd & Tilton filed a motion, supported by affidavits, for an order vacating said decree, and for leave to file a supplemental complaint making the appellants, Mary and O. P. Mason, defendants, on the ground that intervening the execution of their mortgage and the commencement of the foreclosure suit, said Mary had obtained the legal title to the mortgaged premises, which fact was unknown to them until after the rendition and entry of said decree. The court below granted the motion, the supplemental complaint was filed and summons served on the appellants. They thereupon appeared and moved the court, upon affidavits accompanying their motion, to vacate the order setting aside the previous decree and allowing them to be made parties; but their motion was overruled. They next demurred to the complaint, but their demurrer was overruled also. They then answered, denying every material allegation in the complaint, and as separate defenses alleging certain facts as constituting tenders of the amount due upon the note secured by the Ladd & Tilton mortgage, previous to their having been made parties to the suit. They also filed an answer to the affirmative allegations in the answer of DeLashmutt & Oatman, denying them, and as a separate defense setting up new matter in avoidance, without having obtained any order from the court to interplead.

Afterwards, H. W. Prettyman was allowed, upon his own

application, supported by affidavit showing that he had endorsed one of the notes secured by the DeLashmutt & Oatman mortgage for accommodation merely, and had been compelled to pay the same, and was therefore entitled to the benefit of the mortgage security, to become a party defendant. DeLashmutt & Oatman filed no reply to the answer of the appellants, but the latter filed a demurrer to the answer interposed by H. W. Prettyman. The cause was, in this shape, referred, and upon the evidence reported by the referee, and the pleadings, the court below decreed the foreclosure of the Ladd & Tilton mortgage and the sale of the mortgaged premises, and the distribution of the proceeds as follows: 1, To the payment of costs of suit and expenses of sale; 2, To the payment of the amount secured by the Ladd & Tilton mortgage; 3, To the satisfaction of the amounts due DeLashmutt & Oatman and H. W. Prettyman respectively on the notes secured by their mortgage. From this decree the appeal has been taken.

The errors assigned and points discussed in the brief of the appellants are quite numerous, but we shall confine our attention in this place to such as we deem of essential importance in the determination of the case. The order of the court below, of June 26, 1879, vacating the previous decree of June 19, 1877, and allowing appellants to be made parties defendant by a supplemental complaint, seems to us open to none of the objections urged by the appellants. The rule of law which prohibits courts from revising, changing, or reversing their own decisions, after the term at which they are rendered has expired, has no application to a case like the present. It applies only where the court has jurisdiction and the cause is heard upon its merits. In the present instance, as Mary Mason had obtained the legal title in the mortgaged property previous to the commence-

ment of the foreclosure suit, the decree of foreclosure and sale entered before she was made a party was simply a nullity, the court having no jurisdiction to render it. The inherent power of the court to set aside and vacate such an entry, made without jurisdiction, at any time afterwards, whether at the same term it is made, or any subsequent term, seems hardly to admit of a serious doubt. Judgments, decrees or orders made without jurisdiction are not more binding upon the courts that enter them than upon persons sought to be affected by them. Not only may they be vacated to subserve the ends of justice between parties litigant, but it would seem that they might be set aside by the courts upon their own motion, by virtue of their inherent power to correct their own records and free them from extraneous matter. (Civil code, sec. 100; Freeman on Judgments, secs. 98, 100, 107, 108; *State Bank, &c., v. Abbott, et al.*, 20 Wis. 599.)

The affidavits filed by Ladd & Tilton, in support of their motion to vacate, disclosed a state of facts fully justifying the interposition of the court in the exercise of this power. They caused the record to be searched in contemplation of bringing the suit to foreclose their mortgage, but the sheriff's deed for the premises to Mary Mason had not been registered. Although executed December 21, 1876, it was not recorded until January 11, 1877, seven days after the commencement of the foreclosure suit. The execution on which the land had been sold had been returned and docketed, but the docket entry had not been indexed, and hence escaped the searcher's notice. And neither Ladd & Tilton nor their agents or attorneys had any notice of such conveyance until after the entry of the decree of June 19, 1877. There had been no sale nor attempt to sell the premises under this void decree, and we think the course pursued to get it va-

cated and bring in the appellants, as holders of the legal title, was the correct practice. (*State Bank, &c., v. Abbott, et al., supra.*)

The question raised by the demurrer to the complaint is as to the sufficiency of the description of the mortgaged property. Appellants contend that it is fatally uncertain and indefinite. Evidently the word "thence," or words of equivalent import, must be supplied immediately before the words, "in a northerly direction," in the description, and this being done the description is certainly good on its face. The natural objects referred to, and the courses and distances do then apparently, at least, describe a definite tract of land in Multnomah county, Oregon. If there is any ambiguity in the description it certainly does not appear upon the face of the record itself, as set forth in the complaint, and cannot be reached by demurrer.

It is alleged in the answer of the appellants, and admitted in the reply of Ladd & Tilton, that prior to the vacation of the first decree and the bringing in of the appellants as parties to the suit, under the order of court, the appellants caused a written offer to pay the amount of principal and interest due on the note secured by the Ladd & Tilton mortgage, to be served upon W. S. Ladd, one of said firm, by the sheriff of Multnomah county, Oregon. This answer contains this further allegation, which is put in issue by the reply: "That at said time defendants had the said money ready as therein specified, and were willing to pay the same as therein set forth, and the said plaintiff, W. S. Ladd, declined and refused to accept the said offer, and has ever since declined and refused to accept the said offer and tender in writing, and to receive the said money, and still refuses to do so." No evidence upon this issue was introduced by either party. Appellants claim that an "offer in writ-

ing," under sec. 816 of the civil code, is admitted by these pleadings. The section reads as follows: "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property." This provision seems by no means common in the statutes of the different states, nor to have been elucidated to any considerable extent by judicial decision. Indeed we have only been able to discover it in the statutes of a single state besides our own—those of Iowa—and to find a single reported case where it has come to judicial examination. The Iowa statute is, in substance, identical with our own, and no doubt the original from which ours was derived. Under it the supreme court of Iowa have held that the offer in writing therein provided for might be sent by mail to the postoffice address of the creditor in another state. (*Crawford v. Paine*, 19 Iowa, 178-9.) But without dwelling upon the proper mode of procedure under this provision, or expressing any opinion of our own in regard to the broad construction put upon it in the Iowa case, we think it perfectly safe to hold that while the offer in writing, under the statute, is, if not accepted, equivalent to the actual production and tender of money to be paid or other thing to be delivered, it does not dispense with the readiness and ability on the part of the person making the offer to pay or deliver at the time the offer is made. Surely the justice and good sense of the legislature should not be impugned by such a construction of this provision as would place its framers in the position of having intended to provide a mode whereby a party might make a valid tender if his offer should not be accepted, without the readiness or ability to make it good, in the event of its acceptance. The legislature cannot, it seems to

us, by any such doubtful construction, be held to have sanctioned and authorized what otherwise would be deemed a plain and palpable fraud. (*Fisk v. Holden*, 17 Tex., 408; *Fuller v. Little*, 7 N. H., 535.) In the case at bar, appellants allege such readiness and ability on their part, which is denied; and no evidence upon this issue has been introduced. Who must fail? Evidently the appellants, for on them the burden of proof rested. These facts were directly and distinctly in issue and it devolved upon the appellants to prove them. (*Pulsifer v. Shepard*, 36 Ill., 513.) Consequently the defense founded upon the offer in writing, in our judgment, fails. Neither is the allegation in the answer of the appellants of an actual tender of the amount due on the note sustained by a preponderance of the evidence. The testimony of E. Quackenbush and the appellant, O. P. Mason, the only witnesses examined in regard to it, is in direct conflict, while there is nothing besides in the record to enable the court to judge between them. The burden of proof resting upon the appellants here, as in the preceding instance, in this evenly balanced state of the evidence, they must fail as to this defense also.

The only remaining question which we deem it necessary to consider relates to the action of the court below in reference to the pleadings of the appellants to the respective answers of DeLashmutt & Oatman and H. W. Prettyman. The court seems to have disregarded them altogether, as unauthorized and of no legal effect whatever. This, we conceive, was erroneous. Our statute expressly provides for making subsequent lien-holders parties defendant in a foreclosure suit; also prior lien-holders, at the option of the plaintiff, or by order of the court. (Sec. 411, Civil Code.) Also for a decree foreclosing the liens held by such parties, and the distribution of the proceeds of the sale of the mort-

gaged property among them, according to priority. (Sec. 412, Id.) It is plain from these provisions that the mortgagor, or his grantee of the equity of redemption, must be allowed an opportunity to contest the claims of such of his co-defendants as set up liens in their answers against the mortgaged property, in the foreclosure suit itself, or he will be precluded from asserting his rights as against them altogether. The practice in such cases has not been provided for by statute, nor are we aware of any adjudication upon it in this state. The want of such statutory provision in regard to the mode of procedure is not, however, an insuperable barrier to the exercise of the jurisdiction so clearly conferred upon the courts by the sections of the code last cited.

Sec. 911 of the civil code provides: "When jurisdiction is, by the organic law of this state, or by this code or any other statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

It is probable that even without this express legislative authorization, the courts would feel justified in adopting suitable modes of proceeding in such cases, and the highest courts in some of our sister states, at least, have not hesitated to so declare. (*Meredith v. Lockey*, 16 Ind., 1; *Dice v. Morris*, 32 Id., 278; *Tucker, et al. v. St. Louis Life Ins. Co., et al.*, 63 Mo., 588.)

So far as the answers of his co-defendants attempt to set up claims against the mortgaged property, they are, in substance and effect, complaints against the mortgagor or his grantee defendant in the foreclosure suit, and should be so considered by the court. (*Meredith v. Lockey, supra.*) No

order to interplead is necessary. The right to do so would seem to follow absolutely from the very fact that the statute itself requires such persons to be made defendants in the suit, and authorizes the determination of their rights therein by the court. Surely parties thus situated should not be called upon to ask leave of the court to assert their legal rights. In respect to the time of filing pleadings among co-defendants in such cases, it would seem most expedient to consider the answer of the defendant setting up a claim against the mortgaged property, as the complaint or first pleading, and proceed afterward in analogy with existing statutory provisions for filing pleadings subsequent to the complaint. And if such answers are complaints, in fact, we do not perceive how any different rule can well be adopted. Our conclusion is that the course which appellants attempted to pursue in regard to the respective answers of DeLashmutt & Oatman and H. W. Prettyman, was the correct practice, and that the circuit court erred in disregarding their pleadings to such answers, and in treating them as nullities, and for this reason so much of the decree as concerns the determination of the rights between the defendants must be reversed.

But as it is apparent that the defendants have through misapprehension as to the correct practice in such cases, failed to present their respective claims and defenses upon the record, in such a manner that their merits can be fairly investigated, and to offer any evidence in their support, we deem it both competent and proper after reversing the decree as to them, to remand the cause to the lower court for a new trial between them upon issues to be framed, and evidence introduced as that court shall direct. (*Speyer v. Ihmals*, 21 Cal., 281.)

The decree of the court below in favor of Ladd & Tilton

is affirmed, with costs. Its provisions in favor of DeLashmutt & Oatman and H. W. Prettyman are reversed and set aside, and this cause remanded for further proceedings in accordance with the views contained in the foregoing opinion. LORD, J., concurring.

DISSENTING OPINION.

By WALDO, J.:

At common law a tender was the production and manual offer of the money. (*Bakeman v. Pooler*, 15 Wend., 638.) But a refusal to receive the money dispensed with its actual production. (*Ball v. Stanly*, 5 Yerg., 200; *Hazard v. Loring*, 10 Cushing, 269.) The refusal to receive is grounded on the assumption that the money is at hand ready to be produced. Therefore, he who pleads a tender, and proves a waiver of the actual production of the money, must yet show that the money was at hand ready to be produced. However, a less strict rule is laid down in *Holmes v. Holmes*, 9 N. Y., 525.

But our statute steps in and says that an offer in writing to pay money is equivalent to an actual production and tender. Therefore, when, under the statute, a party proves an offer in writing, it is precisely the same in legal effect as if he had proven an actual production and offer of the money. This seems the plain reading of the statute, and the inference to be drawn from the authorities. (*Bartel v. Lope*, 6 Or., 327; *Shugart v. Pattee*, 37 Iowa, 422, 425.)

The good faith of such an offer is presumed, which includes the ability to make the offer good. If a want of good faith is averred it must be proved by the party setting it up. In *Brewer v. Fleming*, 51 Penn. St., 107, 112, 113, a tender was made the defendant of a sum of money called by the plaintiff $2,660, which the defendant refused to re-

ceive, but made no objection to the quantity. It was held that the defendant could not afterwards allege that the sum was insufficient; or, if so, that the burden of proof was upon him. Fraud would vitiate the tender, but this must be proved by the party denying the tender. (*Nelson v. Robson*, 17 Minn., 291; *Hayward v. Munger*, 14 Iowa, 516.)

To apply the language of Mr. Justice Washington, in *Blight v. Oakley*, Peters' C. C., 24—the respondents, having declined to accept the tender, cannot be heard now to say that the appellant could not have performed his offer. The tender destroyed the lien, as the authorities cited by the appellant show. See, also, *Tiffany v. St. John*, 65 N. Y., 314.

DeLASHMUTT *v.* SELLWOOD.

MORTGAGEE IN POSSESSION.—Possession taken by a mortgagee, with the mortgagor's consent, after foreclosure and a sale of the mortgaged premises, and execution of a sheriff's deed to the former as purchaser at such sale, does not constitute him a mortgagee in possession, with the right to retain the same until the debt is paid. The consent of the mortgagor given after being thus divested of all interest in, and control over the property, is simply a nullity.

JUDGMENT LIEN DOCKET.—The omission to enter the names of all the judgment debtors under the proper heading in the judgment docket does not prevent the judgment from becoming a lien on the real property of those whose names are properly entered in such docket.

DOLLARS AND CENTS—WHAT MARKS DENOTE.—Any mark commonly understood, and ordinarily employed in business transactions, to denote the division of figures, obviously representing money, into dollars and cents, is sufficient for that purpose, in judicial records, or other official documents. Of this character are the lines and spaces in the ruled money columns of regular books of account, or official records similarly prepared.

MORTGAGE LIEN—SUBSEQUENT JUDGMENT CREDITOR.—The foreclosure of a prior mortgage lien upon real property, without making a subsequent judgment lien creditor a party, in nowise affects the rights of the latter, and a sale under his judgment conveys the legal title to the purchaser, notwithstanding the fact of a previous sale of the same premises having taken place under the decree of foreclosure.

IDEM—BANKRUPTCY.—The rights of the purchasers, under said sales respectively, are not affected by the proceedings in bankruptcy against the mortgagor and judgment debtor, commenced over a year after the last of such liens attached to the premises, and the assignee in bankruptcy has not intervened, either to redeem the premises or oppose the enforcement of such liens, or have the proceedings to enforce the same transferred to the court in which the bankruptcy proceeding is pending.

PRACTICE—EVIDENCE.—A tax deed, although regular on its face, offered in evidence by a party, together with the assessment and delinquent tax rolls upon which it is based, and which disclose a state of facts which demonstrate its invalidity, is properly rejected by the court.

DOCUMENTARY EVIDENCE—COURT DETERMINES EFFECT AND ADMISSIBILITY.—Where, at a trial by a jury, no evidence for the defendant is admitted, and plaintiff establishes a *prima facie* case upon documentary evidence, whose effect as well as admissibility is a proper subject for the determination of the court, an instruction to the jury to return a verdict for the plaintiff is both correct and proper.

APPEAL from Multnomah County.

On the 1st day of February, 1875, C. M. Carter borrowed $3,000 from John Sellwood, the appellant, and gave his promissory note therefor. At the same time, to secure the payment of said note, Carter and his wife joined in executing a mortgage to Sellwood on blocks 35, 47 and 58, in Carter's addition to the city of Portland, Oregon, which mortgage was duly recorded in Multnomah county, in which said premises are situated, on the 5th day of the same month. On the 14th day of February, 1876, Geo. P. Gray recovered a judgment against said Carter and one W. P. Doland in the circuit court for said Multnomah county, for the sum of $705.50, which was docketed in the judgment docket of said court on the same day it was rendered. Afterwards, Sellwood brought a suit in said court against Carter and wife, and Gray, and other judgment creditors, to foreclose his mortgage, and obtained a decree of foreclosure and sale on February 21st, 1877. Gray was not served with the summons and did not appear. The three blocks

were sold upon this decree, and Sellwood became the purchaser. The sale was confirmed and he received a deed for the premises from the sheriff, executed August 18th, 1877. January 4th, 1878, Gray had an execution issued on his judgment, upon which the property was again sold by the sheriff, and the respondent, DeLashmutt, became the purchaser. This sale was also duly confirmed, and a deed executed by the sheriff to DeLashmutt on May 10th, 1878. DeLashmutt afterwards brought this action against Sellwood, who had obtained possession of the property, to recover the same.

The complaint is in the usual form. The answer of Sellwood, in addition to denials of all material allegations in the complaint, and a plea of title in himself, contains a further separate defense, in which the facts above are substantially alleged, and concludes as follows: "That by virtue of said mortgage, foreclosure, proceedings, and sheriff's deed, and with the consent of the said Charles M. Carter, this defendant is in possession of the premises."

The plaintiff demurred to this defense for insufficiency, and the court sustained the demurrer. The cause was then tried by a jury, and under the instruction of the court a verdict was found for the plaintiff. From the judgment rendered on such verdict the defendant Sellwood appealed, and assigned as error: 1, The decision sustaining said demurrer; 2, The admission of the judgment docket offered by plaintiff to prove the entry therein of the Gray judgment; 3, The rejection of the record of the forcelosure proceeding and sheriff's deed to Sellwood; The record of a proceeding in bankruptcy, in the U. S. district court for Oregon, against said Carter and one Estes, and a quit-claim deed for said premises executed to Sellwood, by the assignee of the bankrupts, on August 30th, 1879; Also, the assess-

ment and delinquent tax rolls of Multnomah county for 1875, and a tax deed for said block 47 to Sellwood, executed December 14th, 1880; all of which were offered by the defendant, and the ruling of the court duly excepted to by him, in each instance.

W. W. Chapman, for appellant.

Seneca Smith and H. B. Nicholas, for respondent.

By the Court, WATSON, C. J.:

The question first presented for us to determine is whether the demurrer to the further separate defense in the answer was properly sustained. Appellant claims that the facts stated in this defense show that he was a mortgagee in possession, with the mortgagor's consent, after default in payment of the debt secured by the mortgage, and within the rule laid down by this court, in *Roberts v. Sutherlin*, 4 Or., 219. There is no analogy, however, between the essential facts in the two cases. In the case cited, where an action similar to the present had been brought by the mortgagor against the assignee of the mortgagee in possession, the defense which the court held good on demurrer was that, after default in payment, the defendant entered into the possession of the premises with the full assent of the plaintiff, and that there was still due on the mortgage the sum of about four thousand dollars. The court construed the facts thus alleged as implying an agreement that the assignee of the mortgagee might retain the possession so acquired until his debt should be satisfied; and held such agreement valid, and possession under it a good defense to the action. But it does not appear from the allegations in the separate defense in the case here, that the appellant was let into possession before the execution of the sheriff's deed to him, under the decree of foreclosure and sale of February 21st.

1877; or that he ever got possession with the mortgagor's consent, or even had his consent to remain in possession, until after that date. As the mortgagor had no interest in or control over the property, at the date of his alleged consent to the possession thereof by the mortgagee, it is self-evident that he at that time had no power to make a valid or binding contract for the possession, such as appellant would have the court imply from the facts stated in the separate defense in his answer. The appellant plainly entered into possession as a purchaser at sheriff's sale, which he had a perfect legal right to do, and the consent of the mortgagor was entirely unnecessary and wholly devoid of meaning or effect. The appellant took the title itself, as against the mortgagor, in fee, and not the mere possession, to be held until his debt should be paid, and then be re-delivered to the mortgagor, freed and discharged from the incumbrance created by the mortgage.

The facts set forth in the separate defense cannot be made to sanction the inference which appellant seeks to deduce from them, *i. e.*, an agreement between the mortgagor and mortgagee that the latter shall retain possession until the amount due on his mortgage shall be paid, accompanied by actual possession under such agreement. But it seems to us needless to pursue the discussion upon this point any further. So plain a proposition needs no explanation.

The next question is raised by the appellant's exception to the ruling of the circuit court, admitting the judgment docket in evidence to show the entry of the judgment of Geo. P. Gray against C. M. Carter and W. P. Doland. Appellant made two principal objections at the trial to the admission of this evidence: 1. That it did not show who the judgment debtors were; 2. That it did not show any judgment for money. On examining the docket, we find

under the head of "judgment debtors" the following entry: "Carter, C. M., *et al;*" and opposite, under the head "amount of judgment," the figures | 6 | 5 | 5 | 50 |, in a column ruled in the manner usual with money columns in books of account to denote the amounts entered, in dollars and cents, but without any dollar mark to show that such figures are intended to represent money at all.

Appellant insists that the entry is fatally defective, in both respects, and that in consequence thereof the Gray judgment never became a lien on the property in controversy. The statute, however, does not expressly require the entry of the names of all the judgment debtors, in any case, under this head, in the judgment docket. (Civ. Code, secs. 266 and 562.) And we can perceive no good reason for holding invalid an entry which does, as in this instance, fully and correctly set forth the name of the judgment debtor against whose lands the lien is claimed, because it does not also give the name of a co-debtor, against whose property no relief is sought. There is no misdescription of the judgment, and the addition of the name of W. P. Doland, as a co-debtor, in the docket entry, would not have made it more certain that the judgment was a lien on the real property of C. M. Carter, lying within Multnomah county. Construing the statute both in view of its express requirements, and the obvious purpose of the entry in the judgment docket, we think there can be but little doubt that if not otherwise deficient it made the Gray judgment a lien upon the real property in controversy, the title of which was then in C. M. Carter. The objection that it does not appear from the docket entry what the figures, in the column headed, "amount of judgment," stand for, presents a question by no means new in this court. In the case of *French, et al. v. Rogers*, disposed of at the last term, we

held, in effect, that any mark commonly understood, and ordinarily employed in business transactions to denote the division of figures, obviously representing money, into dollars and cents, would suffice for that purpose, in entries of this character. Such we deemed the mark ordinarily used in setting down sums of money on paper, to denote the amount represented by the two figures on the right as cents, and that represented by the figures on the left as dollars; and the same effect in our judgment must be allowed to the lines and spaces in the ruled money columns, in regular account books, or official records similarly prepared. General usage and common understanding have given such marks and lines, when so employed, a signification by which not individuals only, but courts as well, are enabled to determine what, and what amount figures so placed were intended to represent, with as much ease and almost as much certainty as though the dollar mark itself, or written words even had been used to express the same meaning. To the doctrine of that case we still adhere, and deem it decisive of this point in the case before us.

Appellant next contends that the sheriff's deed to him of August 18, 1877, conveyed to him the entire legal title in the property in controversy, and that the subsequent sale under the Gray judgment to the respondent, had no effect upon such legal title, but, at most, operated as an assignment of the judgment to the purchaser thereof, and invested him only with the right to redeem from the appellant, by a suit in equity. The decision in *Post v. Arnot*, 2 Denio, 344, has been cited as supporting this view. Unfortunately this was only one of two questions presented and considered in that case, and the decision might well stand upon the determination of either in a given manner by a majority of the court, or even by the concurrence of minorities on both.

Eleven senators voted for the reversal and nine against it. Only six of those voting in the majority expressed opinions, and two of these placed their judgment on the other ground. It cannot be said with any kind of certainty that any principle was determined by this decision, or that it has any weight as an authority on either of the questions it involved (*Kortwright v. Cady*, 21 N. Y., 343.) And it is quite sure that it has not been followed in the state where it was rendered or elsewhere. (*Walsh v. The Rutgers Fire Ins. Co.*, 13 Abb. Pr., 37; *Peabody v. Roberts*, 47 Barb., 100.)

And besides, we regard the question as virtually settled the other way in this state, by the decision of this court in the case of *Besser v. Hawthorn*, 3 Or., 512, affirming the decree of the circuit court, also reported in the same volume on page 129. Under this decision, the title in the case at bar did pass to the respondent by the sale and deed under the Gray judgment, and he can maintain this action. We conceive the true doctrine, and that which has been established in this state by the decision referred to, to be that the junior lien holder is not in any way affected by the proceedings to foreclose, to which he is not a party; that his right to sell on execution and convey the title remains unimpaired; and that as to the purchaser at the sale under his judgment, the purchaser at the prior sale under the decree of foreclosure must be considered as an assignee of the mortgage, and successor in interest to the mortgagor, simply, and as in the some position he would have occupied had he taken a simple assignment of the mortgage from the owner, and a conveyance of title from the mortgagor, and made no attempt to foreclose. (*Davenport v. Turpin*, 43 Cal., 597; *Vanderkamp v. Shelton*, 11 Paige, 28; *Holmes v. Bybee*, 34 Ind., 263; *Peabody v. Roberts*, 47 Barb., 100.)

The exclusion of the record of the proceeding in bank-

ruptcy, and the assignee's deed to appellant, seems to us open to no objection whatever. The petition to have Carter adjudged a bankrupt was not filed until July 6, 1877, long after the sale under appellant's decree had been made and confirmed, and when Carter had only a mere right to redeem. There seems never to have been any question as to the validity or *bona fides* of such sale to appellant so far as Carter was concerned, or those claiming under him. The assignee never had any title to the premises; never pretended that he had or could get any, and his quit claim deed to the appellant, which the latter seems to have solicited, to exclude any question as to the soundness of his title, passed nothing. The tax deed was offered in evidence by the appellant at the trial in connection with the original assessment roll and delinquent tax roll on which it was based. Neither of these rolls showed any assessment against Carter or his property, or any delinquent tax to pay which block 47 might lawfully have been sold. While if the tax deed had been offered by itself, it might or might not have been admissible, it clearly was not when presented in connection with the assessment and delinquent tax rolls, which failed to show facts essential to its validity. The court below properly rejected all the papers thus offered together. And as the respondent's case was established by documentary evidence alone, whose effect as well as admissibility were proper subjects for the determination of the court, and fully sustained the propositions assumed in the instruction to the jury, to return their verdict for the respondent, and no evidence was admitted on behalf of the appellant, such instruction was not only correct, but in every respect proper. The judgment of the circuit court is affirmed with costs to the respondent.

Judgment affirmed.

TONGUE v. GASTON.

INJUNCTION.—An injunction will not be granted when the so conflicting as to make the right to it doubtful. The proof in such case being on the plaintiff, he must clear the essential allegations in his bill.

APPEAL from Washington County.

Thomas H. Tongue, for appellant.

T. B. Handley, for respondent.

By the Court, LORD, J.:

This suit is brought by Tongue, the appellant, the defendant from maintaining a dam across Pat by means of which the waters of said creek are through a canal across plaintiff's land, and, as he his irreparable injury. The answer puts in issue t and damages, and sets up as a separate defense that with a canal complained of, is part of a system of ments for the purpose of drainage, constructed b fendant under the authority of the county court, also, that it was located and constructed over plain with his consent, and that the same has been in us ation for such purposes of drainage since the co of such improvements. The court sustained a de the separate answer, and upon the remaining issues was taken and submitted to the court, which, afte sideration, refused the injunction prayed for. It i ceived upon what ground this demurrer was susta were any authorities cited, or argument made, t such ruling of the court. Waiving this, howeve pellant conceded that the canal was constructed land with his consent, but he claimed that that oc not include the erection of the dam across the st

that his consent must be confined to the location and construction of the canal, and not to the dam, which caused the overflow and the injury; and, therefore, conceding the rights of the defendant in the premises to that extent, he submitted upon the evidence whether he was entitled to an injunction. The evidence shows that the object of diverting the water from the stream into the canal was two-fold—to drain Wapato lake by leaving the channel open below the dam, with which it was to be connected by a short canal, and to drain the lands through which the proposed canal was to pass, among which was the land of the appellant. Before, and at the time the dam and canal were constructed, the evidence indicates that the appellant knew and understood these objects, and his consent and waiving damages are some indication of the supposed benefits which he presumed would result to his land from the proposed improvements. But he insists that if the canal had been excavated to the depth of the bed of the stream, it would have obviated the necessity of the erection of a dam across the stream to divert the water into the canal, and thus avoided the injury of which he complains. To this, it is replied that the appellant knew and understood, before and at the time he gave his consent to the location of the canal across his lands, that it included the erection of a dam across the stream to turn the waters of it into the proposed canal; that such dam was regarded as essential to be of any value or benefit to the Wapato lake part of the improvement, which was the main inducement of the respondent to undertake the proposed plan of improvements, and incur the heavy expense their construction necessarily involved; and finally, to construct the canal on the line located, and to which he had given his consent, it necessarily tapped the stream at a sharp angle; that the width of the stream and the force and

flow of its waters at that point, and the general
the land surrounding, made it absolutely necess
a dam across the stream to turn its waters into
as without it the main body of the water would
flow on in the channel of the stream, even thou
of the canal was dug as low as the bed of the st

Without pursuing the respective merits of th
further, we are satisfied that the evidence does
the claim of the appellant to the equitable inte
the court. The weight of evidence clearly in
the injury from the overflow is not occasioned
but is attributable to natural causes which exist
fore the dam was erected. It shows that the l
appellant lie at the base of the foot-hills, and are
by slight freshets; that there are breaks or low p
the banks of the stream for some distance up it, a
which the waters runs, cutting channels in severa
when the height and volume of the stream is i
the winter rains, and necessarily overflows the l
appellant from the nature of its location; that
flows occurred frequently, and years before the
the dam, nor have these overflows been any
Allowing the highest consideration to the evide
appellant, it is confronted with too much evide
ing his alleged grievance to authorize the inte
equity. The general rule is, that an injunction
granted where the evidence is so conflicting as t
right to it doubtful. The burden of proof in su
ing on the plaintiff, he must clearly establish t
allegations of his complaint. The decree of th
low is affirmed.

Decree affirmed.

SAVAGE v. SAVAGE.

PRACTICE—DIVORCE.—Where the defendant, in a suit for divorce, intentionally omits to take her evidence within the time prescribed by the statute, she cannot afterwards claim, as a matter of right, that the suit shall be continued, and the time extended to enable her to introduce such evidence; and it is not error in the court where the suit is pending, to refuse her application for that purpose.

APPEAL from Polk County.

R. S. Strahan and Daly & Butler, for respondent.

John Kelsay and W. Truitt, for appellant.

By the Court, WATSON, C. J.:

This was a suit for divorce, on the grounds of cruel and inhuman treatment, and personal indignities practiced by the appellant upon the respondent, rendering his life burdensome. The issues having been made up, the court below, at its December term, 1881, directed the respondent to pay the appellant one hundred dollars to enable her to make her defense, and referred the cause to Chas. A. Johns, Esq., to take the evidence and report the same at the ensuing term. Respondent completed taking his evidence in the latter part of January, 1882, but as appellant was not ready to proceed with the taking of her evidence, further proceedings before the referee were postponed by mutual consent of the parties until the 8th day of April following. The parties met at this latter date, accompanied by their respective counsel, but the appellant being still unprepared or unwilling to commence, the proceeding was again postponed until the 12th day of that month. At this latter date, the parties again appeared with their respective counsel before the referee, but the appellant refused to proceed further in the matter, and entered into a written stipulation

with the respondent as follows (after giving
cause):

"Now on this day comes the plaintiff, in l
person as well as by his attorneys, Daly & I
defendant in her own proper person, as well
& Hurley and W. Truitt, and the referee,
Esq., being present, prepared to take testim
of defendant, the defendant refuses to proce
by stipulation it is agreed that the plaintiff
for divorce as prayed for in his complaint, ar
custody of the minor children mentioned in
and that all the matters in controversy are
fully settled; the plaintiff to pay the costs of
no decree against defendant therefor.

Dated April 12, 1882.

WM. SAVAGE, p
SARAH SAVAGE,

At the May term, 1882, the appellant ap
court below by counsel other than those nam
lation, and moved the court upon the groun
her own affidavit accompanying the motion,
stipulation, and continue the cause until the t
to enable the appellant to take her evidence
was set forth in the affidavit. The court
motion, and upon the pleadings in the cause
dence taken by the respondent, and reported
granted the respondent a divorce, and the ca
of the minor children, named in the complain
that the costs of suit be paid by the respond

The error complained of here by the appell
court below erred in overruling her said
stipulation itself, so far as it related to the d
care and custody of the minor children, was

(*Sayles v. Sayles*, 21 N. H., 312; *Viser v. Bertrand*, 14 Ark., 267.) But the question still is whether the appellant was imposed upon or misled by it or the arrangement out of which it arose, so that she was induced to abandon her defense through ignorance or misapprehension of material facts. She says, in her affidavit, that she did not understand its provision in respect to the care and custody of the minor children; that she understood that she, and not the respondent, was to have the "care, custody, and education" of all said minors. She states no facts in her affidavit to show how the mistake on her part occurred, or might have occurred. Whether she read the stipulation, or heard it read or explained before she signed it, or whether she signed it without taking any of these precautions, and consequently without any opportunity of understanding its actual contents, is not stated.

The provisions of the stipulation are few, simple, and plainly expressed. It is impossible that the appellant could have either read or heard it read or correctly explained, and not have understood just what it meant. She was also, as the stipulation shows on its face, represented by able and experienced counsel, who could not consistently with a proper regard for their professional obligations, have suffered her to take such a step in ignorance of its nature and consequences; and there is no pretense that the respondent or any one on his behalf was instrumental in procuring the execution of the stipulation on her part. Under such circumstances the vague and general allegation on her part that she did not "understand" the written stipulation that she signed; that she supposed it contained a provision directly the reverse of what it did in fact contain—a mistake so improbable in its very nature as to demand a particular explanation of the manner of its occurrence—can hardly be

received to counter-balance, much less outwe
sumption arising from the fact of her havin
stipulation, that she was acquainted with its
understood the plain meaning of its provision

The other ground stated in the affidavit is th
"undue influence." The facts which are relied
to show the "undue influence" are thus state
davit: "At the time I signed the stipulation,
some persons, and especially by my brother, N
on that day, and before I signed it, that if I
the stipulation the plaintiff would get a divo
and take all my land, and break him, my brot
had to borrow money to carry on the suit and
my security for four hundred dollars." She
that but for the "undue influence" exercised
her said brother at that time, she would not ha
stipulation. There is no ground for supposing
spondent was concerned in this matter, and no
was. Her brother's counsel seems to have be
in good faith, and as their pecuniary interest
cal, it could not have been otherwise than wel

But whatever influence her brother's opini
course most beneficial to both, which she coul
the circumstances, her final determination to
further with the taking of evidence in her de
stipulate for certain supposed advantages re
such a course on her part, was none the less a
own free will and independent judgment. She
ceived or misled as to any material fact, nor
act in opposition to her own will. If then sh
full knowledge and unobstructed volition, wi
her own advantage solely, she was not entitle
sought by her motion, if the ordinary rules o

in equity are to govern in suits for divorce. She had knowingly and intentionally suffered the period prescribed by the statute for taking evidence in suits in equity to expire, without making any effort to introduce her evidence. She supposed, evidently, that this was her best course, under the circumstances. But she knew what evidence she could procure, and had the means at her command to procure it. And there is no pretense that she was ignorant of the law, even, or that she was not fully cognizant of the legal consequences of her failure to introduce her evidence in due season. It seems quite evident that she weighed these against the probable advantages of the opposite course, and deliberately chose the latter. That she had no legal right to come in afterwards and insist upon a further enlargement of time, in which to furnish her evidence, under such circumstances, we are fully satisfied.

It would seem strange, indeed, if the interests of the opposite party, the methodical procedure of the courts, and the positive provisions of the law, could be thus trifled with and disregarded. Under our system, the state is represented in every suit for divorce by its law officer, the district attorney of the district where the suit is pending. It is the duty of such officer to intervene on behalf of the state, where there is sufficient ground to suspect collusion or fraud in the proceeding for divorce. But a private party is as completely bound by his defaults in respect to the requirements of the law governing such suits as he would be in respect to similar requirements in suits of any other character, and he can be relieved from their effects only upon the same equitable grounds and terms. (2 Bishop on Marriage and Divorce, secs. 236, 237.) We are therefore of the opinion that the ruling of the court below, of which appellant com-

plains, was correct, and that the decree appe
should be affirmed.

Decree affirmed. LORD, J., concurring; WALL
senting.

DISSENTING OPINION.

By WALDO, J.:

The maxim *audi alteram partem*, should be co
this case to require imperatively that the eviden
pellant had to offer should be heard. The law fa
upon the merits (*Critcher v. McCadden*, 64 N. C
pecially so in suits for divorce, which is not a mat
of private concern, but the public are likewise in
preventing divorces, except for adequate cause; an
there is good cause or not, can only be properly c
by hearing both sides.

The reasons offered by the appellant why she
offer evidence in her defense, explains her condu
onerates her from blame, if her delay needed an
tion where, before a decree, she asked to be he
order of the court denying her motion to be he
plainly erroneous, and to call for reversal. The
of the court, as is well said in *Bailey v. Taaff*
424, "is not a capricious or arbitrary discretion,
partial discretion, guided and controlled in its e
fixed legal principles. It is not a mental discre
exercised *ex gratia*, but a legal discretion to be e
conformity with the spirit of the law, and in a
subserve and not to impair or defeat the ends of
justice. In a plain case, this discretion has no off
form, and its exercise is limited to doubtful cases
impartial mind hesitates." See further, 23 Mai

BERGMAN & BERRY v. TWILIGHT.

EVIDENCE.—Where the question before the jury was the good faith of a sale of goods, whatever was said and done by the parties to that transaction, cotemporary with it, and which tend to explain or elucidate its character, are parts of that transaction, and as such are admissible in evidence and may be proven by either party at the trial.

APPEAL from Clatsop County. The facts are stated in the opinion.

By the Court, LORD, J.:

This is an action for the wrongful taking and conversion by the defendant of certain personal property of the plaintiffs. The defendant admits the taking, denies the ownership of plaintiffs, and justifies under an execution issued, &c., in favor of *E. J. Ingalls v. E. S. Cottrell*, and further alleges, in substance, that the said property was the property of Cottrell, and not the property of plaintiffs, and that the same was taken and sold under execution against the said Cottrell. The reply of plaintiffs denies all allegations in the defendant's answer, and sets up a title to said property derived by a bill of sale from Cottrell, anterior to the issuance of execution in the case of *Ingalls v. Cottrell*, under which defendant justified. It appears by the bill of exceptions that one Delvin, a witness for the plaintiffs, was present at the sale and delivery of said goods, and testified that the sale and delivery was made to the plaintiffs about the first day of June, 1878, but that the said Cottrell remained in possession of the goods as steward of the plaintiffs. As part of the *res gesta*, the plaintiffs offered in evidence the declarations of said Cottrell—the judgment debtor of the plaintiff in the writ of execution, and vendor of the plaintiffs herein—made at the time of the alleged sale and delivery of the goods claimed by plaintiffs, which, upon ob-

jection, the court sustained, and to which rul
was taken. The plaintiffs then introduced t
Cottrell as a witness, and among other thing
what conversation passed between him and s
or either of them, concerning the said sale an
the time of said delivery. Upon objection, the
to allow the witness to state the said conversat
ruling an exception was also taken.

The exclusion of the testimony of these wi
only material assignment of error. If the
competent, it was upon the ground offered,
part of the *res gesta.* The fact that the ven
in possession of the property after the sale, w
stance of fraud, and to repel the conclusion
this fact, the evidence excluded by the court
What was the main issue to be tried? Und
good faith of the sale by Cottrell to the pl
bona fides of that transaction is the principal
gesta—and all that was said and done by the
transaction, cotemporary with it, and which t
trate, explain or elucidate its character, are
transaction, and as such are admissible in evid
be proved by either party at the trial. Probabl
a statement of the law as may be found on t
in *Lund and wife v. Inhabitants of Tyngsb*
36, in which Mr. Justice Fletcher, in deliverin
of the court, said: "But when the act of a
given in evidence, his declarations made at t
calculated to elucidate and explain the characte
of the act, and so connected with it as to c
transaction, and so as to derive credit from t
are admissible in evidence. The credit whic
fact gives to the accompanying declarations, as

ransaction, and the tendency of the cotemporary declarations as a part of the transaction, to explain the particular act, distinguish this class of declarations from mere hearay. Such a declaration derives credit and importance, as orming part of the transaction itself, and is included in the urrounding circumstances, which may always be given in vidence to the jury with the principal fact. There must e a main or principal fact or transaction, and only such eclarations are admissible as grow out of the principal ransaction, illustrate its character, and are cotemporary vith it and derive some degree of credit from it." So in *Banfield v. Parker*, 36 N. H., 357, which involved the aplication of this principle to a subject quite analogous to hat now under consideration, the court say: "The principal issue to be tried was the good faith of the sale by Avery o Banfield, and whatever was said by the parties contemporaneous with the sale, and having a tendency to elucidate, r give character to it, and which would derive credit from t, was admissible." Indeed, the principle seems to be elementary, that the declarations and acts of the debtor made efore the transfer and contemporaneous with it, are admisible. (Bump on Fraudulent Conveyances, 562, and authorties cited in the note.) They are admissible in evidence in avor of the grantee, (*Eliott, et al. v. Stoddard*, 98 Mass., 45,) as well as of creditors, and the acts and declarations f the grantee which accompany the transfer stand on the ame footing as those of the debtor. (*Boyden v. Moore*, 11 Pick., 363.)

Mr. Greenleaf says: "In regard to the competency of vitnesses for or against the sheriff, it may be further oberved where the issue is upon a fraudulent conveyance by he judgment debtor, his declarations made at the time of he conveyance are admissible as part of the *res gesta*, and

when the question is wholly between his own
the attaching creditor, his interests being balar
competent witness for either party." (2 Gree
sec. 598; 1 Wharton on Law of Ev., secs. 568
2 id., sec. 1102.) What was said by Cottrell ar
tiffs at the time of the sale and delivery, and co
it, tended to show the character of the sale.
temporaneous with the main fact—the good f
sale—and tended to explain the nature of that
Declarations explanatory of an act done are alw
ble as part of the *res gesta*. (*Howe v. Bunma*
S. C. R., Thomp. & Cooke, 430.) Such eviden
mitted is to be taken in connection with the otl
and as to its effect, the jury are to give to it su
as it may appear to deserve under the usual r
The exclusion of the evidence in question bein
judgment must be reversed and a new trial ord

CORBITT & MACLEAY, ET AL. v. BAU
ROEMER.

APPEAL from Wasco County.

Motion by appellants to substitute sworn c
original exhibit that had been lost or destroyed
transcript for appeal was sent up. Cross-motion
ents to dismiss appeal for such defect in transc

PER CURIAM:

That the substitution could not be allowed.
equivalent to supplying a judicial record of the
that had been lost or destroyed, which that cou
the power to do, in the first instance. And i
taking cognizance of such record, after thus su

by copy authenticated by affidavit, instead of official certificate of the clerk as by the law required. Motion to substitute denied and cross-motion to dismiss appeal allowed.

PETTYJOHN v. PARMENTER.

ROAD TAXES.—A road supervisor cannot maintain a suit, in his official character, to enjoin the misapplication of road taxes by a party who has collected them from tax-payers in his road district wrongfully and without authority of law.

APPEAL from Marion County.

Bonham & Ramsey, for appellant.

J. J. Murphy, for respondent.

By the Court, WATSON, C. J.:

The gist of appellant's case, as set out in his complaint, is that the respondent has been, and is, wrongfully and unlawfully collecting road tax from tax-payers of road district No. 57, residing within the city of Salem, which belong to the appellant as supervisor of said district, and has been and is unlawfully misappropriating the same, and threatens to and will continue the misapplication of such taxes, unless restrained. While he also alleges that he is a tax-payer in said road district No. 57, and in said city of Salem, he does not aver that he resides in said city, or that any of said road tax has been collected off himself. It is road tax due to him as such supervisor that he claims is being misapplied, and against the future misapplication of which he asks for an injunction.

If the respondent has collected road tax, as alleged in the complaint, such tax cannot be said to be due to the appellant, in his official character as such supervisor. Such conduct on the part of the respondent, however illegal and wrongful in respect to the tax-payers from whom such tax

may have been collected, could not affect any of
lant's rights as such supervisor, or hinder him f
ing the road tax due from them without regard
lections made by the respondent. And it is no
duty, and he has no authority as such officer, t
to prevent the illegal exactions of the respond
unwarranted application by him. Judgment aff

WISNER v. BARBER.

DAMAGES FOR BREACH OF CONTRACT.—Actual damages incl
and actual loss which a party sustains when hindered
from completing his contract. The loss sustained inc
of profits which would have been realized as the in
necessary result of the fulfillment of the contract.

IDEM.—The damages in such case resulting necessarily fro
of the contract upon the part of the defendant, it is
that they should be specially stated in the complaint.

APPEAL from Multnomah County.

By the Court, LORD, J.:

This was an action brought to recover dam
upon a written contract to erect a certain buildi
in specified, for the consideration of $500, by r
defendant's preventing its fulfillment. At the
plaintiff offered to prove the profits of which
prived by the termination of the contract by the
which, upon objection, the court refused to all
prove, and this constitutes the ground of error
a reversal is sought. Actual damages include
and actual loss which a party sustains when h
prevented from completing his contract. The los
includes the loss of profits which would have be
as the immediate and necessary result of the ful

the contract. Such profits growing out of the contract itself as one of its direct and legitimate fruits, constitute a just and proper element of the damages to be recovered against the party whose breach of the contract has prevented such profits from being realized. They are a part and parcel of the contract, and are supposed to have entered into the contemplation of the parties when the contract was made, and to deny them, would be to give the delinquent party the benefit and advantage of his own wrong. They must be certain, however, in their nature, and in respect to the cause from which they proceed. In *Marbiton v. The Mayor, &c., of Brooklyn*, which is a leading case, the court say: "But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are a part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated before the contract was made, and formed perhaps the inducement to the arrangement. The parties may, in- have entertained different opinions concerning the ad- ntages of the bargain, each supposing and believing that had the best of it; but this is mere matter of judgment ing to the formation of the contract, for which each has own himself willing to take the responsibility, and there- re must abide the hazard. Such being the relative posi- n of the contracting parties, it is difficult to comprehend ny, in case one party has deprived the other of the gains profits of the contract by refusing to perform it, this loss hould not constitute a proper item in estimating the dam- ges. To separate it from the general loss would seem to

be doing violence to the intention and understan
parties, and severing the contract itself." The p
this case as to the allowance of profits are now
lished. (*Delvin v. Mayor, &c.*, 63 N. Y., 25; *Fo*
ing, 9 Cush., 522; *Burrill v. New York, &c.*,
38; *Hay v. Gronoble*, 34 Penn. St., 10; Sedgwic
ages, 7 ed., vol. 1, p. 120, note a.)

The weight of these authorities press heavily
case of the respondent, and to avoid the force c
contends that the profits should be pleaded. It i
all damages, however specially alleged, must, to
recovery, be the natural result of the act comp
But here it is important to note the distinctio
those damages which may be recovered under t
allegation of damages, and those which must b
pleaded. Damages are either general or special
when they are such as the law implies or presum
accrued from the wrong complained of. Special,
are such as really took place and are not impli
and are superadded to general damages arising f
injurious in itself. (Chitty's Pleading, 395;
supra; 2 Col., 606.) The former, being the dire
mediate result of the act complained of, and
arising out of it, can be recovered under the gene
tion of damages, without stating their particul
or how they arose, because the law implies or pre
damages to follow the breach of the contract or
wrong complained of. But the latter, not nece
sulting from the act complained of, are not impl
and require the particular damage which the pl
sustained to be specially alleged, or he will not be
to give evidence of it. (*Laraway v. Perkins*, 1
374; *Dumont v. Smith*, 1 Denio, 322; *Burril*

York, &c., 14 Mich., 38.) And the damages in this case resulting necessarily from the breach of the contract upon the part of the defendant, it is not necessary that they should be specially stated in the complaint. From these views, it follows that the judgment must be reversed, and a new trial ordered.

Judgment reversed.

CRESAP v. GRAY.

ELECTION—CANVASSING VOTES.—Where the returns of a certain precinct were not received by the clerk until fourteen days after the election, and the clerk, ten days after such election, took to his assistance two justices of the peace of the county, opened the returns, and made an abstract of the votes, upon which he issued a certificate of election to one G. as sheriff, he having the highest number of votes based on the returns without including the returns of such precinct, the vote of which was admitted to have been legally and regularly cast; *Held*, in an action to contest the election of G. by C. it was not error to include in the count the votes of such precinct and to adjudge the certificate of election to issue to him who received the highest number of votes based on such count.

act of the state legislature, not prohibited by the express words of the constitution, or by necessary implication, cannot be declared void as in violation of that instrument.

PPEAL from Grant County.

Kelsay, for appellant.

H. Williams, for respondent.

the Court, LORD, J.:

This action was a contest for the office of sheriff of Grant nty under the provisions of title 4, chapter 14 of the cellaneous laws, page 574. The appellant claims that was elected sheriff of said county at the general election

held in June last, 1882, and that he has quali
sheriff. The record discloses that the respond
notice to the appellant of his intention to cont
election, that the case was tried at chambers
spondent was declared duly elected. The facts
lated by the parties, and waive all other issues ar
excepting those arising out of the votes of Catel
which render a statement of the pleadings unn
is agreed by the stipulation that the returns fr
precinct were not received by the clerk within t
scribed by law, and by not counting the votes g
precinct, the appellant would be elected, but if
respondent would be elected. The legality and
of the votes of Catelow precinct are admitted.
the court counted the votes of this precinct, ar
the certificate of election to issue to the respo
reverse this judgment, is the object of the appe

Two grounds of error are assigned. 1. It v
count the votes of the precinct, if section 35,
573, is to be regarded as mandatory. 2. It was
the case at chambers, the statute authorizing i
constitutional. These objections will be consid
order they are made. The general doctrine s
well settled that the acts of judges of elections a
ing boards in forwarding the returns are purely
(McCrary on Elections, sec. 84, 85, and autho
cited,) and that statutes relating to them are m
tory. In *ex parte Heath*, 3 Hill, 47, Mr. Jus
says: "Nothing is better settled, as a general
that where a statute requires an act to be done b
within a certain time, for a public purpose, the s
be taken to be purely directory; and though he
duty, by allowing the precise time to go by, if he

perform, the public shall not suffer by the delay." And this doctrine, Mr. McCrary says, "has been uniformly maintained by the courts, and nothing is better settled." (*People v. Allen*, 486, and cases there cited; *Colt v. Eves*, 12 Conn., 243-253 to 255; McCrary on Elections, secs. 77, 88, 128, 129, 166-7-8; *People v. Cook*, 8 N. Y., 84; *People v. Pease*, 27 N. Y., 45.)

The statute directs that on the tenth day after the close of the election, or sooner, if all the returns be received, the county clerk, taking to his assistance two justices of the peace of the county, shall proceed to open said returns, and make abstracts of the votes, &c., and it shall be the duty of said clerk immediately to make out a certificate of election to each of the persons having the highest number of the votes for members of the legislative assembly, county and precinct officers, respectively, and to deliver such certificate to the person entitled to it, &c. (Sec. 35, Mis. Laws, 573.) The vote of Catelow precinct was not received by the clerk until fourteen days after the election, and although admitted by the stipulation to have been regularly and legally it, it is insisted that the court committed an error in counting the vote of that precinct. The purpose of an election is to ascertain, by the votes of the people, who shall be the public officers. It is true, as a general rule, the certificate of election, regular on its face, gives *prima facie* right to the office, but here the stipulation admits that it is a certificate not based upon a majority of all the votes, but of a part, and by counting all, including the vote of Catelow precinct, the respondent is admitted to have received a majority of all the legal votes cast. The manifest intent of the statute is to give effect to "the expressed will of a majority of the legal voters, as indicated by their votes for such office;" (sec. 44) and so far as concerns the power of the court to ascertain

what the actual vote was, and to give effect to
the electors, it is of no consequence whether tl
been rejected by the canvassing officers, or has c
to be counted by them, or is destroyed. (McCra
tions, sections 88, 145, 166, 182, 185, 302 and
the same effect, and much further in substance,
Kent, 1 Or., 123; much further than we are req
facts before us to decide; and the dissenting opi
case supports the proposition, for Mr. Justice D
his dissent upon the ground that there was no le
before the court to show what was the vote of t
in controversy, while in this case the very ev
scribed by law—the return—proves it. Lookir
the intent of the statute, which is to guide the
out regard to "technicalities," in determining w
vote, so as to give effect to the expressed will o
ity, it being admitted that the vote of Catelow p
legally cast, the court did not err in counting t

The next objection is that it was error to try
chambers, on the ground that the statute autho
unconstitutional. It is said that when the law
or contemplates the doing of a judicial act, it i
be understood to mean that the court, in term ti
must do it, and the judge, in vacation, cannot,
power is expressly conferred upon him. (*Lare*
neuva, 30 Cal., 564; *Norwood v. Kenfield*, 34
But here the statute expressly authorizes it, and
out in any way impairing the right of any perso
any election in the manner otherwise provid
(Title 4, chap. 14, Mis. Laws, 574, 575.) The onl
cited to sustain this objection is sec. 1, art. 7 of
tution, which provides that "the judicial power
shall be vested in a supreme court, circuit courts

courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law in accordance with this constitution." An act of a state legislature, not prohibited by the express words of the constitution, or by necessary implication, cannot be declared void as a violation of that instrument. (*People v. Simeon Draper*, 15 N. Y., 543; *Logan v. Hunter*, 19 N. Y., 463.) There is nothing in the section of the constitution referred to inhibiting, expressly or impliedly, the power of the legislature to enact the law in question, and it is not therefore repugnant to that section. Besides, the rule is well settled that every doubtful question is to be thrown in favor of the validity of the act of the legislature, and before a court will deem it their duty to declare such act void, its repugnancy to the constitution must be plain and clear. (*Adams v. Howe*, 14 Mass., 345; *Fletcher v. Peck*, 6 Cranch, 87.) In the absence of any reference, other than the section cited, or reason offered to sustain the objection, as at present advised, no error is perceived, and the judgment of the court below must be affirmed.

Judgment affirmed.

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*HENEKY v. SMITH.

DAMAGES FOR ASSAULT AND BATTERY.—In actions for assault and battery, where malice is shown, the jury may give exemplary damages; and evidence of the social rank and pecuniary circumstances of the plaintiff is admissible in such cases.

TESTIMONY—ORAL, AS TO PHYSICAL OBJECTS.—The appearance and condition of physical objects when material may be established by oral testimony, without producing the objects themselves, or accounting for their non-production.

IMPLIED ADMISSION FROM CIRCUMSTANCES.—The disposal of property by a defendant, under peculiar or unusual circumstances, indicative of consciousness on his part of liability as charged in the action, operates as an admission, and is equally competent to be proved against him.

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*See 45 Am. Rep. 143

EVIDENCE.—It is incompetent, in civil cases, to rebut spe
intoxication by evidence of general habits of sobri
mission of improper evidence, which could not hav
party complaining, does not justify a reversal.

APPEAL from Marion County.

Bonham & Ramsey, for appellant:

Contend that there is no ground for admittin
to the amount of appellant's property, except a
vindictive damages, which are not allowed i
this. The objection lies with much greater fo
mony as to the respondent's financial circums
family relations. And in some of the cases it is
evidence as to the latter facts is ever admissibl
the weight of authority supports our view, an
able to perceive upon what principle the contr
can be sustained at all. The right to introduc
dence in cases of slander, seduction and *crim.*
serted upon principles which do not apply to a
ing, *Hunt v. Chicago & N. W. R. R. Co.*, 26
Shaw v. Boston, &c., R. R. Co., 8 *Gray*, 80; *S*
B. V. R. R. Co., 44 Cal., 414 and 429; *Corni*
ing, 2 Seld., 97-104; *Pittsburg, Ft. Wayne, &c*
v. Powers, 74 Ill., 341; *Smith v. Wunderlic*
Ill., 426; *Sowell v. McDonald*, 58 Miss., 251.

The court erred in permitting respondent to
the hat which he wore at the time of the affray
an instrument of evidence (code, p. 245, sec. 65
in the possession of the respondent. The hat
original evidence, and respondent's testimony
dition was secondary, and not admissible with
the loss of the hat, or that it was out of his po
cure it.

The court certainly erred in permitting the

to introduce the deed of appellant and wife to Coolidge and McClaine, "to show guilt on the part of Smith." The deed being fair and regular in every respect, it seems to us that a *private transaction* of that character could not be properly allowed and introduced "to show guilt on the part of Smith."

One of the presumptions of law is, "that private transactions have been fair and regular." (Code, p. 261, subd. 19 of sec. 766.)

N. B. Knight and John Kelsay, for respondent:

Claim that the record of the deed from the appellant to Coolidge & McClaine was material, because it was made soon after his assault on respondent Heneky, and soon after this action was commenced, and tended to show that the appellant was guilty of the assault and battery by seeking to save his property from the consequences of his act by disposing of it at that time. See code, p. 367, secs. 210-11-12; 1 Starkie on Ev., pp. 558, 562 to 571; 1 Greenl. on Ev., sec. 2.

It was competent and material to show the condition of defendant's hat, as the complaint alleged a shooting in the head, its condition may be described by witnesses without producing the article itself. See *Commonwealth v. Pope*, 103 Mass., 440; *People v. Gonzales*, 35 N. Y., 62.

By the Court, WATSON, C. J.:

The respondent, Heneky, brought this action to recover damages from the appellant, Smith, for wrongfully and maliciously shooting and wounding him with a pistol, at Silverton, Oregon, on September 28, 1881. The damages were laid at fifteen thousand dollars; he obtained a verdict and judgment for four thousand dollars. The appeal is from this judgment. The errors assigned in the notice of

appeal, and relied upon by the appellant to secur
of the judgment of the circuit court, are involv
tain rulings of that court at the trial, upon the
of evidence. Heneky, as a witness in his own b
ing testified as to the time, place and circumstan
shooting, proceeded as follows: "After I was s
not know anything for about five days. I hav
able to do any work since I was shot. Have end
pain." His counsel then asked him this questio
you any property?" Appellant duly objected, b
jection was overruled by the court. Heneky ther
as follows: "Well, I got a little, but I am in
than I am worth. It is timber land. I got n
The respondent's counsel were then permitted t
the respondent to answer, the following question
appellant's objections: Ques. "Have you got any
Ans. "I have a wife and three children. The ol
years and two months old; the second is four yea
month old; the youngest, one year and three m
The eldest is a boy—the others girls." Ques
whom did the wife and children depend for the
before you got hurt?" Ans. "They depended o
since I was hurt they and me have been suppor
neighbors and the county."

The admission of this testimony involves the
assigned. We think it was admissible on tw
grounds: First, As tending to show the extent
spondent's injury. If he was not only accustome
der the necessity, to labor, to provide the means
for himself and family previous to his being sh
appellant, the facts of his not doing any labor a
and of his depending on and receiving support
and family from his neighbors and the county, ce

orroborate his statement that he was not able to labor after eceiving the injury complained of, and afforded some evi- ence for the consideration of the jury, in determining its xtent and the amount of damages it produced. (*Caldwell . Murphy*, 11 N. Y., 416.)

The second ground of its admissibility is broader, and erhaps even less questionable. The complaint makes a roper case for exemplary damages. It alleges that the in- ury was inflicted maliciously. We do not feel called upon discuss the proposition that in actions of this character e jury may give exemplary damages, where malice on the art of the defendant is proven. (*Day v. Woodworth*, 13 low., 363.) But while appellant's counsel concede that it ight have been competent to prove the pecuniary circum- ances of their client, at the trial, with a view to the impo- tion of exemplary damages, if the proof should justify the onclusion that his act, by which the respondent was in- ired, was not only wrongful but malicious, they contend at the same rule did not apply to the pecuniary condition f the respondent. Greenleaf, in speaking of the amount f damages recoverable in actions of this class, gives ex- ression to the following views:

"Nor are the jury confined to the mere corporal injury hich the plaintiff has sustained; but they are at liberty to onsider the malice of the defendant, the insulting charac- r of his conduct, the rank in life of the several parties, nd all the circumstances of the outrage, and thereupon to ward such exemplary damages as the circumstances may, their judgment, require." (Greenleaf on Ev., sec. 89.)

n *Reed v. Davis*, 4 Pick, 215, Putnam, J., in discussing e question of excessive damages, in a case of trespass, ac- mpanied with circumstances of harshness and oppression, the part of the defendants, says: "But the jury had

reason to think that some, if not all, of the
knew, but wholly disregarded the provision of t
supposed that the trespass could be committed
nity, on account of the poverty of the plaintiff
the defendants (Goodred) stated to a witness, i
his inquiry, whether he thought the plaintiff
make him suffer, that 'the plaintiff had been
sworn out, and *was not able to do anything.*'
circumstance was to be taken into considera
jury. * * * The plaintiff also was poo
seen better days, but had been reduced in his cir
He was thought not able to do anything in vir
his rights at the law. But in this the defendan
lated. His case has been submitted to a jury o
try, and they have assessed $500 as the damage
should recover. The jury seem to us to have n
strong sense of the security which the dwelling-h
afford to its lawful possessor. They have proc
higher grounds of damages than those which a
from bodily wounds and bruises. They have d
determination to vindicate the rights of the poor
aggressions of power and violence. These n
sound and should be cherished; and we ascribe
of the verdict to these considerations, rather tha
ity, or passion or any unworthy motive." It
decision in this case was affirmed on the appe
equal division of the court; but it seems quite
the difference in opinion among the several mem
court was not as to the soundness of the gener
announced in the opinion delivered by Putnam
which we have quoted so largely, but as to its
to the facts in this particular case. We hav
clearer or more satisfactory exposition of the gr

which the admission of evidence as to the plaintiff's financial condition, in a case like the present, can be justified, than the opinion referred to. There are many authorities, however, which recognize and support the doctrine that such evidence is admissible in this class of cases, and we have discovered none to the contrary. (*Bump v. Betts*, 23 Wend., 85; *McNamara v. King*, 2 Gilman, 432; *Cochran v. Amson, et ux.*, 16 Ill., 316; *White v. Murtland*, 71 Ill., 250; *Gaither v. Blowers*, 11 Md., 536; *Buckley v. Knapp*, 38 Mo., 152; *Clements v. Maloney*, 55 Mo., 352.)

Some of these were cases of seduction and some of slander. But we can perceive no distinction between cases of seduction and slander and cases of assault and battery, where malice is alleged and proven, so far as it concerns the right of the jury to give exemplary damages, and to take into consideration the rank and pecuniary condition of the plaintiff in order to arrive at a just conclusion as to the amount to be awarded.

The next exception taken by appellant was to the ruling of the circuit court allowing Heneky to testify to the condition of the hat he wore at the time of the shooting, when first saw it afterwards, without either producing the hat or accounting for its absence. The appellant's objection was that such testimony was secondary. We think the rule invoked by him only applies to "writings," and has no application to a case like this. (Code, sec. 681; *Commonwealth v. Pope*, 103 Mass., 440; *The People v. Gonzales*, 35 N. Y., 49.)

The circuit court also admitted in evidence, as tending to establish appellant's liability in the action, a certain deed shown to have been executed by him and his wife to Coolidge & McClaine, of some twenty-five different lots or parcels of land, situated in Marion county, and amounting in

the aggregate to over four hundred acres, for th
consideration of twelve thousand dollars. Thi
executed October 12, 1881, fourteen days after t
and six days, as appears from the record, after
was commenced, and the summons served. Th
of this evidence was also duly objected to, and a
taken to the ruling of the court admitting it t
jury. In view of its character and the circumst
which it was executed, we think it was properl
The jury might reasonably infer from this act o
lant, in view of all its surroundings, that it wa
by a consciousness on his part, that the shootin
spondent was unjustifiable, and that he was le
for the damages occasioned by it. In this vie
operate like an admission of liability, and be e
petent. "Admissions may be by acts, as well as
(2 Wharton's Law of Ev., sec. 1081; *Pennsy*
Henderson, 51 Pa. St., 315; *McKee v. Bidwell*,
Parker v. Montieth, 7 Or., 277.)

The only remaining questions to be dispo
whether the circuit court erred in admitting
Heneky's character for sobriety, and if so, whet
jury to the appellant could have resulted there
had testified, on his cross-examination, in respon
lant's questions, that he had taken two drinks of
fore the shooting occurred. The testimony he
given on his direct examination, in connection w
mission on his cross-examination, showed that h
the two drinks of brandy not more than three or
previous to the shooting. The respondent after
duced Charles Rosehart as a witness, who had s
immediately before the affray took place, and a
encounter during which Heneky was shot. In

of his direct examination he was asked if Heneky was drunk? He answered without objection, that Heneky was not drunk. He was then asked if Heneky was in the habit of getting drunk? The appellant objected that the question was incompetent and irrelevant, and the objection being overruled by the circuit court, took the exception we are now examining. The witness then answered in the negative. Afterwards the appellant introduced John Wolford and Milton Fitzgerald, among others, as witnesses in his own behalf; the former testifying upon this point that he saw Heneky just before the affray, and that he thought he was some in liquor; and the latter testifying as follows: "I saw Heneky at my shop a short time before the difficulty and had a business talk with him. He was considerably in liquor, but was not what I would call drunk. He did not stagger, but felt pretty good apparently." This was all the evidence given upon the subject, at the trial, as appears from the bill of exceptions.

There can be no doubt as to the incompetency of the testimony offered and admitted, touching Heneky's general character or habits for sobriety. That character was not in issue in the case. It could not, in any possible view, affect his right to recover, or the amount of his recovery. And unless general character is involved in the issue, in this sense, evidence in relation to it is inadmissible in civil actions. This is the doctrine of all the authorities. (*Porter v. Seiler*, 23 Pa. St., 424; *Wright v. McKee*, 37 Vt., 161; *McCarty v. Leary*, 118 Mass., 509.) But there was no evidence even tending to show that Heneky was drunk on this occasion. That he had been drinking brandy, he himself solemnly admitted on his cross-examination. The testimony of Wolford and Fitzgerald, for the defense, did not go beyond this admission. They both give it as their opin-

ion that he was "in liquor"—had been drinking-
states that he was drunk. Fitzgerald says ex
he was not drunk; and his observations were m
ately previous to the affray, and in the course
ness talk" he was having with him. If he w
able condition to discuss "business" matters w
ald at that time, he was not drunk; nor doe
witness or Wolford intimate an opinion that he
hart testifies positively that Heneky was not dru
not dispute that he had been drinking—was
Now if it was material to ascertain Heneky's
the time of the affray, for any purpose, as to his
the influence of intoxicating liquor, and the ex
influence, here was the evidence, and all the ev
ing upon these questions—it is in unison upon
tion that Heneky was not drunk. The jury co
estly have come to any different conclusion o
Now, evidence that Heneky was not "in the hab
drunk" was not in conflict with any of the t
this point. If it had been admissible, its o
would have been to rebut evidence of his bei
the particular occasion. But there was no evi
kind here to rebut. Proof that a person is not
of getting drunk has no tendency towards a co
he does not occasionally, or even habitually, in
use of intoxicating drinks. It would be un
practice, if admissible in law, except to rebut
charge of drunkenness. From a careful cons
all the evidence, we are fully convinced that t
issue as to Heneky being drunk at the time o
before the jury—nothing for him to rebut—a
of his general character for sobriety, although
could not have injured the appellant. In th

error complained of, in this respect, will not justify a reversal. (Hilliard on New Trials, 57 *et seq.; Forrest v. Forrest*, 25 N. Y., 501; *The People v. Gonzales*, 35 N. Y., 49.) We find no other errors than this in the rulings excepted to, and therefore affirm the judgment.

Judgment affirmed. LORD, J., concurring.

WALDO, J., dissenting: Evidence of the plaintiff's reputation for sobriety should not have been admitted, and the deed was unequivocally inadmissible. (*McCarty v. Leary*, 118 Mass., 509; *Underwood v. Brown*, 106 Mass. 298.)

DELL *v.* ESTES AND CARTER.

APPEAL FROM ORDER CONFIRMING SHERIFF'S SALE.—The order of confirmation of a sheriff's sale on execution is appealable.

IDEM.—The objections to a confirmation of a sheriff's sale on execution, allowed by the statute, must be filed within the time prescribed in the statute, and cannot be filed afterwards without leave obtained from the court.

APPEAL from Multnomah County. The facts are stated in the opinion.

Sidney Dell, for appellant.

H. B. Nicholas, for respondents.

By the Court, WATSON, C. J.:

The appellant, Sidney Dell, claiming as assignee of Ira T. Powers, caused an execution to be issued on a judgment obtained by Powers against Levi Estes and C. M. Carter, in the county court of Multnomah county, on April 3, 1876. The execution was issued January 21, 1882, came into the hands of the sheriff of said county on the 23d day of said month, and on the day following was levied upon a large quantity of real property, situated within the city of Portland, in said county. A sale of the property so levied upon

was had under said execution, on March 11, 1882,
the appellant became the purchaser, and on the 2
said month the execution was duly returned and
the clerk of said county court. On the 3d day of
lowing, that being the first day of the next regula
said court, after the return of the execution, Dell
and moved, as assignee of the judgment, that th
confirmed. On the same day, J. P. O. Lownsdale
as assignee in bankruptcy of the estates of Estes ar
and filed objections to the confirmation of such sal
shown in these objections that Estes and Carter
adjudged bankrupts July 19, 1876; that he had
pointed assignee of their estates February 19,
that long prior to the issuance of the execution up
the sale to Dell had been made, the register in ba
had duly assigned all the property of Estes and C
cluding that sold on said execution, to the said L
as such assignee.

The objections filed by Lownsdale also disclo
irregularities in the proceeding of sale, and set
general condition of the property, to show that th
of the sale was improper. Dell moved to strike
tions from the record, because not filed in time,
other reasons. The county court refused to confirm
and Dell appealed to the circuit court, when the
cision was rendered. From this decision he appea
court. We think his right to appeal, under the
clear. The order of the county court, denying hi
and refusing to confirm the sale, was "a final order
a substantial right, and made, in a proceeding af
ment," within the meaning of sec. 525 of the c
(Code, subdiv. 1, sec. 293; *Koehler v. Ball*, 2 Kar
Moore v. Pye, 10 *id.*, 246.)

Subdiv. 1, sec. 293, declares that the plaintiff in a writ of execution "shall be entitled, on motion therefor, to have an order confirming the sale, at the term next following the return of the execution, or if returned in term time, then at such term, unless the judgment debtor, or in case of his death, his representative, shall file with the clerk, ten days before such term, or if the writ be returned in term time, then five days after the return thereof, his objections thereto." The return, in the present instance, showed upon its face regular proceedings throughout in making the sale, and it was the imperative duty of the county court, under the provisions of the foregoing subdivision, to grant the motion to confirm the sale, unless it had a right to consider the objections interposed by Lownsdale, the assignee in bankruptcy. We assume that Dell as assignee occupied the same position in regard to the judgment that Powers did previous to the assignment. (Freeman on Executions, sec. 21.) Whether Lownsdale, as assignee of the estates of Estes and Carter, could, upon a proper showing, have obtained leave of the county court to file his objections, after the time for doing so allowed by the statute had elapsed, under sec. 100 of the civil code, we are not called upon to decide, as no attempt was made to get leave, and no order was made concerning the matter. Without such leave first obtained from the county court, they were improperly placed on the files, and Dell's motion to strike them out should have been sustained. That court had no right to consider them, and its duty to grant the order of confirmation was plain.

Judgment reversed.

BERRY v. CHARLTON.

ATTACHMENT—EXECUTION—EXEMPTION.—An order for t
tached property, under sec. 155 of the civil code, a
1878, is no bar to an action for the recovery of prope
exempt from execution, and duly claimed as such, b
defendant in the writ of attachment.

APPEAL from Linn County. The facts are s
opinion.

R. S. Strahan, for appellant.

Bonham & Ramsey, for respondent.

By the Court, WATSON, C. J.:

On October 1st, 1881, H. J. Butler commenc
to recover money, in the circuit court for L
against L. T. Berry, the respondent here, and
time procured a writ of attachment to be issued
tion, and levied on a span of horses, set of h
wagon belonging to the latter. J. J. Charlton
lant, was sheriff of said county at the time, an
attachment. Berry duly claimed the property
from execution, but it was not released. After
ler recovered judgment and order for the sal
tached property, and caused an execution to b
conformity with such order, and delivered to
such sheriff. Before Charlton had succeeded i
sale of the property, this action was commen
him by Berry, in the county court of Linn co
cover possession thereof. Berry obtained judgm
possession of the property, in the county court,
ilar one in the circuit court, on appeal. Fro
judgment Charlton appeals to this court. His c
rested their claim to have the decision of the c
reversed, upon the determination of the sing

whether the order of sale of attached property provided for in sec. 155 of the civil code, as amended in 1878, is to have the effect of an adjudication that the property ordered to be sold is subject to the payment of the judgment rendered against the defendant in the same action.

The provision in the amended section which is to be construed is as follows: "If judgment be recovered by plaintiff, and it shall appear that property has been attached in the action, and has not been sold as perishable property, or discharged from attachment, as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demand. (Sess. L., 1878, p. 100.) Previous to the adoption of this amendment, the law itself directed how attached property should be disposed of, after judgment rendered, and no action of the court was necessary. The precise purpose and effect of this amendment are not entirely free from doubt, and have occasioned a considerable amount of discussion. Without attempting a complete settlement of these questions, we are fully satisfied that the order of sale provided for in sec. 155, as amended, cannot accorded the effect of an adjudication upon the *status* the property attached, as to its being exempt or not from ecution. Under the laws of this state, exempt property, claimed as such in due season, can neither be seized un- attachment nor sold on execution. Yet there is no provision for determining the question whether it is, in fact, empt or not, either in the attachment proceeding or in e action itself in which the attachment is issued. There no provision in the attachment law for obtaining the release of exempt property wrongfully seized under a writ of tachment. But, on the other hand, the right to maintain action like the present to recover the possession of exempt property wrongfully seized under process, is clearly

authorized by statute. (Secs. 130 and 131,
It has been held by the supreme court of In
order for the sale of attached property, und
of law similar to our own, concludes the ques
property being exempt. (*State v. Manly*, 15
the previous decisions of the court, relied upo
in that case, show that under the attachmen
state provision had been made for raising an
such issues, in the same manner as in ord
(*Collins v. Nichols*, 7 Ind., 447; *Cooper v.*
53.) The supreme court of Iowa has decided
the provisions of the attachment law in th
broad enough to enable the parties to litigat
of exemption in the attachment proceeding
the defendant should not choose to avail h
remedy, he would not be precluded from m
plevin for the property, even after judgment
sale in the original action. (*Tapping v.*
Greene [Iowa], 552.) But under the provisi
tachment law, the defendant has no such op
must resort to an independent action for the
his interests in exempt property. The judgm
cuit court is therefore affirmed with costs to t

MARSH v. PERRIN.

JUDGMENT OBTAINED BY FRAUD WILL BE SET ASIDE.—
tained by the improper management or fraud of a
who has a good defense to an action at law, will
the proceedings under it enjoined.

APPEAL from Umatilla County.

Bonham & Ramsey, for appellant.

J. H. Reed and James K. Kelly, for respo

By the Court, LORD, J.:

Where a defendant had been sued in a justice's court, and short time before the hour of trial had arrived, he, at the uggestion of the attorneys for the plaintiff, was engaged nd occupied with the plaintiff, and one of his said attor-eys, in an effort to make a settlement, and the other attor-ey, knowing them to be thus engaged, and while such effort t settlement was pending, procured a judgment against im, (whether just before the hour set for trial, or shortly fter it had expired, the evidence is conflicting) and without he knowledge of such defendant, and it appearing by the nswer of the defendant filed upon a motion for new trial in he justice's court, that he had a meritorious defense, which e was prevented from setting up by reason of the facts ereof; *Held*, that the judgment must be set aside and the roceedings under it enjoined, and the defendant permitted o file his answer in said justice's court.

Where a party, having a good defense to an action at law, nd has had no opportunity to make it, by the improper nanagement, or fraud of the opposite party, and by reason hereof a judgment has been obtained which it is against ood conscience to enforce, equity will interfere to restrain he use of an advantage thus gained. Decree modified in ccordance with this opinion.

STATE v. LEE YAN YAN.

INDICTMENT—LARCENY.—It is sufficient, in an indictment for larceny under sec. 552 of the criminal code, to allege that the defendant "feloniously took and carried away" the personal property therein described, without employing the word "steal" in any form.

CRIMINAL ACTION—PRESUMPTION.—Where the bill of
not purport to give all the evidence introduced
upon the trial of a criminal action, and the corre
struction given the jury can only be determined
facts proven on the trial, the appellate court wi
such evidence was given and such facts established
instruction given.

APPEAL from Jackson County.

J. W. Whalley, for appellant.

P. P. Prim, for respondent.

By the Court, WATSON, C. J.:

The indictment in this case charges that t
"feloniously took and carried away" the pers
therein described. The appellant objects to
because the word "stole" is omitted. We ca
merit in this objection. Sec. 79 of the crim.
that the "words used in a statute to define a c
be strictly pursued in the indictment, but oth
veying the same meaning may be used." I
the crim. code, under which this indictment w
word "steal" is manifestly used in the sense
larceny. Besides, sec. 71 of the crim. code
"the manner of stating the act constituting
set forth in the appendix to this code, is su
cases where the forms there given are appli
other cases forms may be used as nearly simil
ture of the case will permit." The indictme
exact conformity with form 11 in said appen
we aware that it has ever been held that the
of the word "steal" is fatal in an indictment
Abbott says in regard to the meaning of thi
steal is the verb employed as meaning to com
and stealing, when used as a noun is equivale
terchangeable with larceny, though less technic

liable to be found in connections where the context shows an intended deviation from the strict sense." (Abb. Law Dic., vol. 2, p. 503.) The omission of this word has been held not a fatal defect in such cases. (*Damewood v. The State*, 1 How., [Miss.] 262; *Engleman v. The State*, 2 Ind., 91.)

The second and only remaining objection made by appellant is, in substance, that the indictment is for larceny under said sec. 552, and the instructions given by the court below on the trial were only applicable to crimes under that section, while the proofs introduced on the trial disclosed the fact that the larceny occurred in a dwelling house, and was therefore governed by the provisions of the succeeding section 553. This objection cannot be considered here for the simple reason that the bill of exceptions does not purport to give all the evidence introduced or facts established on the trial, and we are bound to presume that such other evidence, if necessary, was given, and facts proven, as fully warranted the instructions complained of. This has long been the established practice of this court, and we have no inclination to change it. The judgment is therefore affirmed.

Judgment affirmed.

HAYDEN v. WAYMIRE.

OPEN MUTUAL ACCOUNT.—Where one performs services for another, at his request, and charges him with the reasonable worth of the same, and the latter expends money for and loans money to the former, at his request, and charges him therewith, the account between them is "an open mutual account," within the meaning of subd. 3, of sec. 539, of the civil code, relating to costs.

APPEAL from Polk County.

W. H. Holmes, for appellant.

Daly & Butler, for respondent.

By the Court, WATSON, C. J.:

The appellant sued the respondent, as admi
the estate of Fred. Williams, deceased, in the c
for Polk county, and obtained a verdict for f
which amount was paid into court by the respon
appellant moved for judgment for costs, in add
amount of the verdict, which was refused by the
judgment for costs given in favor of the respon
ruling constitutes the error complained of by th
The action was brought on an account for profe
vices as an attorney-at-law, rendered by the a
said Williams, in December, 1876, at his reque
alleged in the complaint to have been reason
$200. Interest was claimed thereon at 10 pe
annum, from the time they were rendered. The
mitted the services, but denied that they were
$100, and denied the claim for interest altogeth
sets up as a separate defense an agreement betw
lant and Williams, under which it alleges the se
performed, by the terms of which the appellant
nish his professional services whenever needed b
liams, free of charge, and in return Williams was
appellant, whenever he should be at Dallas, w
wine and beer free of charge; and it alleges tha
did furnish appellant with such articles, in accor
such agreement, to the amount of not less than
made no charge therefor against him.

As a second separate defense, the answer alle
various specified times said Williams laid out an
money for, and made loans to the appellant, at
amounting in the aggregate to the sum of $18
such sums, nor any of them, have ever been pa

still due from the appellant, with interest. The new matter in the answer is put in issue by the reply.

It will be seen from this statement, beyond doubt, we think, that the appellant's claim, and the counter-claims set up in the second defense, constituted "an open, mutual account" between the appellant and Williams, within the meaning of subdiv. 3, of sec. 539, of the civil code, which entitles a plaintiff recovering judgment for any sum, "in an action involving an open mutual account, where it appears to the satisfaction of the court that the sum total of the accounts of both parties exceeds one hundred and fifty dollars," to recover costs also. (*Norton v. Wilson*, 30 Cal., 126; *Brady v. Durbrow*, 2 E. D. Smith, 78; *Gilliland v. Campbell*, 18 How. Pr., 177.) And the record conclusively shows that the amount of the accounts of both parties exceeds the sum mentioned in the statute. The court could not but have been satisfied on that point. The answer admits one hundred dollars of appellant's demand, unless covered by the agreement set up in the first separate defense. The verdict for appellant for any sum, however small, virtually determined that such agreement had no existence. It was either a good defense to the whole of appellant's claim, or else to no portion of it, and was negatived by the finding of any sum due him upon it. But the verdict settles another question in the case. It decides that ninety-five dollars, at least, of the amounts plead as counter-claims was proven to the jury.

We must presume, then, that the fact that the sum total of the accounts of both parties was in excess of one hundred and fifty dollars did appear to the satisfaction of the court below. And it was error not to give the appellant judgment for costs, instead of adjudging them to the respondent. The other questions discussed at the hearing

seem to us not to require any discussion here. below refused to give appellant the judgment was entitled to, and gave respondent one to wl not entitled. We are clearly of the opinion that lay.

Judgment reversed, with costs to appellant.

WOLCOTT v. MADDEN.

WHERE the findings show that a plaintiff brought suit wi or tendering a conveyance of certain property, acc terms of a certain instrument of writing, and the was not entitled to recover, affirmed without prejud

APPEAL from Curry County.

R. S. Strahan, for appellant.

Cyrus Madden, for respondent.

By the Court, LORD, J.:

Upon the issues presented by this case, the c at the time of the execution of the deed, the n to in the pleadings was surrendered to the def that contemporaneously with the execution of tl other writing was entered into between the p defendant which gave the deed the effect of a m terms of which allowed the defendant a reas within which to sell a certain mine to pay the su and upon the expiration of which time the plai reconvey the property. The court also found th had not been sold, but did not find whether a time had expired, and further that the plaint made, or tendered any conveyance to the defend

Conceding the time to have expired, the plain quired to have tendered a conveyance of the pro

suing. He certainly ought not to be allowed to collect the debt, and keep the property also. The respondent suggests in his brief the surrender of the note was payment, and there was therefore no debt due upon which a mortgage could operate, and that the findings in this respect were error. The findings show that the note was surrendered because it was merged into another, or higher security. The plaintiff, however, not having tendered the deed, there was no error in the judgment of the court, which must be affirmed without prejudice to further proceedings.

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*SHAW v. OSWEGO IRON CO.

WATER COURSES—NAVIGABLE STREAMS.—Where a stream is naturally of sufficient size to float mill logs—and, it may be, small boats over some portion of it—the public have a right to its free use for that purpose. Nor is it essential that such capacity continue through the year; it is sufficient at its periods of high water, or navigable capacity continue a sufficient length of time to make it useful as a highway.

RIPARIAN RIGHTS.—Under the well settled principles of the law, the title to the bed of such stream is in the riparian owners.

APPEAL from Clackamas County.

Jas K. Kelly, for appellant.

Thomas N. Strong, for respondent.

The Court, LORD, J.:

This is an injunction bill brought to enjoin the defendants from diverting the water of the Tualatin river from its natural channel, into Sucker lake, for manufacturing purposes. The complainant, Shaw, substantially alleges that he is the owner in fee of a certain tract of land which formerly was a portion of the donation land claim of Ambrose Field, deceased, and that the said land lies at and near the

*See 45 Am. Rep. 146.

confluence of the Willamette and Tualatin ri
being bounded one-fourth of a mile on the W
and about a half of a mile on the northern
Tualatin river. That from the upper end of
land, where the same abuts on the Tualatin,
ence with the Willamette river, there is a fall
of the said Tualatin river of about twenty
water flowing in the said river is sufficient, at
the year, to propel a large flouring and saw-m
machinery; that said water can be diverted on
tract of land with little trouble and expense
diversion it will form a water privilege and p
value, and that the use of the water of said r
great prospective value as a motive power to
ant, as the riparian owner of the said land.
tember, 1880, the defendant commenced to di
canal from the said Tualatin river for the p
verting the water from its natural channel, at
five miles above the plaintiff's land, and turni
into Sucker lake, so that it will not again flow
river, and that the defendant has already cu
said canal to such a depth as to cause a large
water in said river to flow from the Tuala
Sucker lake; and, furthermore, threatens to
canal deeper and wider so as to divert the g
of the said waters from its natural channe
lake. That if the said defendant be permitted
use the said water, in the summer and fall
year especially, it will cause great and irrepar
the plaintiff as a riparian owner of said trac
render the same much less valuable than it
defense relied upon to defeat the injunctio
Tualatin river from its confluence with the W

to a point more than twenty miles from said confluence is, and always has been a public navigable stream, and is entirely within the state of Oregon. The question then presented by this record, and which we are required to decide by this appeal is, whether the Tualatin river is, in the legal sense, a public navigable stream. If it is, it is conceded that the bed of the stream is owned by the state, and that the plaintiff's suit, based on riparian ownership *ad medium filum aquae*, must fail. As the court is supposed to know judicially the permanent geographical features of the country, it necessarily includes as part of it, what are its public navigable streams. (*Brown v. Schofield*, 8 Barb., 239; *People v. The Canal Appraisers*, 33 N. Y., 461; *Neaderhouse v. State*, 28 Ind., 257; *Ross v. Faust*, 54 Ind., 474; *Wood v. Fowler*, 26 Kansas; 1 Wharton's Law of Evidence, sec. 339.) And the courts will also take judicial notice of the government surveys, and the legal subdivisions of the public lands. (*Atwater v. Schenck*, 9 Wis., 164.)

We know that the lines of the United States survey have not meandered the Tualatin as in the case of the Willamette river, of which it is a tributary, but that the Tualatin river has been sectionized by the government surveyors as though it had no existence; that it has been sold by the government as land, without any reservation or deduction of the bed of the stream, the whole being computed as land and sold as so many acres. We know from such geographies and histories of the state as we have examined, that the Tualatin is not mentioned among the public navigable waters of this state; that about a mile above its mouth there is described a series of rapids over which the water falls from thirty to forty feet, in a distance of a quarter of a mile; that above the rapids it is generally a narrow and tortuous stream with spaces of slack or sluggish water of sufficient depth for

small boats, and in other places shallow, with
ing except during seasons of high water, and
at its ordinary stage of water capable of sus
if any, valuable floatage, but that it is subjec
fluctuations, when the volume and height of
greatly increased, recurring with the regulari
seasons, and lasting for several months, and,
periods of high water, it is susceptible of b
rafting logs to market; and this not at vari
general import of the evidence. We find th
1870, the legislature passed an act authorizing
River Navigation and Manufacturing Compar
much of the stream as might be necessary fo
of maintaining and operating a canal and loc
Colfax, on the Tualatin, to Sucker lake; that it
the act that "the said Tualatin river can only b
able for navigation purposes by means of su
locks, and other like improvements," and tha
vided that "the said company shall, in all
owner, or owners of land damaged by the co
said canal, such damages as courts of competen
may, in any and all cases, award to parties ag
ascertain from the evidence that the company,
of this act, did make some improvements in t
of the river, constructed a canal to divert the
Tualatin to Sucker lake, and succeeded to
steamboat on the river for a short time.
were never built as required by the act, the
the river seems to have proved a failure, and n
been made to navigate it since in such mode;
became involved, then insolvent, and finally,
was sold on execution, since which time it has
business, or keep up its organization. We are

an examination of the evidence that during certain periodical seasons of high water the Tualatin does possess a qualified capacity for floatage, and that it is susceptible of being used to float logs or timber to market, and, perhaps, to float small boats over certain portions of it, and that the products of the forest in the region which it penetrates can be made available for market by using it for that purpose. That it has, in fact, been used for rafting logs to market, is manifest from the decision of this court in the case of *Wise v. Smith*, 3 Or., 448, as it is equally manifest that the court considered it as having the character of a highway *for that purpose*, although in that case the portion of the river used for rafting logs was only four or five miles above its mouth. But the question occurs: Does such a floatage place the Tualatin upon a footing with public navigable waters, so as to confine the riparian ownership to the margin of the river? At the common law, all rivers in which the tide ebbs and flows are denominated navigable rivers, but above the flow of the tide water when they are of sufficient natural depth for valuable floatage, they are denominated public highways, and the public have only an easement therein for the purposes of transportation and commercial intercourse. Accordingly, streams of water have been divided into several distinct classes. First, Such rivers, or arms of the sea in which the tide ebbs and flows; and in these, which are technically called navigable, the sovereign is the owner of the subjacent soil, and all right in it belongs exclusively to the public. Second, Such streams as are navigable in fact for boats, vessels, or lighters; and in these, which are termed public highways, the public have an easement for the purposes of navigation and commerce, but the title of the subjacent soil to the middle of the stream, and the right to the use of the water flowing over it is in the riparian owner, subject

to the superior rights of the public to use it f
poses of transportation and trade. Third, Su
as are so small or shallow as not to be naviga
purpose; and in these the public have no rights
or otherwise, and they are altogether private pro
The Tualatin river is not a stream in which th
and flows, and in the common law sense is not na
is a fresh water stream, of which Lord Hale says,
tise *De Juris Maris*, "do of common right be
adjacent owners," but which, nevertheless, ma
servitude to the public interests for the benefit o
commerce. But the great size of many of the
rivers of this country, and their capability of na
yond anything known to the common law, ha
some of the highest courts of several of the stat
to such rivers the common law consequences of n
and thereby abrogating the common law distinct
such rivers and those in which the tide ebbs and fl
grants bounded upon them stop at the margin of
The reasons which these courts have thought suffi
tify the limiting of riparian ownership to the ma
rivers and whether high or low water mark is
indicated, are, First, that when lands are gran
government bounded on navigable fresh water
from the terms of the grant nothing appears to
intention of the government to part with the
river, the grantee does not take *usque ad filum*
that this intention is sufficiently evinced when
the river is not included in the survey by the
surveyors; and Second, that only so much of t
law is adopted in this country as is adapted to ou
and consistent with the spirit of our institutio
common law doctrine of the flow and reflow of t

criterion for determining what rivers are public, was framed with special reference to the physical condition of a country widely different from our own, and must necessarily prove an imperfect standard when applied to the great fresh water rivers of the United States, and is, therefore, inapplicable to such rivers, and either forms no part of our common law as to them, or is an exception to its principles. As a result, these courts have held that upon the large fresh water rivers which are navigable in fact, the riparian owners do not take to the middle of the river, but that the state is the owner of the subjacent soil, and the public have an easement in the river. (*Shrunk v. The President, &c.*, 14 S. & R., 79; *Carson v. Blazee*, 2 Binney, 477; *Flaumgain v. City of Philadelphia*, 42 Penn. St., 219; *McManus v. Carmichal*, 3 Iowa, 57; *Haight v. Keokock*, 4 *id.*, 215; *Tomlin v. Railroad Co.*, 32 *id.*, 106; *Musser v. Hershley*, 42 *id.*, 356; *People v. Canal Appraisers*, 33 N. Y., 461; *Bambridge v. Shirlock*, 29 Ind., 364; *Wood v. Fowler*, 26 Kansas, 682; *Bullock v. Wilson*, 2 Dev., 30; *Collins v. Bentbury*, 3 Ind., 277; *Cates v. Wadlington*, 1 McCord, 580; *Bailey v. Railroad Co.*, 4 How., 389; *Thurman v. Morrison*, 14 B. Munroe, 249; 17 *id.*, 367; *Benson v. Morrow*, 61 Mo., 350.)

It is noticeable, too, that for some time the supreme court of the United States refused to declare the great lakes and other navigable fresh water rivers entitled to be denominated as navigable waters, and amenable to admiralty jurisdiction. But in the case of the *Genesee Chief*, 12 How., 446, the court overruled the reasonings and decisions of two generations, and declared that the admiralty and maritime jurisdiction given by the constitution of the United States is not limited to the high seas and tide waters, or waters navigable from the ocean, but embraces our great mediter-

ranean seas, bordered as they are by different
as well as different states of the union. And i
Keokuk, 94 U. S., 324, Mr. Justice Bradley
confusion of navigable with tide water, found i
ments of the common law, long prevailed in
notwithstanding the broad difference between th
topography of the British island and that of t
continent. It had the influence of two genera
cluding the admiralty jurisdiction from our gre
inlands seas, and under the like influence it laid
tion in many states of doctrines with regard to
ship of the soil in navigable waters, above ti
variance with sound principles of public polic
as rules of property it would now be safe to
doctrines where they have been applied, is for
states themselves to determine. If they choose
the riparian proprietor rights which properl
them in their sovereign capacity, it is not for ot
objections." (*Railroad Co. v. Schurmeir*, 7
So that it is settled now in that court that the
the common law as to the navigability of wa
application in this country. "Here," say the
ebb and flow of the tide do not constitute the
in England, or indeed, any test at all, of the na
waters. Those rivers must be regarded as pub
rivers in law, which are navigable in fact, and th
gable in fact when they are used, or suscepti
used in their ordinary conditions as highways f
over which trade and travel are, or may be c
the customary modes of trade and travel on w
Daniel Ball, 10 Wall., 557; *The Martello*, 11
20 Wall., 439.)

There is, however, a strong array of authori

to the view taken by these courts. Eminent tribunals of other states, regarding the binding force of the common law on which American jurisprudence essentially rests, have maintained with great firmness and learning, as a part of it, the common law rule of navigable waters. Nor have they deemed the greater size of the American rivers as furnishing any sufficient reason to depart from the common law rule, which Hosmer, J., says, "promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership, a legal and determinate owner." They have, therefore, held to the strict application of the common law rule that only those rivers in which the tide ebbs and flows, limit grants of lands adjoining to high water mark, and that in all others, without regard to size or capabilities for transportation and commercial intercourse, the middle of the river is the boundary of lands on either side. (*Adams v. Pease*, 2 Conn., 481, 484; *Chapman v. Kimball*, 9 *id.*, 39; *Magnolia v. Marshall*, 39 Miss., 110; *Ingraham v. Wilkinson*, 4 Pick., 268; *Commonwealth v. Chapin*, 5 *id.*, 199; *Knight v. Wilder*, 2 Cush., 199; *Lorman v. Benson*, 8 Mich., 18; *Ryan v. Brown*, 18 *id.*, 196; *Watson v. Peters*, 26 *id.*, 517; *Bay City Gas Light Co. v. Industrial Works*, 28 *id.*, 182; *Jones v. Pettibone*, 2 Wis., 308; *Walker v. Shepardson*, 4 *id.*, 486; *Manner v. Schutti*, 13 *id.*, 692; *Olson v. Merrill*, 42 *id.*, 210; *Brown v. Chadbourne*, 31 Maine; *Granger* v. *Avery*, 64 Maine, 292; *Stewart v. Clark*, 2 Swan., 12; *Gavill v. Chambers*, 3 Ohio, 496; *Benner v. Platter*, 6 *id.*, 505; *Blanchard v. Porter*, 11 *id.*, 138; *Walker v. Board of Public Works*, 16 *id.*, 540; *June v. Purcell*, 36 Ohio St., 396; *Middleton v. Prichard*, 3 Scam., 510; *Board of Trustees v. Haven*, 5 Gilman, 548; *City of Chicago v. Laflin*, 49 Ill., 117; *Braxton v. Brusler*, 64 Ill., 488;

Browne v. Kennedy, 5 H. & J., 195; *Schurm*
road Co., 10 Minn., 102; *McCullough v. W*
68; *Greenleaf v. Kilton*, 11 N. H., 531; 3
Gough v. Bell, 1 Zal., 160; 2 *id.*, 455; *Bell*
id., 656.)

Now it must be evident that none of the fac
which have induced the courts of some of the
nore the common law distinction between the
water rivers of the country which are navigabl
the transportation of passengers and property,
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tide ebbs and flows, and as a result thereof, li
rian ownership to the margin of such rivers, c
application to the Tualatin river; yet to maint
tion that the bed of this river is the property
and the riparian owners stop at its margin, th
must, at least, bring his case within the reason
thorities, and the conclusions upon which they
These are drawn, as before stated, from the inap
this rule of the common law to *large* fresh wate
also from the fact that the government has n
the beds of such rivers to individuals. But th
Tualatin river was not reserved; it was section
and sold and patented by the government wit
duction or reservation whatever of the subjace
Tualatin. Nor do the reasons of the inapplica
common law rule to the large rivers and inlan
to such streams as the Tualatin. It was th
standard that rule furnished as a test of navig
applied to the large fresh water rivers and
abounding on this continent, and navigable
"over which trade and travel are, or may be,
the customary modes of trade and travel on wat

these courts held that rule to be inapplicable, and declared that such rivers must be regarded as public, navigable rivers in law. Manifestly, the Tualatin does not come within the reason of the courts which excepted such rivers from the strict common law principle, and limited riparian ownership to the margin of them. There can be no difficulty in adapting well established principles to fresh water streams of the character and capacity of the Tualatin. Such streams, having at best but a limited capacity for floatage, occurring at regular seasons of high water, and at which times may be useful to trade and the interests of the community, can be used as highways by the public for that purpose, leaving in the riparian owners all rights of property, not inconsistent with such use of the public. This principle is ably declared in *Morgan v. King*, 18 Barb., 288, in which the court say: "The capacity of a stream which generally appears by the nature, amount, importance and necessity of the business that can be done upon it, must be the criterion. A brook, although it might carry down saw-logs for a few days, during a freshet, is not therefore a public highway. But a stream upon which, and its tributaries, saw-logs to an unlimited amount can be floated every spring, and for the period of from four to eight weeks, and for the distance of one hundred and fifty miles, and upon which, unquestionably, many thousands will be annually transported for many years to come, if it be legal to do so, has the character of a public stream *for that purpose*. The floating of logs is not mentioned by Lord Hale, and probably no river in Great Britain was in his day, or ever will be, put to that use. But here such is common, necessary and profitable, especially while the country is new, and if it be considered a lawful mode of using the river, it is easy to adapt well settled principles of law to the case." That this

mode is considered lawful, to use such streams
pose, leaving in the riparian owner his rights
pose not inconsistent with that public use, is
authority and in this state.

In an early case in Maine, the doctrine
Parvis, J., that where a stream is naturally an
size to float boats or mill logs, the public have
free use for that purpose. (*Wordsworth v. S*
field, 278; *Brown v. Chadbourne*, 31 Main
the same rule has been adopted in Michigan
sin. (*Moore v. Sandborne*, 2 Mich., 521;
&c., v. Speechly, 31 Mich., 342; *Whistler*
22 Wis., 572.) Nor is it essential to the pu
that such capacity continue through the year;
if its periods of high water, or navigable capa
ly continue a sufficient length of time to make
highway. (*Treat v. Lord*, 42 Maine, 558
Smith, 35 N. Y., 459; *Deidrich v. N. W. R.*
203.) All these cases recognize the riparian
the middle of the stream, subordinate to the
ment. In *Wise v. Smith*, 3 Or., 446, this ide
was recognized as subject to the public easem
ing logs to market, and the reasoning of the
ities was quoted and approved. To the same
ger v. Robinson, 3 Or., 458, in which it is
stream in this state on the waters of which lo
can be floated to market, that they are public
that purpose; that it is not necessary that they
the whole year for that purpose to constitut
It is sufficient if they can be used for floatin
ing the seasons of high water. There is
gestion that the bed of such streams is owned
on the contrary, the doctrine of the law, as ap

cases, and the authorities cited and approved, recognize the right of the riparian owner to the middle of the stream, subject only to the public servitude. It is, perhaps, proper to remark that the facts of this case, not coming within the exception to the common law principle adopted by some of the courts of the Union, no opinion is intended to be expressed upon that point. As a consequence, however, of the law applicable to this case, the decree of the court below must be reversed and the defendant enjoined from diverting the waters of the Tualatin from its natural channel, and it is so ordered.

Decree reversed.

CITY OF PORTLAND v. KAMM.

STREET IMPROVEMENTS—DAMAGES, HOW ESTIMATED.—The damages for laying out and establishing a public street across the lands of an individual should be estimated according to the probable condition thereof after the street shall have been opened, improved and rendered fit for use for ordinary street purposes. The cost of such opening and improvement, although charged exclusively against the land fronting and abutting upon such street, by charter provision, cannot be considered in estimating the amount of damages; such charge being in the nature of a tax imposed upon the ownership in the land for the purposes of municipal government, and having no natural connection whatever with the injury to the land itself, occasioned by the opening and improvement of the street. The damages to the entire lot or tract are to be estimated.

IDEM—EVIDENCE.—The probable grade and condition of the street, when opened, improved and rendered fit for public use, are proper subjects for the consideration of the jury in estimating such damages; and for this purpose it is competent to prove the officially established grades of adjacent or connecting streets; and also to prove by qualified witnesses the existing grades, on the proposed street, and the changes necessary to render it practicable.

APPEAL from Multnomah County.

Dolph, Bronaugh, Dolph & Simon, for appellant.

S. W. Rice, for respondent Kamm.

By the Court, WATSON, C. J.:

This was an appeal to the circuit court from an assessment of the damages and benefits occasioned by the extension of Salmon street through a tract of land belonging to the appellant, in the city of Portland. From the decision of the circuit court on such appeal, the cause has been appealed to this court. A question has been presented as to the meaning and constitutionality of sec. 7 of the act of December 19, 1865, entitled "An act to authorize the city of Portland to open, lay out and widen streets and alleys, and to appropriate private property therefor," which section provides that any number of persons, affected by the assessment of damages or benefits, arising out of the appropriation of land for a public street or alley, may "join" in an appeal therefrom to the circuit court, and that "all such appeals from such assessments shall be tried as one action, and the only question to be determined by such appeal shall be the question of damages and benefits;" also a question as to the proper practice, in such cases, in regard to the allowance of peremptory challenges, by the several defendants, during the formation of the jury to determine the amount of damages and benefits resulting to each.

But as the provisions of this section has been repealed, and we have concluded that the decision of the circuit court must be reversed on other grounds, we shall not attempt to discuss or determine either of the questions alluded to.

The first assignment of error which we deem it necessary to notice, relates to the ruling of the circuit court, allowing the respondent's counsel to ask H. S. Allen, one of the respondent's witnesses, the following question: "What, in your opinion, is the damage to that portion of the tract of land belonging to defendant Kamm, which lies within 100

feet of the proposed street by reason of laying out of said street; you may state separately the damages to those portions lying on each side of the proposed street?" The appellant's counsel objected to the question as "incompetent and irrelevant." We cannot see that it was either. It may not have gone far enough, but it certainly was "competent and relevant" as far as it did go. The appellant was entitled to all the damages resulting to his entire tract, and it would have been error in the circuit court to have limited the investigation to any portion, or within any boundaries not including the whole; but the ruling in question involves no such restriction. The limit of 100 feet prescribed in sec. 4 of the act above mentioned, does not apply to a case like the present. This seems plain enough from the mere reading of the section itself. But inasmuch as it does not appear from the record that any of the rulings of the circuit court, of which appellant complains, was predicated upon a different construction of the provisions of this section, the assignment of error we have been considering cannot be sustained. The objections urged by the appellant here to the instructions given by the circuit court to the jury on the trial, and excepted to by him, appear to us wholly untenable. As we understand them, they embody the principle that the amount of damages should be estimated according to the probable condition of the appellant's land after the street shall have been opened, improved, and rendered fit for use for ordinary street purposes; and that the jury could not take into consideration the probable cost and expense of opening and improving the street in estimating his damages. Although such costs and expenses, under the city charter, are charged exclusively upon the land fronting and abutting on such street, still it cannot be said that they constitute any part of the damages to the land, resulting from the establishment

and opening of the public street through it. This charge is in the nature of a tax imposed by the municipal government, to enable it to open and improve the public streets. It has no natural connection whatever with the injury done to the land itself by the opening and improvement of such streets. It is plain that if the appellant could get the amount of such cost and expenses from the city, in this proceeding, that he would escape the burden imposed upon the ownership of land which fronts and abuts upon public streets, to furnish the necessary means for their opening and improvement. But it is not so apparent how the city might proceed, under the circumstances supposed, to procure the necessary means for accomplishing those objects.

The testimony of W. S. Chapman, formerly city surveyor, and the table of street grades established by the municipal authority in connection with the map of the proposed street and adjacent blocks, and streets made by Chapman as city surveyor, and showing the established grades of adjacent and connecting streets, as well as the existing grades of such proposed street, ascertained by actual measurement, offered by the appellant as evidence on his own behalf at the trial, and excluded by the circuit court upon the objection of respondent's counsel for incompetency and irrelevancy, seem to us to have been clearly admissible, under the law, and in accordance with the principle announced in the first portion of the foregoing instructions to the jury. The probable grade and condition of the street, when it should be opened, improved and rendered fit for use for ordinary street purposes, were not only proper but necessary subjects for the consideration of the jury, in estimating the amount of damages to result from the establishment of the street through the land of the appellant. The witness, Chapman, was shown to be a competent and experienced civil engineer and surveyor, and to

have been city surveyor for many years. As such officer, he had located and surveyed the proposed street in question, ascertained the grade at various points, made the map referred to, and marked upon it the grade so ascertained by him. The circuit court refused to allow said table of grades and map to be given in evidence before the jury, and refused to allow the witness to testify as to the grade upon which said street would have to be constructed to render it of any practical utility as a public street. This evidence all tended to prove what the grade of the proposed street would be, when opened up, improved and made practicable; and its rejection was material error. (Wills on Eminent Domain, secs. 162, 180, 195; *Chandler, et al. v. Jamaica Pond Aqueduct*, 125 Mass., 552; *Fellows v. New Haven*, 44 Conn., 240.) The judgment is therefore reversed and case remanded.

ROGERS v. WALLACE.

EVIDENCE—BURDEN OF PROOF.—An instruction to the jury that "the burden of proof is on the plaintiff; he has the laboring oar, and the evidence on his side must preponderate; if the evidence is equally balanced the defendant is entitled to a verdict," is not necessarily a fatal misdirection, even though a complete affirmative defense is set up in the answer, and put in issue by the reply. In the absence of any application, on the part of the plaintiff, for more specific instructions upon the point, and of any specific exception on the ground of its generality, this court will presume, on appeal, that such instruction was intended and understood, by all parties at the trial, to apply only to the affirmative allegations in the complaint, and could not, therefore, have misled the jury.

APPEAL from Multnomah County.

J. C. Moreland, for appellant.

H. T. Bingham, for respondent.

By the Court, WATSON, C. J.:

This action was brought to recover a balance of two hundred dollars claimed to be due on a building contract. The original contract was in writing, but the complaint alleges a subsequent parol modification in respect to the manner of finishing the window-blinds, and performance accordingly. The answer denies the alleged subsequent modification and performance, and sets up as a separate defense the failure of the plaintiff to comply with the original contract in regard to said blinds, and an agreement between him and the defendant, made after such failure, that the defendant should pay the plaintiff thirty dollars for extra work, and all the contract price, except said sum of two hundred dollars, which he was to retain until the plaintiff should remove the window-blinds he had placed upon the building, and replace them by new blinds properly made, varnished, &c.; and that defendant made the payments accordingly, but plaintiff has not performed, nor offered to perform, his part of such new agreement. These allegations in the answer are put in issue by the reply.

The cause having been submitted to a jury, a verdict was returned for the defendant, upon which judgment was regularly entered in his favor. The plaintiff has appealed from this judgment, assigning as errors certain instructions given the jury at the trial. These instructions are four in number, but as the correctness of the first three must be determined, as respondent's counsel have aptly suggested in their brief, from an examination of the terms of the contract, rather than from a consideration of any legal principle involved, little need be said respecting them except that they seem entirely consistent with its provisions.

The parties having seen fit to stipulate in express terms that the appellant should finish the window-blinds "in the

best and most workmanlike manner," and that they should be "fresh and clean upon completion of the building," these particular specifications taken altogether must be regarded as of the very substance of his undertaking, and not to be omitted in a substantial performance. And, as we understand the instruction upon which this question arises, it goes no farther than this, *i. e.*, that a failure in respect to all these particulars would bar a recovery on the contract. The principal contention here, however, is over the fourth instruction. It is in these words: "In this cause the burden of proof is on the plaintiff. He has the laboring oar, and the evidence on his side must preponderate. If the evidence is equally balanced, the defendant is entitled to a verdict."

It is manifest that if this instruction applies to every material issue in the case, it embodies a fatal error, as the bill of exceptions shows that the only evidence introduced at the trial, as to the affirmative allegations in the answer, was the testimony of the appellant and respondent, each in his own behalf, which was in direct conflict, without any attempt at corroboration or impeachment on the part of either. But it does not expressly so apply, and may well be limited to the affirmative allegations in the complaint, which are denied in the answer. The court below could have intended no more than this, and in the absence of any application on the part of the appellant for more specific instructions upon the subject, and of any specific exception to the instruction on the ground of its generality, we are warranted in presuming, on appeal, that the limitations upon its applicability above suggested, must have been understood and acquiesced in by all parties on the trial, and that it could not therefore have misled the jury to the appellant's detri-

ment. The case of *Bain v. Doran*, 54 Penn. St., 124, cited by counsel for respondent, clearly supports this principle.

Judgment affirmed.

ANKENY v. THE FAIRVIEW MILLING CO.

PRACTICE—TRANSCRIPT ON APPEAL FROM AN ORDER ON A MOTION.—Affidavits or other documents, properly filed and considered by the court below, on the hearing of a motion for an order, allowing a warrant to issue to the sheriff, for the abatement of a private nuisance, under sec. 330 of the civil code, constitute parts of the record of such proceeding, without being made such by a bill of exceptions. There is no technical record or "judgment roll" in such cases, the statute not having prescribed of what is shall consist; therefore it included *all* papers properly filed in the court below.

NUISANCE—PRIVATE, TO BE ABATED BY THE SHERIFF.—Unless it appears on the hearing of such motion that the nuisance has ceased, or that the remedy by abatement would be inadequate, it becomes the imperative duty of the court to order the issuance of the warrant The court has no authority to direct the defendant to abate the nuisance established on the trial, or prescribe the mode in which it shall be done. Its jurisdiction extends, in a proper case, to making the order allowing the warrant to issue, only leaving to the officer the responsibility of executing it properly.

IDEM.—It is the duty of the sheriff under such warrant to abate the nuisance with as little injury to the defendant as possible. For any unnecessary damage he would be liable to the injured party.

DAMAGES—PROCEEDINGS OF COURT AFTER JUDGMENT.—In an action for damages for a private nuisance, where the plaintiff recovers a verdict, and judgment is entered thereon in his favor, and the record does not show on its face the particular nuisance established by the verdict, it is competent for the court in which the trial was had, in making the order allowing a warrant to issue for its abatement, to identify such nuisance by means of its own knowledge of the evidence introduced on the trial, and applicable to the issues made in the pleadings.

APPEAL from Marion County.

Shaw & Burnett, for appellant.

Issue was joined in the pleadings upon the question as to

whether or not defendant's ditch was a nuisance to plaintiff. Such being the case, we contend that the general verdict of the jury "for the plaintiff" was a decision of all the issues of the action in favor of the plaintiff—among others, that the ditch was a nuisance. (Code, p. 261, sec. 766, subd. 18; *Torrence v. Strong*, 4 Or., 39; *Reed v. Gentry*, 7 Or., 497.)

In addition to this, the section of the code under which the action was brought, expressly authorizes the allowance of a motion to abate the nuisance whenever the plaintiff shall recover a judgment for damages, and says such motion "shall be allowed of course." (Code, p. 179, sec. 330.)

The existence of the nuisance having thus been established by the result of the trial, it was the plain duty of the court below, under sec. 330, *supra*, on motion of plaintiff to that end, to grant an order allowing a warrant to issue to the sheriff directing him to abate the nuisance. (*Marsh v. Trullinger*, 6 Or., 356; *Burge v. Underwood*, 6 Cal., 45; *Weimar v. Lowery*, 11 Cal., 104.)

A general verdict is sufficient foundation for such a motion. (*Blood v. Light*, 31 Cal., 115.) We think the court below, in the absence of a cross motion and undertaking by the defendant, (code, sec. 332) should have ordered a warrant for a general abatement to issue, and that not to the defendant, but to the sheriff.

J. A. Stratton, for respondent.

The jury found simply that plaintiff was damaged $10. It is a well established principle that a person whose land is unlawfully flowed by another has no right to do any unnecessary injury to the adverse party. He may abate the nuisance, but that may be a very different thing from the total destruction of the ditch or dam that caused it. The abatement should be limited to its necessities, and should

do the least practicable injury to the object which creates the grievance. (*State v. Moffett*, 1 Green., 247; *id.*, 348.) Upon the allegations of the complaint taken in conjunction with the trivial amount of the damages found by the jury the natural inference would be that the ditch was not a nuisance at all, but that the plaintiff had been only nominally damaged by some casual and temporary neglect of the plaintiff. (*Bloomhuff v. The State*, 8 Blackf., 204; *Brightman v. Bristol*, 65 Me., 429.)

The statute provides (code, p. 179, sec. 330) that "if judgment be given for the plaintiff in such action (*i. e.*, for damages) he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance." It was sufficient for the court to pronounce the judgment of the law. The award of execution need not be mentioned in the judgment, for it is the consequence of the judgment. The issuance of the execution is a mere ministerial act to be performed by the clerk. No special form of judgment was necessary. (*Lewis v. Watrous*, 7 Neb., 478; *Church v. Crossman*, 41 Iowa, 373; *Barrett v. Garrigan*, 16 Iowa, 47.)

By the Court, WATSON, C. J.:

This action was brought under the provisions of title 2 of chap. 4 of the civil code, for damages alleged to have been caused by a private nuisance, affecting the use and enjoyment of real property. Section 330 of this title is as follows: "Any person whose property is affected by a private nuisance, or whose personal enjoyment thereof is in like manner thereby affected, may maintain an action at law for damages therefor. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant

to issue to the sheriff to abate such nuisance. Such motion must be made at the term at which judgment is given, and shall be allowed, of course, unless it appear at the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance; in which latter case the plaintiff may proceed in equity to have the defendant enjoined." The complaint was filed September 12, 1881. After alleging the incorporation of the respondent, the appellant's ownership, in fee simple, and possession of the premises described therein since October 8, 1879, the complaint charges, "that defendant has continuously, since the first day of November, 1879, maintained and kept in operation, and does now maintain and keep in operation, upon and adjoining to plaintiff's said lands, a large ditch full of water; that all of plaintiff's said lands lying adjacent to said ditch are now, and at all the dates herein mentioned, have been used and occupied by plaintiff for agricultural purposes; that between the 1st day of November, 1879, and the 1st day of May, 1881, by reason of the negligence and carelessness of defendant, in the construction and management of its said ditch, the drainage of plaintiff's said lands was greatly obstructed and impaired, and a large portion of plaintiff's said lands was overflowed with water, and rendered wholly unfit for cultivation, and plaintiff's growing grain thereon was destroyed, to the damage of plaintiff in the full sum of one thousand dollars; that by reason of the defective and improper construction of said ditch, and the negligence and carelessness of defendant in the management thereof, said ditch has become, and now is, a nuisance, and continual cause of damage to plaintiff, for the reason that it continually obstructs the natural and necessary drainage of plaintiff's said lands, and often causes a large portion of said lands to be overflowed with water;

that plaintiff has often requested and notified defendant, prior to the commencement of this action, to abate said nuisance, and to so repair and change said ditch that plaintiff would not be damaged thereby, but defendant, though so requested and notified as aforesaid, fails, neglects and refuses to abate said nuisance." The prayer is for judgment for one thousand dollars damages, together with costs and disbursements of the action, and for an order that said nuisance be abated.

Most of the material allegations in the complaint are denied in the answer. In addition to the denials, the answer contains some averments of new matter as separate defenses which are put in issue by the reply. The issues thus formed were tried by a jury, and a general verdict returned for the appellant, assessing his damages at ten dollars; for which amount the court rendered judgment in his favor. The appellant then moved the court for an order allowing a warrant to issue to the sheriff to abate such nuisance, under the provisions of the section above quoted, but specifying, in such motion, the particular mode of executing such warrant. To this motion he added another upon the same sheet of paper as follows: "Plaintiff further and separately moves the court to grant an order allowing a warrant to issue to the sheriff of Marion county, Oregon, directing him to abate the nuisance complained of in plaintiff's complaint as being caused by defendant's ditch; this further and separate motion being based upon the judgment given for the plaintiff in this action." Upon the hearing of this motion, affidavits were introduced on behalf of the appellant to show what changes and improvements in the respondent's ditch would be necessary to remove the nuisance complained of. The order determining the motion recites that the same was made by the court "after hearing the allegations and proofs

of the parties and the arguments of counsel, and viewing said ditch and the premises affected thereby." This order directed the respondent to cut its ditch to a specified depth and grade over one portion; to raise the embankment along another portion; to construct several flumes of certain dimensions, respectively, at various points specified in the order, and also a waste gate; and enjoined the defendant from using the ditch for conveying water to its mill until said nuisance should be abated as therein prescribed. From the decisio of the court, on this motion the appeal is brought.

That an appeal will lie from such an order under section 525 of the code of civil procedure is not questioned. But the respondent claims that the affidavits filed upon the hearing of the motion in the court below, not having been made a part of the record by a bill of exceptions, cannot be considered here, but should be stricken out of the transcript. We have uniformly held that upon appeals from judgments and decrees, only the technical record or judgment roll, prescribed by section 269 of the code, could be considered. (*Oregonian Railway Co. v. Lynden Wright*, March term, 1882, p. 162 of this volume.) But on the other hand, where the statute has not prescribed what the record shall contain, as in the case of proceedings resulting in "final orders," which are neither judgments nor decrees, but which are to be deemed such for the purpose of review, under said sec. 525, we have held the record to consist of all papers and documents properly filed and before the court, in the proceeding below, under section 230. (*Page v. Finley*, March term, 1881.) The distinction clearly renders it necessary to overrule the motion to strike such affidavits from the transcript. The importance of retaining this portion of the transcript is apparent. Otherwise how could this court

determine, on the appeal, that it did not appear to the circuit court on the hearing of the motion for the order allowing a warrant to issue to the sheriff, to abate the nuisance complained of, that such nuisance had ceased, under section 330, above quoted? Or, that it did not appear on such hearing that the remedy by abatement would be inadequate, under the same section? In either case, it would not have been error in the circuit court to enforce the order allowing the warrant to issue. Without any record of what did appear at the hearing, we should be compelled to presume, in support of the correctness of the order appealed from, that one or the other of these facts did appear on the hearing of the motion.

With these affidavits before us, we have no difficulty in deciding that neither of such facts did so appear to the circuit court. The statute declares that in such a case the order directing the warrant to issue to the sheriff "shall be allowed of course." (Section 330, *supra.*) The circuit court did not allow such order in the case at bar. Its attempted directions to the respondent were in no sense the equivalent of such order, and were clearly beyond its jurisdiction. Its authority, in the premises, were derived from the statute, which permitted but one of two courses: Either to allow the order, or disallow it, as the facts developed upon the hearing of the motion rendered proper, in view of the provisions of said section. In the former case, the court was authorized by section 332 to stay the issuance of the warrant upon seasonable application by the defendant, and its giving an undertaking as therein prescribed, for a period not exceeding six months, to enable the defendant to abate the nuisance itself. But the court had no authority to direct the defendant to abate the nuisance, or even to stay the issuance of the warrant (assuming that this was a pro-

per case for the allowance of the order) except upon the conditions prescribed in the statute itself. The failure of the circuit court to allow the order upon the state of facts disclosed by the record in the case, was equivalent to a refusal. (*Thompson v. McKay*, 41 Cal., 221; *Johnson v. Murphy*, 17 Tex., 216.)

The fact that the appellant specified in one part of his motion for the order the particular mode in which he wished the court to direct the execution of the warrant, cannot be held to obviate the effect of such refusal. He was entitled to the allowance of the order for the issuance of the warrant, although he had no right to ask, and the court had no power to grant it, with qualification as to the manner of its execution in the hands of the sheriff. By asking too much, he certainly did not debar himself from insisting upon the relief he was clearly entitled to. The different matters embraced within the motion were readily severable. The position that the circuit court substantially granted the relief asked for in the appellant's motion, is plainly indefensible. It did not order the issuance of a warrant to abate the nuisance at all. It simply directed the defendant to abate it, in a particular mode prescribed by it—a direction it had neither authority to give, nor power to enforce. But it is further contended on behalf of the respondent, that the pleadings and verdict are of such a nature that the circuit court could not have determined what, if any, nuisance was found by the jury to exist; and could not for this reason have specified any, in a warrant to the sheriff, had it ordered one issued so that the officer would know from the warrant itself what his duty was. There is, however, but one nuisance charged in the complaint, and that is *the ditch itself*. It is true it is alleged that the ditch has become such nuisance, through "improper and defective construction," "neg-

ligent and careless management," &c. But notwithstanding, it is the ditch itself, so constructed and managed by the defendant, that is alleged to be a nuisance. The ditch so constructed and managed by the defendant is alleged in the complaint to "obstruct the natural and necessary drainage" of the appellant's lands, and thereby cause a large portion of such lands to overflow with water; and the injury thus caused to his lands, he contends, renders the ditch itself a private nuisance. The fact that the defendant might so alter the construction and management of its ditch as to render it no longer objectionable, does not prevent its being considered a nuisance, in its existing state. If the ditch itself was operated in any manner it was capable of, by the defendant, actually caused the injury of which appellant complains, it was the nuisance; and any verdict for damages, however small, necessarily settled its character as such.

As to the ability or power of the circuit court to designate in its order allowing the warrant to issue the particular nuisance to be abated, there can be no serious question. That court is presumed to have knowledge of the evidence introduced on a trial before it, and whether any evidence was so introduced upon any particular material issue. The well established practice of *nisi prius* courts to direct nonsuits where no evidence proper for the consideration of the jury has been offered, furnishes the most common illustrations of this jurisdiction. It is evident that proof of an overflow upon any portion of the lands of the appellant described in the complaint, caused by the ditch of the respondent obstructing the natural and necessary drainage of such lands, would establish appellant's case under the pleadings, leaving only the amount of damages to be settled by the jury. And under a general verdict, in a case of this nature,

where the issues are not, and need not be more particularly defined in the pleadings, we understand the rule to be that wherever evidence has been submitted to the jury as to any matter embraced within such issues, the general finding is to be deemed conclusive.

But it is nevertheless competent for the court in which the trial is had to determine, in the discharge of its own proper functions, whether any evidence justifying a verdict as to any such particular matter was submitted to the jury. Why the court should not take judicial cognizance of any facts relating to the introduction of evidence, in trials before them in actions of this character, when authorized by law so to do, while the same facts may be established by parol evidence in different actions where it becomes important to settle the precise boundaries of the previous adjudication, is difficult to understand. While the only form of plea in ejectment was the general issue, parol proof was always admissible, where the record was introduced, in a subsequent action between the same parties, to show the particular title actually litigated in the ejectment suit. (*Briggs v. Wells*, 12 Barb., 567; *Wood v. Jackson*, 8 Wend., 9.) Seward, Senator, in the course of his opinion delivered in the last case, says: "From the view I have taken of this case, not unsupported by authorities, I deduce this principle: that a former judgment may be given in evidence, with such parol evidence as is necessary to show the grounds upon which it proceeded; and that where such grounds, from the form of the issue, do not appear from the record itself, it is competent to prove the same, provided that the grounds alleged be such as might legitimately have been given in evidence under the issue, and such that when it is proved they were given in evidence, it appears by the verdict and judgment that they must have been directly and necessarily in ques-

tion, as the grounds of the verdict." It has also been held that parol evidence was admissible to show that upon the trial of a former action of trespass *quare clausum fregit*, the plea being *liberum tenementum*, the only evidence introduced tended to establish a trespass on a particular portion of the close, within which the trespass was alleged in the declaration to have been committed. (*Duncle v. Wiles*, 5 Denio, 296.) The statute makes it the duty of the court to order the warrant for the abatement of the nuisance to issue, "as of course," except in certain specified cases. (Section 330.) And this order is based on the verdict and judgment for damages, as plainly appears from the context. The hearing of the motion for such order provided for in said section is for the purpose of ascertaining whether the nuisance has ceased, and if not, whether the remedy by abatement would be adequate. But the court must be able to determine from the record and its own knowledge of the evidence introduced on the trial, whether any, and if so, what nuisance has been established. There is no other way provided in the statute, while a duty is enjoined rendering such determination necessary. And no good reason, it seems to us, can be assigned in opposition to this view.

In *Howard v. The State*, 6 Ind., 444, the same view is taken of the question, although arising in a somewhat different case. The point is thus stated and disposed of by Gookins, J., who delivered the opinion in the case: "A further objection taken to the information is, that it does not point out the particular locality of the house in which the liquors were sold. This objection is founded on the ninth section of the act for the punishment of misdemeanors (2 R. S. 1852, p. 429,) providing that on conviction of nuisance, the court *may* order the nuisance to be removed. That is not a necessary part of the judgment. The court may

order its removal or not at its discretion; and, in case of such order, which must always be based upon the testimony given at the trial, the court is competent to make the direction for its removal sufficiently specific to guide the officer in the discharge of his duty. A description of the precise locality is no necessary part of the information. The information gave no other description of the house than that it was 'a certain house wherein,' &c. The court below thus being enabled to embody in its order every matter which should appear in the warrant for the sheriff's guidance, there is no ground upon which its refusal to do so in this case can be sustained. That the sheriff, in executing such warrant, would be liable to the respondent for any injury to its property beyond what might be found necessary in effecting the abatement of the nuisance therein specified, cannot be doubted." (*The State v. Moffett*, 1 Iowa, [G. Greene] 247; *Moffett v. Brewer*, *id.*, 348.) The destruction of the portion of the ditch only, causing the overflow of the appellant's lands, in the manner alleged in the complaint, and established by the verdict and judgment, could be justified under such warrant. On this point the decision of this court in *Marsh v. Trullinger*, reported in 6 Or., p. 356, has been cited by the appellant. The decision in that case was clearly correct. There was nothing in the record on the appeal showing what evidence was introduced on the trial in the court below. Whether the issue made in the evidence there was as to the entire dam, or only a portion of it, being a nuisance, did not appear in the record on the appeal, and in support of the order appealed from, which directed a warrant to issue for the removal of the entire dam, the former state of the evidence on the trial was to be presumed. So far, however, as the motion is there advanced that a general verdict for damages, in cases of this nature,

is conclusive that the entire thing alleged to have caused the damage and to be a nuisance, is such nuisance, irrespective of the character of the evidence introduced on the trial, we cannot acquiesce, and as it was not necessarily involved in the decision, we do not feel bound to follow it in opposition to our own convictions. The judgment must be reversed and the cause remanded for further proceedings in accordance with the foregoing views.

Judgment reversed.

SHEPPARD v. YOCUM AND DELASHMUTT.

WITNESS MAY EXPLAIN BY DIAGRAM.—Where a diagram not questioned and shown to be correct, was not admitted as evidence, but only to enable a witness to explain the position and location of different points and objects as to which he testifies, such a diagram may be referred to and shown to the jury.

IDEM—CREDIBILITY OF, HOW ASSAILED.—Sec. 831 of the code is but declaratory of the common law rule, and when a witness is to be assailed by proof of something he may have said elsewhere, contradictory of his testimony as given, and the witness has been first inquired of concerning it, and the time when, and place where, and the person involved in the supposed contradiction called to his attention, a foundation has been properly laid within that rule for a contradiction of the witness. The object of the rule is simpy for the protection of the witness, to give him an opportunity to recollect the facts, and correct the statements when immediately brought to his mind.

CONFESSIONS—WHEN THEY DO NOT AFFECT CONFEDERATES.—The rule of law is elementary that when the connection of the individuals in the unlawful enterprise is shown to exist, "every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them," but what one party may have been heard to say at any other time, as to the share which others had in the transaction, cannot be admitted as evidence to affect them, for such confession is evidence only against the person himself who makes the confession and not against others.

IDEM.—The impeachment of the credit of a witness by showing that he has made statements at other times contradictory of his testimony given on the trial, does not lay the foundation for sustaining him by proof of his reputation for truth and veracity. (*Glase v. Whitley*, 5 Or., 167, overruled.)

STATUTE OF LIMITATIONS IN ACTION OF TROVER.—The statute of limitations begins to run against an action of trover from the time of the conversion, and the action must be commenced within six years.

APPEAL from Polk County. The facts are stated in the opinion.

James McCain and George W. Yocum, for appellants.

The circuit court erred in permitting the plaintiff, while testifying as a witness, to point out to the jury, upon a diagram purporting to show the house, office and safe from which the money mentioned in the complaint was alleged to have been stolen. It was not authenticated by any authority and was totally incompetent as original testimony. It was not made by the witness, and could not, therefore, be referred to to refresh his memory. (Civil Code, p. 274, sec. 826; 1 Wharton Ev., secs. 521-522.)

The reason of the rule requiring the attention of a witness whose credit it is intended to attack, is correctly laid down in *Pendleton v. The Empire Stone Dressing Co.*, 19 N. Y., 13. Denio, J., speaking for the court, says: "The reason for requiring that a witness whose credit it is intended to attack by the proof of contradictory statements should be first examined respecting them is, according to the unanimous opinion of the judges in the Queen's case, that he may be enabled to give such reason, explanation, or exculpation as the circumstances of the transaction may happen to furnish."

Certainly this opportunity was given the witness whose contradictory statements were sought to be proven. In

support of our position upon this subject, we cite the following authorities: (*Sloan v. The N. Y. Cen. R. R. Co.*, 45 N. Y., 125; *Bennett v. O'Byrne*, 23 Ind., 604; *Lawler v. McPheeters*, 73 Ind., 577; *Pittsburg v. Connellsville R. R. Co.*, 39 Md., 354.)

The court erred in admitting the evidence of J. F. Bewley, Wm. Savage and other witnesses for the plaintiff in support of the general reputation for truth and veracity of W. A. Fenton and J. K. DeLashmutt. As this question was before the supreme court of this state under its former organization (*Glaze v. Whitley*, 5 Oregon, 164,) and as the decision of the court in that case was adverse to our view of the statute and the law upon that subject, we approach this assignment of error with diffidence. But with due deference to the court making that decision, and the learned judge who delivered the opinion of the court, we respectfully submit that the decision was not founded in reason nor supported by the current of authority. Indeed, such a result cannot be reached without doing violence to the plain language and evident intent and meaning of the statute. Parker, J., in *The People v. Gay*, 1 Parker's Criminal Reports, page 316, says: "It would greatly multiply the issues, and needlessly increase the prolixity of trials, and I think also tend to mislead the jury from the more important questions of the case." (See *Russell v. Coffin*, 8 Pick., 143; Barb. Crim. Law, 432; *Starks v. The People*, 5 Denio, 106; *Pruitt v. Cox*, 21 Ind., 15; *The People v. Hulse*, 3 Hill, 308; *Rogers v. Moore*, 10 Conn., 13; *Brown v. Moors*, 6 Gray, 451; *Ray v. Donnell*, 4 McLean, 504; *Atwood v. Allen*, 1 Allen, 483; *Vance v. Vance*, 2 Met., [Ky.], 581.)

A man's confessions are only evidence against himself, and not against his accomplice, although made in the hearing of the accomplice who did not deny them. (Barb. Crim.

Law, page 463; 2 Stark R., 33; *Commonwealth v. McDermott*, 123 Mass., 440, [25 Am. R., 120]; *Commonwealth v. Kinney*, 12 Met., 235; *Commonwealth v. Walker*, 13 Allen, 570.)

Williams, Hill, Durham & Thompson, for respondent.

Secondary evidence may be received of buildings, monuments and other objects which cannot be brought into court. For this purpose, authenticated plans or diagrams of the *locus in quo* are admissible, and may go to the jury. (2 Wharton's Law of Evidence, sec. 677.) The plan was not evidence and it does not appear that it was admitted as such. As a means of enabling a witness to explain the position of different points, locations, walks and fences, as to which he testifies, such a sketch may be referred to and shown to the jury. It appears to have been used merely as such. (*Clapp v. Norton*, 106 Mass., 33; *Commonwealth v. Holliston*, 107 Mass., 232.)

On a direct examination, leading questions are not allowed, unless merely formal or preliminary, except in the sound discretion of the court under special circumstances, making it appear that the interests of justice require it. (General Laws of Oregon, sec. 827.)

The diagram in question was not in the nature of a leading question. It was first shown without objection and without question to be correct. It then stood for the purposes of being used at the trial, on the same footing as official maps, upon which streets, houses and other places and things are designated and marked. Official maps, when material, may always be used at the trial without further proof, because from their official character they are presumed to be correct. Unofficial maps and diagrams have not this presumption of correctness; but when they are once proven,

and their correctness is unquestioned, as in this case, then they may be used for any purpose if material. (*Vilas v. Reynolds*, 6 Wis., 214.)

There are circumstances under which a party may impeach his own witness, but he can do so only in the manner provided by the statute, "He may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony." (Gen. Laws, sec. 828.) He cannot, under any circumstances, impeach his own witness excepting in one of the two ways above provided. A party can never impeach a witness, when the sole purpose of calling him is to impeach him. It is only when the testimony of the witness upon some material point is different from that which the party has reason to believe it ought to be, that the witness can be impeached by the person producing him; and then only as to such material point. (1 Greenleaf on Evidence, sec. 449.) The practice in this state, in matters of impeachment of witnesses, and rebutting impeaching testimony, is very well regulated by statute, and settled by decisions of the supreme court. (General Laws, secs. 830 and 832; *Glaze v. Whitley*, 5 Oregon, 164; see also, 1 Greenleaf Ev., sec. 469.)

An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, shall be commenced "within six years" after the cause of action shall have accrued. (General Laws of Oregon, sec. 6.)

By the Court, LORD, J.:

This was an action of trover to recover damages for the wrongful taking, carrying away and conversion of the sum of $7,200, on the 6th day of November, 1877. The answer of the defendants denies each and every material allegation of the complaint, and as a further defense pleads the statute

of limitations, alleging that more than two years had elapsed since the alleged taking, carrying away and conversion of the money named in the complaint, before the commencement of the action. The plaintiff replied, and the cause being at issue, a jury was empaneled to try the same; a verdict was found for the plaintiff, and judgment rendered thereon. At the trial, numerous exceptions were taken to rulings of the court on the admissibility of testimony, and to the instructions of the court to the jury, and the appeal from the judgment is brought before us upon the error alleged in the bill of exceptions.

The first exception presents the question, whether a diagram or map, after being shown by the evidence to be correct, can be used by a witness to explain the location of places designated on the map or diagram. It appears by the bill of exceptions that the court permitted the witness to refer to the map or diagram, and to point out thereon the objects and things thereon noted and named, giving their relative positions to, and distances from each other, and from the map or diagram to explain to the jury the exact location of the safe where the money was stolen, and the relative position thereto of the other objects, but the map or diagram was not offered in evidence, and did not go to the jury except for the purposes as above stated. In *Clapp v. Norton*, 106 Mass., 33, the court say: "The plan was not evidence and it does not appear that it was admitted as such. As a means of enabling a witness to explain the position of different points, locations, walks and fences, as to which he testifies, such a sketch may be referred to and shown to the jury. It appears to have been used merely as such." (*Commonwealth v. Holliston*, 107 Mass., 232; *Paine v. Woods*, 108 Mass., 168.)

It is claimed that the diagram was in the nature of a

leading question, but to this it is replied, that it was first shown to be a correct representation of the several things represented upon it, and therefore, could not have prejudiced the defendants by its use, and second, in the exercise of a sound discretion, the court had the right to permit its use, even though it should be found to be a leading question. Our code provides that "on direct examination, leading questions are not allowed unless merely formal or preliminary, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it." (Code, sec. 837.) But we are unable to concur in the view that the map or diagram was in the nature of a leading question as claimed and argued by counsel for the defendants. The map was first shown without objection and without question to be correct. When this was done, for the purposes of the trial, it stood on a similar footing as official maps. The presumption of the law in favor of the correctness of official maps originates in their official character, and although the same presumption does not exist in favor of unofficial maps or diagrams when their correctness is proven and unquestioned as in this case, they are admissible. (*Vilas v. Reynolds*, 6 Wis., 214.) We are, therefore, of the opinion there was no error in the ruling of the court in permitting the witness to use the map or diagram for the purpose as stated.

The next exception is that the court erred in sustaining the objection of counsel for the plaintiff to the testimony of James A. Yocum, a witness called by the defendants, to impeach the evidence of J. K. DeLashmutt, who had testified as a witness for the plaintiff for the purpose of showing that he (DeLashmutt) had made declarations out of court inconsistent with his evidence at the trial. The question propounded to the witness Yocum was as follows: "Did

you on the 1st day of November, 1881, at the residence of Filmore DeLashmutt, have a conversation with J. K. DeLashmutt in which he said to you, 'we want you to swear that Hathaway Yocum told you that he got away with the Jews and their money, and if you will do so you will not lose anything, and I will make by it?'" The plaintiff's objection was, that the proper foundation had not been laid, by calling the attention of the witness DeLashmutt to the time, place, and circumstances of the conversation, and "*persons present.*" On cross-examination, this witness had been asked by counsel for the defendants this identical question, and as there was no objection, he answered, "I did not. I went there to Filmore's to ask James A. Yocum if he had said that Hathaway Yocum got away with the Jews and their money, and did not ask him to swear that Hathaway Yocum said he got away with the Jews or their money, or that he would not lose anything, or that I would make by it." This answer shows clearly that the witness, DeLashmutt, had his attention called to the conversation sought to be proven, sufficiently for him to recognize the particular conversation referred to; for he admits having a conversation with James A. Yocum upon that day, at that place, upon that subject. But the particular objection made at the argument was that the "persons present" were not stated in the question, as required by sec. 831 of the code, p. 274, and as decided by this court in *State of Oregon v. McDonald*, 8 Or., 117. An examination, however, of that case will show that the objection was based on the ground that there was *no time* or *place* fixed in the impeaching question, and the particular question here involved was not presented, or intended to be decided by the court. In delivering the opinion of the court in that case, Judge Prim said: "The code provides that 'a witness may be impeached by evidence

that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statement must be related to him, with the circumstances of time, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them.' Sec. 831.) This was the common law rule as laid down in Greenleaf and other works on evidence." (1 Greenleaf on Ev., 462, note 1.) Now it is here decided that this section of our code is but declaratory of the common law rule; and in California the same rule is applied and declared in respect to a provision of their code, identical in every particular with out own. (Code of Civil Procedure, sec. 2052; *People v. Devine*, 44 Cal., 457.)

To ascertain, then, the soundness of the objection under consideration, it becomes necessary to examine what the common law rule is, its purposes, and limitations. The general rule which governs in the production of verbal testimony to impeach the credit of a witness who has made statements, at other times, inconsistent with his present testimony, is deduced by the text writers and the courts from the opinion of the judges in the Queen's case, 2 Brod. & Bing., 313-314, and *Angus v. Smith*, 1 Mood. & Malk., 474, in which last case Tindal, C. J., says: "I understand the rule to be that before you can contradict a witness, by showing that he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place and *person involved* in the supposed contradiction." And subsequently in *Crowley v. Page*, 7 Carrington & Payne, 790, Parke, B., said: "Evidence of statements by witnesses on other occasions relevant to the matter at issue and inconsistent with the testimony given by them at the trial, is always admissible in order to impeach the value of that testimony; but it is only such statements

as are relevant that are admissible, and in order to lay the foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, *with the name of the person to whom, or in whose presence he is supposed to have said it*, or some other circumstances sufficient to designate the particular occasion." As a sound and correct exposition of the common law rule governing in the production of evidence in such cases, these authorities have been approved and cited by Phillips, Greenleaf and Wharton in their text books on evidence, (2 Phillips on Ev., 959, 960; 1 Greenleaf on Ev., sec. 462 and note; 1 Wharton's Law of Ev., secs. 551-555, and notes,) and a few illustrations and references to the decisions of the highest judicial tribunals of this country, will serve to show that the rule, as thus announced, has been approved and applied, and generally prevails in nearly all the states of the union.

In *People v. Devine*, 44 Cal., 457, the court say: "It is a settled rule prevailing in this court, in the English courts, and in those of nearly all the states of the union, that where the credibility of a witness is to be assailed by proof of something he may have said elsewhere, contradictory of his testimony as given, the witness must first be inquired of concerning it, and the time, place, and person involved in the supposed contradiction must be called to his attention. When this has been done, a foundation for a contradiction of the witness is said, in legal parlance, to have been laid, for these inquiries are necessary in order to found a contradiction, and of course, when there has been an omission to do this, it may be objected that *a proper foundation has not been laid.*" In *Spauntrorst v. Lent*, 46 Mo., 199, the court say: "All that is necessary to contradict a witness,

by showing that he has, at some other time, said something inconsistent with his present evidence, is to ask him as to the time, place, and person involved in the supposed contradiction." And in *Cole v. State*, 6 Baxter, (Tenn.,) the court say: "Where it is intended to impeach the witness by proving that he made statements out of court contrary to what he has testified in court, the witness should be asked whether he said or declared that which it is proposed to prove by the impeaching witness, that he did say, or declare, and the time and place and person to whom the declaration was made should also be stated in the question." (See also *Hill v. Gust*, 55 Ind., 51; *Pendleton v. The Empire Dressing Stone Co.*, 19 N. Y., 13; *Sloan v. N. Y. Cen. R. R. Co.*, 45 *id.*, 127; *Nelson v. C. R. & R. Co.*, 38 Iowa, 565; *Pittsburg v. Connellsville R. R. Co.*, 39 Md., 354; 1 Wharton's Law of Ev., sec. 555, authorities cited in note.)

Now the question propounded, and to which objection was made and sustained by the court was definite as to the time when and place where, and the person to whom the declaration was made, and came clearly within the rule as laid down by the authorities. The object of the rule is simply for the protection of the witness, to give him an opportunity to recollect the facts, and correct the statements when immediately brought to his mind, and such only can be the object of the statute (sec. 831) which is but declaratory of that rule. The answer of DeLashmutt on cross-examination showed clearly that he understood the particular conversation referred to, and the witness introduced to contradict and to confront him was *the* witness to whom the declarations were made, and when the question asked specified time and place and the person involved in the supposed contradiction, it was within the rule. As the objection

taken and argument made was confined to this point, it is the only aspect in which we have deemed it necessary to consider it, although proof of this matter was admissible on another ground. (1 Greenleaf on Ev., sec. 462; 2 Phil. on Ev., 435; *Baker v. Joseph*, 16 Cal., 178.) It is our judgment that the court erred in sustaining the objection.

In the progress of the trial, two witnesses were called by the plaintiff, and testified to certain matters material to the issue, and a proper foundation having been laid therefor, the defendants called witnesses who testified that the said witnesses of plaintiff had at other times and places made statements inconsistent with their present testimony. The plaintiff, in rebuttal, was allowed by the court to introduce evidence to prove that the general reputation of his said witnesses for truth and veracity was good. To the introduction of this evidence the defendants objected that it was incompetent and immaterial, and this constitutes the next alleged ground of error. The identical question involved in this exception was decided by this court in *Glaze v. Whitley*, 5 Or., 166; but we have been earnestly pressed, in an able argument, to reconsider the ground upon which that decision rests. Mr. Greenleaf, in his work on evidence, favors the admission of such evidence. (1 Greenl. on Ev., sec. 469, and is cited in *Glaze v. Whitley*, *supra*.) In our examination of this question, we find the rule to admit such evidence is sustained in *Harris v. The State*, 30 Ind., 131; *Stratton v. The State*, 55 *id.*, 468; *Burrill v. The State*, 18 Texas, 713; *Isler v. Dewey*, 71 N. C., 14; *Paine v. Tilden*, 20 Ohio, 554; but that the contrary rule is held in *Russell v. Coffin*, 8 Pick., 143; *Brown v. Morrs*, 6 Gray, 451; *Frost v. McCargar*, 29 Barb., 617; *The People v. Hulse*, 3 Hill, 309; *The People v. Gray*, 3 Selden, 378; *Weite v. May*, 21 Penn. St., 274; *Webb v. State*, 29 Ohio

St., 357; *Stamper v. Griffin*, 12 Ga., 450; *Vance v. Vance*, 2 Metc., [Ky.] 581; *Chapman v. Cooley*, 12 Rich., [S. C.,] 654; *Ray v. Hamilton*, 4 McLean, 512.) These authorities are sufficient to show that some contrariety of decision prevails upon the admission of such evidence, and that the rule laid down in *Glaze v. Whitley*, *supra*, ought not to be disturbed without due consideration. But we are convinced, after a careful examination of the reasons, *pro* and *con*, the better rule is to exclude such evidence—that it facilitates trials by avoiding a multiplicity of collateral issues, and the confusion ordinarily incident thereto—that it tends to secure the proper determination of the legal rights of parties by confining the evidence and the attention of the triers to the real issues sought to be litigated, and it is sustained by the weight of judicial authority. Besides, the reasons upon which the opposite rule is founded, which allows the impeached witness to be sustained by such evidence, applies with equal force to the impeaching witness, and, carried to its logical results, would and ought to include similar evidence to sustain him. In our judgment, it is a better practice to confine the trial to the issues of the action, and exclude such collateral matter, and thereby avoid the delay and tendency to mislead the jury from the more important questions of the case. It is proper, however, to say that this assignment of error would not have prevailed, if the record had not disclosed other matter which must reverse the case.

The next objection is to an instruction of the court, and an instruction refused as asked, but modified, which will be considered together. The court instructed the jury and said: "There has been some evidence introduced in this case tending to show that the defendant, Lindsey DeLashmutt, made some statements, or declarations concerning the taking of the money in controversy, both before and after

the alleged taking, which implicated, or tended to implicate, defendant Yocum in the act. Any admissions made by DeLashmutt concerning the taking of the money are to be considered by you as evidence against him, but not against defendant, Yocum, unless you should believe from the evidence that the plan or design to take the money, if at all, was matured and formed by DeLashmutt and Yocum before the making of such statements, if made at all." Just here it will be noted that the court was instructing the jury in reference to the declarations of Lindsey DeLashmutt, made before and after the alleged taking of the money which tended to implicate his co-defendant Yocum, and while the court properly instructs that any admissions of DeLashmutt are evidence against him, but not against defendant Yocum, he proceeds to state the conditions, or limitations under which such declarations are admissible as evidence against Yocum, to the effect, that if the jury believe there was a plan or priority of design to take the money, formed and matured by the defendants, then the declarations of Lindsey DeLashmutt, concerning the taking of the money in controversy, both before and after the alleged taking, are admissible as evidence against the defendant, Yocum. Or in other words, if the jury find from the evidence that the declarations of Lindsey DeLashmutt, which tended to implicate defendant Yocum, were made after a joint plan or design was formed and matured between the defendants, then the declarations of Lindsey DeLashmutt were admissible as evidence against Yocum, either before or after the alleged taking of the money, and were entitled to be considered by the jury in their deliberations. Whatever doubts might exist as to this being the proper construction, and effect of the instruction, they disappear by a consideration of the instruction refused as asked, but modified by the court, and the

evidence disclosed by the bill of exceptions to which the instructions upon this point refer. To avoid any misconstruction, and to obviate what counsel for the defense conceived to be the error of this instruction, they asked the court to give the jury the following instruction: "If you find from the evidence that the statements and declarations of defendant DeLashmutt, made *after* the alleged conversion of the money, were made at times when defendant Yocum was not present, and did not assent to such declarations or statements, then, in that case, you will not consider such declarations or statements as having any tendency to prove anything against defendant Yocum." The court refused this instruction, but modified it by adding the following words: "Unless you believe that Yocum was a party to the conversion, and it was a joint act of the defendants in pursuance of a joint plan." This was in effect saying to the jury that the instruction he asked is true, unless you believe that Yocum was a party to the conversion, and the conversion was a joint act of the defendants, in pursuance of a joint plan, then it is not true, then the declarations of defendant DeLashmutt made after the conversion of the money, and at times when the defendant Yocum was not present, and did not assent to such declarations, are admissible as evidence against him, and are properly before you for consideration. This virtually reiterates the error complained of in the former instruction, and certainly tends to confirm the construction given to it. The rule of law is elementary that when the connection of the individuals in the unlawful enterprise is shown to exist, "every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them." (1

Greenl. on Ev., sec. 111; 2 Wharton's Law of Ev., sec. 1192; 1 Phillips on Ev., p. 205; *United States v. McKee*, 3 Dillon, 560.) But "here also," says Mr. Greenleaf, "care must be taken that the acts and declarations, thus admitted, be those only which were made and done during the pendency of the criminal enterprise and in furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected."

In *Metcalfe v. Conner*, Littell's Select Cases, 497, (12 Am. Dec., 34,) Boyle, C. J., says: "Any declarations by one of the parties at the time of committing the unlawful act, are, no doubt, not only evidence against himself, but as being part of the *res gesta*, and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they themselves had done the act. *But what one party may have been heard to say at any other time, as to the share which others had in the transaction*, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, for it has been solemnly decided that a confession is evidence only against the person himself who makes the confession and against others." (Phillips on Ev., 73-4; *Lincoln v. Claflin*, 7 Wall., 139; *Lynes v. The State*, 36 Miss., 625; *State v. Pike*, 51 N. H., 105; *Benns v. The State*, 57 Md., 16; *Berford v. Sanner*, 40 Penn. St., 1; *The People v. English*, 52 Cal., 212.)

When it is considered that the bill of exceptions discloses that Wm. Ridgeway and J. K. DeLashmutt, both witnesses for the plaintiff, had testified in substance that after the safe robbery, and after the time when it is claimed that the money was stolen, that the defendant, Lindsey DeLashmutt, had stated to them "he had taken their money and the de-

fendant, Hathaway Yocum, had assisted him," the importance as well as the right of defendant Yocum to have the jury properly instructed as to the rule of law upon the questions presented by the instructions becomes apparent.

The next objection is that the court erred in refusing to instruct the jury that the action was barred by the statute of limitation. This objection is founded upon subdivision 1, sec. 8, of the code, but it is not tenable. Actions of trespass, trover, detinue and replevin belong to the same class and are governed by strictly analogous principles, although the form of proceeding and the results are not the same. (See Wells on Replevin, sec. 44, and notes 1 and 2.) The statute of limitations begins to run against an action of trover from the time of the conversion, (*Kelsey v. Griswold*, 9 Barb., 441,) and the action must be commenced within six years. (Code, sub. 4, sec. 6, p. 107; Wait's Practice, vol. — p. 57; *Kelsey v. Griswold*, 6 Barb., 436.) These constitute all the objections we deem it necessary to notice, presented by the bill of exceptions. The judgment is reversed and a new trial ordered.

Judgment reversed.

COX v. SMITH AND FORWARD.

JUDGMENT AGAINST PRINCIPAL AND SURETY.—Where, in an action against principal and surety on a title bond upon which they are severally as well as jointly liable, separate judgments against each are obtained, but in different amounts, the judgment creditor may insist on the satisfaction of either; but if he accepts the amount of the smaller judgment against the surety and enters it satisfied in full, the debt itself is thereby extinguished, and all recourse on the larger judgment against the principal debtor is gone, although in his entry of satisfaction he expressly reserves "all rights" against the principal debtor on the judgment against him. The attempted reservation under such circumstances is inoperative and void.

IDEM.—Equity will enjoin an execution sale under a satisfied judgment to prevent a cloud on title.

APPEAL from Marion County.

Bonham & Ramsey, for appellants.

N. B. Knight, for respondent.

By the Court, WATSON, C. J.:

This is a suit to enjoin an execution sale on a satisfied judgment, on the ground that it will throw a cloud over the complainant's title to real property if permitted to take place. The facts are as follows: George W. Cox, as principal, and Gideon S. Cox, the respondent, as surety, executed a title bond in favor of A. E. Smith, the appellant, in the penalty of $4,000. There was a failure to convey, and Smith brought an action on the bond for $2,500 damages. George W. made default, and Smith took judgment against him separately for $2,586.75—the full amount claimed as damages—for want of answer. Gideon S. defended the action, but Smith finally recovered judgment against him also, but only for the sum of $1,856.06 and costs. At the time the judgment against George W. was rendered, he was the owner in fee simple of a certain tract of land in Marion county, upon which said judgment became a lien. On or about March 15, 1882, Smith ordered an execution upon his judgment against Gideon S., but before it was issued the latter paid Smith the full amount of said judgment and costs, and the same was entered satisfied by Smith on the record as follows: "For value received I acknowledge satisfaction in full of this judgment this 18th day of March, 1882, but reserve all rights against G. W. Cox on said judgment against him." On the 31st of the same month, Geo. W., to reimburse Gideon S. in part for the money he

had been compelled to pay Smith, by reason of his having been surety on said bond, conveyed to him his title to said realty above mentioned. Afterwards, on the 15th day of August, 1882, Smith caused the execution sought to be enjoined by this suit, to be issued on the judgment against George W., and delivered to the appellant Forward, sheriff of said county, for service, who levied it upon said realty, and threatens to sell the same to satisfy a balance claimed to be still due on said judgment, being the difference between the face thereof and the amount received from Gideon S. in satisfaction of the smaller judgment against him.

In view of the authorities, it can hardly be deemed a debatable question as to whether the satisfaction of the judgment against Gideon S. also operated as a satisfaction and discharge of the judgment against George W. for the same debt. The fact that it was lesser in amount, and that Gideon S. was in fact but a surety, can have no effect upon such result. The payment and acceptance of the amount due upon the smaller judgment, in satisfaction, and its actual discharge by entry of satisfaction on the record, operated to extinguish the debt itself. And whether the debt was represented in one only, or in many judgments, its extinguishment by payment and satisfaction in respect to one judgment would have the same effect as to all the rest. Although a creditor may recover many separate judgments for the same debt against parties severally liable, he can have only one satisfaction; and a payment by one, attended by satisfaction of the judgment against him only, operates in law as a satisfaction and discharge of all the others. They are regarded as being merely cumulative. (Freeman on Judgments, sec. 467; *Sheldon v. Kibbe*, 3 Conn., 214; *Baker v. Lovett*, 6 Mass., 78; *Sherman v. Brett*, 7 Wis., 139; *The First National Bank of Indianapolis*

v. The Indianapolis Piano Manufacturing Co., et al., 45 Ind., 5.)

The judgment creditor may insist on the satisfaction of either judgment; but having accepted satisfaction of a particular one, all recourse on the others, however much larger or more favorable to his interests, is gone. And the attempted reservation of "rights" with respect to the other judgments was necessarily inoperative, as they had all merged in the satisfaction, and were no longer in existence.

Only one of the cases cited by counsel for the appellants conflicts with this view, and it is clearly contrary to the weight of authority. This is the case of *Tompkins v. Fergusen*, 10 Rich., (S. C. Law) 424. The reasoning upon which this decision rests is by no means satisfactory, and, as already stated, the decision itself is not in accordance with the overwhelming preponderance of judicial opinion on the subject. The remaining authorities cited by counsel for the appellants relate to the effect of a release of a surety, or one of two several obligors, or joint obligors, reserving expressly every right to proceed against the other on the joint obligation. But these cases are not to the point we are here considering. The contract is neither discharged nor the debt extinguished. The reservation of the right to proceed against others, implied in the first two instances, and expressly stipulated for in the last, entitles the creditor to seek satisfaction from the others severally or jointly liable unaffected by the release. But if he has received actual satisfaction of the debt, he can have no such recourse, and the attempted reservation thereof would be entirely unavailing. (*Bones v. Aiken and Powell*, 35 Iowa, 534.) That a cloud on the respondent's title would result from allowing the sale to proceed and the sheriff's deed to be executed to the purchaser thereat, is hardly doubtful. What

effect should be ascribed to the entry of satisfaction by the judgment creditor, in the margin of his judgment, as showing from the record itself the invalidity of any subsequent proceedings thereon, and of any claim of title derived through them, it is needless now to inquire. The record of the judgment against George W. Cox, upon which the execution sought to be enjoined in this case was issued, shows no entry of satisfaction, and even if such an entry could be deemed sufficient as a record to show the invalidity of subsequent proceedings upon the judgment to which it relates, in any case, it is obvious that no such question is involved here. While the satisfaction in fact of the judgment against the respondent, Gideon S. Cox, operated in law to extinguish the judgment against George W. Cox, it had no greater effect by being entered on the margin of the former judgment, than it would have had without; and such entry would not be even constructive notice of such satisfaction to a purchaser at a sale under the judgment against George W. Cox. The invalidity of the title acquired at such sale would not, therefore, appear upon the face of the proceedings through which it would be derived. The payment and entry of satisfaction on the margin of a different judgment would have no greater effect than actual payment and satisfaction of the debt represented by both judgments, in any other mode and not entered upon any record. And in such cases courts of equity will interfere to prevent clouds on titles, and grant the necessary relief. (2 Story's Eq. Jur., sec. 876; *Brinkerhoff v. Lansing*, 4 Johns. Ch., 69; *Bowen, et al. v. Clark*, 46 Ind., 405; *Meyer v. Tully*, 46 Cal., 70; *Shaw v. Dwight*, 16 Barb., 536.) We are satisfied with the correctness of the decree appealed from, and that we should affirm it; and it is so ordered.

Decree affirmed.

STATE v. CHADWICK AND BROWN.

VERIFICATION OF PLEADING.—The want of a proper subscription or verification is a mere irregularity, which is waived by pleading over.

STATE LAND FUNDS—TITLE IN STATE.—The legal title to the funds arising from the sales of state lands by the board of commissioners is in the state, and enables it to maintain any action, suit or proceeding against mere wrong doers, which may be necessary or proper for the recovery or preservation thereof.

IDEM—COMMISSIONERS ARE LAWFUL CUSTODIANS.—The board of commissioners is the lawful custodian of such funds, except the proceeds of the lands donated to the state, by congress, to aid in the erection or completion of public buildings, and is authorized by law to expend as much of such funds as may be necessary to defray the expenses of selecting and selling such lands, and the lawful disposition and management of the proceeds.

PAYMENT—HOW APPLIED.—An allegation in the answer of the members of the board, in a suit for an accounting by the state, in effect that all sums received and not paid into the state treasury, have been legally expended in payment of just and legal claims against the state, for necessary services in connection with such lands, performed by divers persons, at the request of such board, state only legal conclusions, and tenders no issue of fact.

ACCOUNTING—MONEY RECEIVED.—A payment on an open account, in the absence of any peculiar circumstances rendering an application according to equitable principles necessary, must be applied toward the extinguishment of the several items of indebtedness, according to priority in point of time. The gist of a suit for an accounting, being the failure to account for moneys received, a distinct allegation in the complaint of conversion of such money by the defendant, wholly unsupported on the trial by proof, will not prevent a recovery by plaintiff, of the amount shown to have been received and not accounted for by the defendants.

APPEAL from Marion County.

STATEMENT.

This was a suit in equity for an accounting, brought by the state of Oregon against the defendants in the circuit court for Marion county. The complaint was filed June 3, 1879. It alleges, in substance, that the defendant, S. F.

Chadwick, was the duly elected and qualified secretary of state, and acting governor of the state of Oregon, from February 2, 1877, to September 9, 1878, and that the defendant, A. H. Brown, was the duly elected, qualified and acting treasurer of said state during said period. That during said period said defendant, *ex-officio* constituted the board of commissioners for the sale of school and university and other lands in the complaint mentioned, for said state, and for the investment of the proceeds arising therefrom. That during said period defendants, as such board of commissioners, and in accordance with their lawfully prescribed duties, received from the sales of lands belonging to the state, large and divers sums of money.

Then follows an approximate statement in detail of the several amounts so received from the sales of the several different classes of lands respectively, and amounting in the aggregate to the sum of $87,062.15. It then alleges as follows: That the defendants have neglected and failed to lawfully account for, and pay into the treasury, the said sums of money so received by them as aforesaid, or any part or portion thereof, except the following amounts paid into the treasury, to-wit:

Then follows a detailed statement of the several amounts paid into the treasury, from the proceeds of sales of the different classes of lands respectively, amounting in all to the sum of $81,609.92.

It then alleges that the defendants have converted the several amounts so received by them and not paid into the state treasury, and applied them to their own use, and divers other uses and purposes, without authority of law, and contrary to the trust reposed in them, and concludes with a prayer for an accounting, etc. It is subscribed by "J. M. Thompson, attorney for plaintiff."

The defendants moved to strike the complaints from the files of the circuit court, for the reasons:

1. That it was not signed by the district attorney.
2. That the suit was brought without authority.
3. That the complaint was not properly verified.

The court overruled the motion. They then demurred to the complaint on the same grounds. This also was overruled.

The answers deny the receipt of any greater amounts in any case than the complaint admits to have been accounted for and paid in the state treasury; and then, as a separate defense, alleges the following facts:

"That all sums of money received by the defendants, or either of them, as the proceeds of the sales of lands referred to in the complaint, or otherwise, were duly accounted for and paid into the treasury in the manner provided by statute and the laws of this state."

The plaintiff, in its replications, denied this allegation. The separate defense in Brown's answer contains the following additional allegation, which was demurred to by plaintiff, and its demurrer being overruled, was not noticed in its replication.

"That all sums of money received by them, or either of them, as the proceeds of the sales of such lands, and not actually paid into the treasury, were expended by them (the defendants) as such board of commissioners, in good faith and in accordance with the constitution and laws of this state, and the orders, rules and regulations made and adopted by said board, in good faith, and according to law, and in the payment of claims justly and legally due and owing by the plaintiff, to divers persons, for services performed by them for the state, at the request of said board, in selecting, surveying and performing other duties neces-

sary to be performed in connection with sai
which said board was authorized, by law,
pay for, out of such funds; that all such cl
for the benefit of the plaintiff, and the def
titled to be credited therewith."

The case being at issue, was referred to Ho
to find the facts and state his conclusions
He found a balance due the state of $2,2
ommended a decree against the defendants f
The defendants moved to set all the findings
were unfavorable to them aside, as not bein
the evidence, and to have certain payments
Cann, who was clerk of the board, from Sep
September 9, 1878, made to the board of co
state treasurer after that date, and amounti
or so much thereof as might be necessary fo
applied in satisfaction of any deficiency w
discovered in their accounts for the term co
ruary 2, 1877, and ending September 9, 1878

The court overruled the motion, and rend
accordance with the report, from which the
pealed. The other necessary facts are stated

Richard Williams, for appellant.

A. C. Gibbs and W. G. Piper, for the sta

Opinion by WATSON, C. J., WALDO, J., co
J., not sitting.

The original complaint in this suit was n
the district attorney of the 3d judicial dis
suit was brought, and the appellants, the de
moved to strike it from the files of the court
and also attempted to raise the same poin
The circuit court overruled both the motio

and the appellants therefore filed their answer and the cause was heard and determined upon the merits. The decree of the circuit court being against the appellants, they bring this appeal and assign the foregoing rulings of the court as error.

We need not determine whether the proper district attorney alone can appear for and represent the state in judicial proceedings. That question is not presented by the records in this case. The objections made by appellant in the court below and which were passed upon there, were that the complaint was not signed by the proper district attorney, and that the suit was unauthorized. But these objections were preliminary in their nature, and were waived by filing the answer. (Moak's Van Santvoord's Pl., 778; *Delafield v. State of Illinois*, 2 Hill, 161; *Greenfield v. Steamer Gunnell*, 6 Col., 67; *Bell v. Railroad Co.*, 4 Wall., 598; Civ. Code, sec. 65.)

Neither the subscription nor verification constitute any part of the complaint, and their omission can only be deemed an irregularity, which would justify the court in striking it out, on motion. If appellant failed to apply for such relief, or having made the application and been refused the relief they were entitled to, they then waived the right to insist upon it further, as they did in this instance, by filing their answer and proceeding to trial on the merits, in either event, they could not be held to urge their objections, on appeal in this court. They cannot be permitted to take issue on the merits, and afterwards insist that the proceeding on the part of the state was irregular or unauthorized. The provision of the statute for the signing of pleadings by the parties, or their attorneys, is a general one and applies to the state as well as individuals. (Civ. Code, sec. 79.)

If the failure of any individual to subscribe his pleadings

is but a mere irregularity which is waived by the opposite party pleading over, the same must hold true where the pleadings of the state disclose the same defect. The fact that the complaint in the present instance appears to have been subscribed by an attorney who possibly had not and could not have sufficient authority to institute the suit on behalf of the state, does not alter the case. His signature, if it be deemed wholly insufficient, can only be regarded as surplusage, and the complaint occupies the same position as though it had never been subscribed at all.

Upon the second point contended for by appellants, that the board of commissioners for the sale of school lands, and not the state should have brought this suit, it is sufficient to say that while such board was created by the constitution, with power to sell, in pursuance of legislative enactment, the school and university lands belonging to the state, and invest the funds arising therefrom, which power of sale was afterwards extended by statute over all classes of state lands, still the legal title and property in such funds have ever remained in the state, until expended in accordance with some provision of law, in the same manner and to the same extent that the legal title and ownership of the lands from whose sale they were derived, were vested in the state, prior to their lawful disposal. (Art. VIII., sec. 5, state constitution, titles II. to VII., miscellaneous laws.) And this was sufficient to enable the state to maintain this suit against the appellants, who do not attempt to shelter themselves behind the power and authority of such board of commissioners. (*People v. Booth*, 32 N. Y., 397; *People v. Ingersoll*, 58 Ind., 1.)

The next question to be considered arises from respondent's omission to reply to the second allegation in the separate defense, in the answer of the appellant Brown. The

referee found, as a conclusion of law, that the board of commissioners were authorized to defray the expenses of selecting and selling the various classes of state lands, and disposing of the proceeds, as required by law, out of such proceeds, with the single exception of clerical aid in the case of school lands. The court below, in confirming the report, necessarily adopted this conclusion as its own. We are satisfied with the correctness of this view. It seems to be only a fair deduction from the various legislative provisions on the subject, and to accord with the practical interpretation given by the legislature of the powers and duties of the board of commissioners. In attempted conformity with this view, evidently, the allegation in the separate defense in Brown's answer was framed.

We shall pass over the question of the effect of such a defense when, sufficiently alleged, as a bar to a suit for an accounting properly brought. For it is apparent, we think, from the most cursory examination of the allegation referred to, that it states only conclusions of law, and not issuable facts. It is, in substance, that the money for which the account is sought has all been legally expended by the appellants as such board of commissioners. No denial of such allegations was necessary. Besides, it also appears from the record in the case that an account of such expenditures was taken before the referee, and that the appellant not only appeared before him and offered evidence to establish such items, but appeared before the court below, when his report was filed, and moved that a portion of said report disallowing certain of such items, amounting to the aggregate sum of $712.07, as not having been proven, be set aside. It is thus made apparent from the record itself that the issue intended to be tendered by such allegation in the separate defense in Brown's answer was as fully tried and de-

termined as it could have been under the r
nials in the replication, and that, too, withou
being interposed by appellants until the
brought into this court on appeal. The obj
too late if otherwise well grounded.

The appellants contend, in the next place,
should have credited them with a portion,
money paid into the state treasury, and to
uals, by T. H. Cann, as shown by his supplen
June 9, 1880, in evidence in the case, and a
aggregate to the sum of $8,951.85, after th
their official term as members of such board
ers, and of Cann's relation thereto as clerl
court below erred in refusing to set aside or
port of the referee in this respect. The evi
to the funds with which these payments were
is extremely meagre and unsatisfactory. I
ever, from Cann's testimony, that all the
making such payments was derived from t
various classes of state lands by the board of
and entrusted to his keeping as clerk of the
testimony, as reported by the referee, Cann s
to this subject: "The payment of $8,951.8
good many sources. The sale of land. *
moneys did not come from the University
moneys paid in for land that did not accrue
* * I ascertained that I still owed the s
$8,951.85, because I had the money, and m
it after 1870. My accounts balanced in
standing this $8,951.85. The money was
lands not yet secured to the state."

These extracts from his sworn testimony
contained in his supplemental report, the tes

McCornack, Cann's successor as clerk of the board of commissioners, showing that the payments stated in the supplemental report to have been made, had been made as reported; and the state of the various funds to which the proceeds of the sales of the several classes of state lands respectively belonged, at all times, from September, 1870, to September, 1878, a period embracing two official terms of said board, and covering the whole time that Cann was employed as clerk, comprise all the evidence as to the origin of such funds, and other facts from which the rule as to their application was to be deducted by the referee. He applied the payment made by Cann upon the first deficiencies in the accounts of the board occurring during Cann's term as clerk, commencing in September, 1870. The result was that such payments were wholly exhausted in the settlement of deficiencies happening prior to Feb. 2, 1877, when by the resignation of Gov. Grover the board was left composed of the appellants, S. F. Chadwick, secretary of state, and acting governor, and A. H. Brown, state treasurer, only, and leaving nothing to be applied upon the deficiencies subsequently occurring in their accounts, found by the referee to amount to the sum of $2,381.59. It was conceded by both parties at the hearing that there never was any appropriation of the payments made by Cann by either party, and that it was a simple question of law, upon the foregoing facts, how it should be applied. The general rule, that an indefinite payment on a running account will be applied to extinguish the several items of indebtedness according to their priority in point of time, will not be questioned. (*U. S. v. Kirkpatrick*, 9 Wheel., 739.) But appellants claim there was something peculiar in the circumstances of the present case, which takes it out of the operation of the general rule. In short, they insist that these payments are

shown by the proof introduced upon the trial before the referee, to have been made with moneys received in part, at least during their official term from February 2, 1877, to September 9, 1878, and charged against them in their account, and that they are entitled to credit for so much of the amount paid by Cann as is shown by the proofs to have been received during their term.

The legal proposition contended for by them is undoubtedly sound. (*Stone v. Seymour and Bouck*, 15 Wend., 20; *Brulenbecker v. Dowell*, 32 Barb., 9; *United States v. Jonneay*, 7 Crouch, 57; *Jones v. United States*, 7 How., 681.) Now, as to the facts which appellants assume to be established by the proofs. Cann says in his supplemental report of June 9, 1880, which was admitted as evidence in the trial before the referee, without objection from either party: "These payments were made towards completion of the transactions of the former board, and the moneys paid should be credited to them on account of discrepancies arising since September, 1870, and thereafter."

Then follows a statement of the amounts expended or paid into the state treasury, on account of the several funds arising from the sales of the several classes of state lands respectively, and altogether making said aggregate of $8,951.85. Among others, the supplemental report shows payments on account of the university fund amounting to $756.37, and a single payment on account of the capitol building fund of $1,000, under date of October 5, 1878. The proofs are decisive that on February 2, 1877, deficiencies existed in the accounts of the board of school land commissioners, occurring since September, 1870, in respect to every fund except the capitol building fund, in the aggregate more than sufficient to absorb the whole amount of

Cann's payments in their settlements, if such payments should be so applied.

We have already given the material portions of Cann's sworn statements before the referee in regard to these payments. The payments were made after the official term of the appellants had expired, and after Cann's relation to them, as clerk of the board which they composed, had also ceased. There is no ground, therefore, for the presumption that Cann was acting under their directions as a board in making such payments; nor for the inference that might have been drawn, if the payments had been made during their official term, that they were from funds currently received by and debited to them, and therefore credits in their account.

The facts that they composed the last board of commissioners, and that their accounts exhibited the latest deficiencies during the time from September, 1870, to September, 1878, in view of the further fact that Cann, who made the payments, was clerk of all the different boards which occupied that whole period, and manifestly had the possession and custody of all the funds, or the greater portion of them at least, during that period in which the deficiencies are found to exist, afford but slender ground, in our judgment, upon which to base such an inference. The facts, however, of there having been no deficiency in the capitol building fund prior to February 2, 1877, of the occurrence of a subsequent deficiency of $1124.72, and of Cann having paid $1000 into the state treasury on account of such fund, although after the official term of appellants had expired and his own relation to them as clerk of the board, which they composed, had ceased, have been strongly pressed by appellants, as showing that such sum of $1000, at any rate, belonged in that fund, and should therefore have been al-

lowed as a credit to appellants against the amount of such deficiency with which they were charged. If these facts stood alone, they would perhaps warrant the conclusion contended for by the appellants.

But, in the same supplemental report which shows this payment, Cann says, as we have already seen, that these payments should be credited against "any discrepancies in the accounts of the board arising since September, 1870." The statements in this report are evidence in the case. In his testimony before the referee, Cann states explicitly that no portion of these payments came out of the university fund, and yet they were made on account of that fund to the extent of $756.37. Immediately following this statement, and in reference to these same payments shown by his supplemental report, he says, "It was moneys paid in for lands that did not accrue to the state." Under the law, the board of commissioners were required to pay into the state treasury the proceeds of the sales of the ten sections granted to the state to aid in the erection of public buildings, to create a capitol building fund, but in all other cases the board retained the custody and management of the proceeds of state lands made by them under the authority and direction of legislative enactment. (Title V., chap. 29, Miss. Laws.)

Unless Cann had this distinction in his mind, and intended to state that the funds out of which these payments were made did not arise from the sales of such ten sections of land donated towards the erection of public buildings by the state, we are at a loss to comprehend his meaning. But let this be as it may, his testimony does show most implicitly and unequivocally that the portion of these payments which he attempted to appropriate to the account of the university fund, amounting to $756.37, did not arise from the sales of the university lands, and consequently did not

belong to that fund. The greater part of this amount was paid into the state treasury only two days after the payment on account of the capitol building fund, and in the absence of any pretense of mistake or offer of explanation on Cann's part, in reference to his misapplication of the public funds in his hands, the inference from the fact of his payment on account of the capitol building fund that the money used in making such payment properly belonged in such fund, is very slight, indeed. Cann also testifies, as we have seen from the citation from his evidence, "I still owed the state the sum of $8,951.85, because I had the money, and my books showed it, after 1870." Evidently, when Cann made these payments he regarded himself as the real delinquent and recognized his obligations to satisfy the deficiencies in the accounts of the board during the entire period he was acting as their clerk, to the extent, at least, his books showed he had received the money from the sales of state lands, and had not paid it over. And he plainly made these payments to cover balances against himself appearing, as he testifies, upon his own books. He makes no distinction on account of the changes in membership in the board of commissioners during his own term as clerk thereof, in his testimony. If his intention could be deemed of any moment in the controversy between the different sets of commissioners, we think it quite clear that his purpose in making the payments was to settle all the discrepancies in the accounts of the board from the beginning of his own term as clerk, without regard to the changes which occurred in the membership of that body during that term, or to the individual liability of any person besides himself.

Upon this evidence, the able and learned referee failed to find as a fact that these payments, or any portion of them, were made out of funds received during the term of the ap-

pellants, from February 2, 1877, to September, 1878, or any other facts entitling them to be credited with any portion of it upon their accounts during said term. This is the most favorable light for the appellants in which the matter can be put, and it is claimed by them that the court below erred in refusing to set aside the report on this ground.

We do not think the proofs established the fact that any portion of the money paid by Cann was received during such official term of the appellants, or that they established any other fact entitling the appellants to an equitable application of the same upon their accounts for that term. The preponderance of evidence appears to us to be upon the other side, and we think fully sustains the referee's conclusion.

The only remaining objection presented in the brief of the appellants is, in substance, that the complaint charges them with receiving large sums of money and converting the same to their own use, and applying it to uses not allowed by law, while the testimony on the part of the respondent tends to show only that Cann, as clerk and custodian of the funds of the board, received more money than he accounted for, and consequently that there is an entire failure of proof. But it seems quite clear to us that the gist of the suit is a failure on the part of the appellants to account for and pay over money received by them which belongs to the state. These allegations are directly made in the complaint, and are entirely distinct from the allegation of conversion by appellants, and show a good cause of suit. The latter allegation should be treated as surplusage.

The decree of the circuit court is affirmed with costs to the respondents.

POPPLETON v. NELSON.

APPEAL—PARTIES.—An appeal will not be dismissed for want of necessary parties, where as between the parties to the appeal, the decision appealed from may be reversed or modified in some substantial particular without affecting the rights of other parties to the litigation in the court below, under such decision, who have not been made parties to the appeal.

IDEM—NOTICE—UNDERTAKING.—The undertaking for an appeal may be filed at any time after service of the notice, although on the same day. Where the undertaking appears to have been filed on the same day the notice is served, the law will presume it was filed afterwards.

IDEM—NOTICE MUST BE SIGNED BY ATTORNEY, WHEN.—If the appellant appeared by attorney in the court below, and the record fails to show any change and appearance by himself, in person, the notice of appeal must be given by such attorney, and a notice purporting to be given and signed by the appellant in person is invalid, and will not enable him to maintain his appeal.

APPEAL from Yamhill County.

PER CURIAM:

The grounds set forth in the motion to dismiss are: 1. The notice of appeal has not been served on all the necessary parties; 2. The undertaking for the appeal was filed before the notice; 3. The description in the notice of the decree appealed from is insufficient; 4. The notice is not signed by the appellant's attorneys of record, in the court below, but purports to have been given and signed by himself alone. The third ground was waived by respondent's counsel at the hearing, and need not, therefore, be considered. The first ground seems to us, upon an examination of the transcript, clearly untenable. The interest of the appellant Nelson, in securing a reversal of the decree, can in no way be deemed adversed to the rights of his co-defendant. If he fails in procuring a reversal he must pay the costs. If he succeeds, the land supposed to be represented by his co-defendant as administrator of Isaac Rogers, deceased, will

be relieved from a heavy incumbrance. In no event could the interests claimed to be represented by the administrator suffer any injury from the appeal. As to the second ground, our conclusion is the same. The provisions of sec. 510 of the code, for the computation of the time within which an act is to be done, only exclude the "first day" from such *computation*. They never could have been intended to prevent such act from being considered and treated as having been done on that day. The only purpose of the statute was to furnish a rule for ascertaining the period within which the subsequent act should be performed. But the fourth and only remaining ground specified in the motion to dismiss, gives rise to questions of greater difficulty.

The appellant appeared in the suit in the court below by attorneys. They appear from the record to have appeared for and represented him there until the final decree was entered against him. Without any change of attorneys upon the record, appellant attempted to give notice of an appeal on his own behalf and in his own name. Section 1000, civil code, provides: "An attorney is a person authorized to appear for and represent a party, in the written proceedings in any action, suit or proceeding, in any stage thereof." * * And section 1001 is as follows: "Any action, suit or proceeding may be prosecuted or defended by a party, in person, or by attorney, except that the state or a corporation, either public or private, appears by attorney in all cases; and where a party appears by attorney the *written proceedings* must be in the name of the attorney, who is the sole representative of his client, as between him and the adverse party, except as provided in the last section." Section 1010 provides for the change of attorneys of record, and the succeeding section 1011 contains the following provisions: "Where an attorney is changed, as provided in the last sec-

tion, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, shall be given to the adverse party. Until then he is bound to recognize the former attorney."

This court has repeatedly held that the notice of appeal may be served on the attorney of record residing within the county where the action is pending under section 521. (*Lindley v. Wallis*, 2 Or., 203; *Rees v. Rees*, 7 *id.*, 78.) Now if the attorney of record may be served with a notice of appeal, his authority to give one should not be denied. Both are based upon the proposition that he represents his client, in the proceeding to appeal. This principle seems clearly involved in and established by these decisions. What, then, can prevent the application of the provisions of section 1001, above cited, to the proceeding to appeal? The notice of appeal is unquestionably a "written proceeding" within the meaning of that section, and if its provisions do apply, should have been "in the name of" the attorneys of record in the suit below. The respondent was "bound to recognize" such attorneys in this case, no notice having been given him of any change, as required by section 1011. Was he also "bound to recognize" the appellant himself, under such circumstances? We think not, and that he was under no necessity of noticing any "written proceedings" not coming from, nor "in the name of," the respondent's attorneys of record. Nor can his rights in the premises be permitted to be affected in any way by the attempt of the appellant to give a notice of appeal in his own name, when the exclusive authority to do so was vested by his own act, under the law, in his attorneys of record. The appeal must be dismissed with costs to the respondent.

Dismissed.

SAVAGE v. GLENN.

CONTRACT—ARBITRATION—DAMAGES.—G. entered into a written contract with S. in April, 1880, to build a brick building at The Dalles for S. G. began and was carrying on the work, when, in July, 1880, during the high water, the foundations gave way and the unfinished building fell to the ground. G. claimed that S. had undertaken to become responsible for the sufficiency of the foundations and was chargeable with the fall of the building. In October, 1880, the parties agreed in writing to leave the decision of the question to arbitrators, and that pending their decision G. should go on with the work under the contract, with the privilege to S. of making certain alterations in the specifications. Nothing was done under the second contract, and S. brought his action for damages for breach of the original contract; *Held*,

1. That the agreement to arbitrate could not be pleaded as a defense to the action, and that G. having failed to go on with the work under the second contract, and having failed to charge his default to S., he could not defend under that part of the agreement.
2. That the instruction to the jury that the measure of the damages was the installments paid by S. to G. under the contract, was error; that the measure of damages was the difference between what it would cost S. to finish the building and what he would have had to pay G. under the contract, together with the probable rental value to S. of the building during the delay caused by G.'s original default and subsequent promises to go on with the work.
3. That the materials in the building at the time of its fall belonged to S., and that G. was entitled to credit for such materials and such work as he had done in digging for the foundations to the extent such work and materials would tend to reduce the cost to S. of completing the building; but that materials on the ground and unattached belonged to G. and that S. could not be charged with their value.

APPEAL from Wasco County.

Williams, Hill, Durham & Thompson, for appellant.

C. B. Bellinger, for respondent.

By the Court, WALDO, J.:

This is an action for damages for a breach of a written contract made on the 3d day of April, 1881, in which the appellant agreed to build at The Dalles a brick building for

respondent for the sum of $6,000, to be paid in installments at stages specified in the progress of the work. The appellant began and was carrying on the work and had got the first two installments, of $2,300, when, on the 3d of July, 1880, during the high water, the foundation gave way and the work fell to the ground. The appellant charged respondent with the responsibility for the fall of the building, which led to the written agreement of October 16, 1880, in which the parties agreed to submit the dispute to an arbitration, and that on the signing of the contract Glenn should immediately go on with the work. Nothing was done under this agreement. The case comes up on exceptions to certain instructions given to the jury and on the refusal to give instructions asked by appellant. The court instructed the jury in effect that the agreement of October 16, 1880, could not be considered by them in estimating the damages. This view of that agreement was correct. As an agreement to arbitrate, unexecuted, it could not be pleaded as a defense to the action. (*Wallis v. Carpenter*, 13 Allen, 24; *Rowe v. Williams*, 97 Mass., 163; *Wood v. Humphrey*, 114 Mass., 185; *Pearl v. Harris*, 121 Mass., 390; *Knaus v. Jenkins*, 40 N. J. L., 288, and authorities cited.)

Glenn's undertaking to go on with the work cannot alter this construction. It is not necessary to consider the consequences of performance of that undertaking. There was no performance, and there is nothing in the case to charge the default to Savage, unless it is found in the twelfth instruction asked by appellant, that: "If the jury believe from the evidence that after and at the time the second contract was made, it was understood and agreed between the parties that they would arrange as to when the work should be commenced, and the plaintiff refused thereafter to make any such arrangements or to furnish the defendant any specifi-

cations for the new foundation walls, and the defendant offered within a reasonable time, all things considered, after such contract was made, to go on with the work according to the contract, and plaintiff refused to allow him to do it, plaintiff cannot recover."

Now it was Glenn's duty, under the contract of the 16th of October, to go on with the work as called for by the first contract without any further directions. While Savage had reserved a right to make some alterations in the specifications as to the foundations, he did not make the exercise of this right a condition precedent to the commencement of work. Glenn was to go on with the work immediately; he was not to offer to go on. If Savage failed to suggest alterations in time, he would be concluded. The court rightly refused this instruction.

But the court erred in instructing the jury that the measure of damages was the installments paid by plaintiff to defendant under the contract. But it was not error to refuse the instruction asked by appellant, that: "The true measure of damages in this case is the difference between what it would have cost plaintiff to construct such a building as is provided for in the contract, and the amount which plaintiff would have had to pay defendant to complete said building according to the contract." The measure of damages was as stated and something more. The respondent was entitled to recover for loss of rents. But it is not sufficient to prove merely the conjectural rental value of the building to entitle him to recover on this ground. He should show what amount in rents he would have, probably, in fact recovered. The difficulty of showing the actual loss or the possibility that respondent might not have received any rent within the time, should not prevent the question of probable loss going to the jury. (*Gilbert v. Kennedy*, 22 Mich., 117; *Hexter*

v. Knox, 63 N. Y., 561; *Sewals Falls Bridge Co. v. Fisk*, 23 N. H., 171; *Abbott v. Gatch*, 13 Md., 332; *Rubb v. Rinaldo*, 55 N. Y., 664.) The respondent, however, can only recover for such reasonable time beyond the time at which the appellant should have delivered the building to him under the contract, as it would have taken respondent to complete the building, and such additional delay as may have been caused by appellant's promises to go on with the work. (*Willey v. Fredricks*, 10 Gray, 357; *Davis v. Talcott*, 14 Barb., 627, 628.) In making the calculations of the cost of completing the building, the materials in the structure at the time of its fall must be taken into account. They had become part of the realty and belonged to Savage. (*Rogers v. Gilinzer*, 30 Pa. St., 185; *Wilmarth v. Bancroft*, 10 Allen, 248.) The appellant is entitled to credit for the work done in digging for the foundation and for such materials as had been put into the building, to the extent they tend to reduce the cost of completing the building. But material lying on the ground and never attached to the realty belonged to Glenn. (*Woodman v. Pease*, 17 N. H., 282.) The respondent cannot be charged with them.

As no evidence is found in the record showing the value to the respondent of that part of the work and materials which had become his property, we are without the requisite *data* to determine whether the erroneous ruling or the measure of damages prejudiced the appellant. We must, consequently, reverse the judgment and order a new trial.

OREGON RAILWAY AND NAVIGA
OREGON REAL ESTATE

Evidence—Right of Way.—Evidence of an effort
before the commencement of an action, to ag
pensation for a right of way, is a prerequisite
of suit.

Tender and Payment into Court.—Payment into
admission of damages to the amount of the te
paid it becomes the money of the party to whom

Easement.—In an action for right of way, an easem
acquired by a railway. A title that may be fre
cannot be acquired by a private corporation b
Land can only be taken for the particular u
sought to be appropriated.

Appeal from Multnomah County. The
in the opinion.

Dolph, Bronaugh, Dolph & Simon, for r

William Strong & Sons, for appellant.

By the Court, Waldo, J.:

This is an action by the Oregon Railway
Co. for a right of way over the lands of t
East Portland. The complaint alleges tha
was "unable to agree with the owners of sa
right of way over the same, and believing
fifteen hundred dollars was the full value a
sation for the lands herein sought to be appr
purpose aforesaid, plaintiff caused the said
dered to the defendant before the commence
tion, which sum plaintiff brings into cour
and still is, and ever since has been ready, t
ant for said right of way."

The appellant argues that this allegation
to give the court jurisdiction of the acti

statute makes it a condition precedent to the commencement of the action, that the parties were unable to agree as to the *compensation* to be paid, and that it does not appear from the complaint that this was the point on which they were unable to agree. It appears, however, from the complaint, argumentatively, in the plea of tender, that they were unable to agree as to the compensation. Argumentative pleading is aided by verdict. (Gould's Pl. Ch., 3, sec. 30.)

But the exceptions show that no evidence of the fact of an effort having been made, before the commencement of the action, to agree as to the compensation, was offered at the trial. This evidence was a prerequisite to establish a cause of suit. (Cooley on Con. Lim., 528, 529.)

The instruction that the jury might find the damages to be any sum not less than two hundred and fifty dollars, and not exceeding eleven thousand dollars, as to the minimum of damages, was error. The payment into court was a positive admission of damages to the amount of the tender. The money paid in became the money of the appellant. (*Schmeer v. Hickcox*, 45 Wis., 200, and cases cited.)

After such payment into court and the refusal to accept such sum in full satisfaction, the continuation of the action was for the purpose of ascertaining what greater damages, if any, the appellant had sustained, above the amount admitted by the respondent.

The entry of judgment for the land, absolutely, was error A title that may be freed from public use, cannot be acquired by a private corporation, by eminent domain. So land can only be taken for the particular use for which it is sought to be appropriated—that is, in this case, for the purpose of a railway, an easement was all that was called for, and all that the respondent could acquire. (*Hegneman*

v. Blake, 19 Cal., 539, 579; 1 Redfield on Railways, 246; *West River Bridge v. Dix*, 6 How., 538; *Geisy v. C. W. and Z. Railroad Co.*, 4 Ohio St., 338.)

Judgment reversed and a new trial ordered. LORD, J., concurring; WATSON, C. J., absent.

SETTLEMIRE v. NEWSOME.

REDEMPTION BY GRANTEE OF JUDGMENT DEBTOR.—Lands sold on execution for an amount less than the judgment debt, and redeemed by the grantee of the judgment debtor, may be a second time sold for the balance due on the judgment.

APPEAL from Marion County.

By the Court, WALDO, J.:

The question in this case is, whether lands sold on execution for an amount less than the judgment debt, and redeemed by the grantee of the judgment debtor, may be a second time sold for the balance due on the judgment. The statute gives the grantee of the judgment debtor the right to redeem, but is silent as to the effect of the redemption.

The lien is a quality in the judgment, inseparably connected with it, which determines the extent of the right to take the land in execution under the judgment as against adverse claims. The lien binds the title of the judgment debtor, and, until there has been a legal transmutation of that title, the lien should, apparently, continue. There is no sale in a legal sense until the title has passed. (*Macy v. Raymond*, 9 Pick., 286.)

The execution comes as a power to seize the debtor's title and pass it to the purchaser. The lien binds the title—the ownership in the land—and having attached to the title, prevents its transfer by the debtor so as to affect the lien.

It is not sufficient, to divest the lien, that the power should be partly executed by an inchoate sale. The sale is but one of the steps in the exercise of the power. The power must be fully executed, to make that change in the status of the property necessary to divest the lien. This is done by the seizure on execution and transfer of the seizin by a legal sale. (*Tropnall v. Richardson*, 8 Eng., 543; *Ladd v. Blunt*, 4 Mass., 403; *Green v. Burke*, 23 Wen., 490.)

The purchaser at the sale holds a defeasible equitable right to a conveyance of the legal title. The lien is a legal right relative to the legal title, and the purchaser's equity can only affect it as it affects that title. But the lien is suspended, because the title bound by the lien is in the grasp of the law; free the title from that grasp and the lien binds as before. Now when the grantee of the judgment debtor redeems, the process of transfer is arrested. The equitable title of the purchaser falls into the legal title in the hands of such grantee and is instantly merged. No notice can now be taken of that title. It is as if it had never existed.

It follows that the respondent was entitled to judgment as held by the court below. Among authorities consulted, see *Wood v. Colvin*, 5 Hill, 228; *Titus v. Lewis*, 3 Barb., 70; *Catlin v. Jackson*, 8 John., 520; *Rutherford v. Newman*, 8 Minn., 47; *The State v. Sherrill*, 34 Ind., 57; *Allen v. McGaughy*, 31 Ark., 260; *Davis v. Ehrman*, 20 Post., 259; *Bagley v. Ward*, 37 Cal., 132; Opinions of Graves, C. J., and of Campbell, J., in *Butler v. Whiting*, 29 Mich., 135; *Eldridge v. Wright*, 55 Cal., 531; *Webb v. Russell*, 33 R., 393.)

Judgment affirmed.

STATE v. ANDERSON.

1. A motion based on facts therein stated, but not other in the record, cannot be considered on appeal.

2. The mere fact of a party having appeared as a witn grand jury upon a charge of crime of which he i indicted and convicted, is no ground for reversal of th

3. The prosecution cannot be deprived of the benefit of of a witness, at the trial, who has been examined be jury finding the indictment, but whose name by in mistake has not been inserted at the foot, or endorse dictment, as required by sec. 61 of the criminal code, circumstances omitted from the copy delivered to the his arraignment, where he has not been misled or pre by with respect to his defense.

4. Evidence of a party's previous declarations are adm dence against him, but not in his favor unless as criminal, the same as in civil cases, and without rega they were favorable or adverse to his interests at the ance. When admissible in his favor as *res gestae*, fact must be properly established by other competent

5. Evidence of the defendant's previous declarations offe behalf to negative the existence of criminal design, a wise free from objection, is still inadmissible, unless of such design at the time the declarations were affirmed by the prosecution, or essentially invalid w introduced to show the defendant's guilt.

6. Hypothetical questions propounded to expert witne based on facts appearing in the proofs; nor is expert missible at all in respect to matters within the scop observation and experience, such as the dangers incid of fire-arms by several persons hunting for game, in

7. The failure of a defendant in a criminal action to trial in his own behalf, affords no inference as to guilt and such failure furnishes no grounds for unfavora by the prosecution to the jury. But such conduct on prosecution is no ground for reversal, unless conn upon the record with error on the part of the court mitting it against the objection of the defendant, or o suitable instructions to the jury concerning it when on behalf of the defense. A mere exception to th counsel for the prosecution, without obtaining or obtain any action thereon by the court, is immateri be considered on appeal.

8. It is not error for the court on a trial for murder in the first degree to give the jury a general description of the offense, although embracing modes of commission not alleged in the indictment nor appearing in the proofs, provided the definition of such crime properly applicable to the pleadings and testimony be afterwards correctly and distinctly given to the jury as to law governing them in the particular case.
9. Belief beyond a reasonable doubt may result as the combined effect of several independent inferences arising from distinct facts, where no one of them separately would justify such belief.
10. Where the court gives a correct and intelligible definition of "reasonable doubt" to the jury in a criminal action, it is not error to refuse to give an equally correct definition of the same thing preferred by the defendant.
11. There is no difference between a subsequent occurrence "directly tending" to prove a previous fact, and one which simply "tends" to prove it; and an instruction based upon a supposed distinction between them is immaterial.
12. The entire charge of the court to the jury should be considered to ascertain the meaning and effect of any particular portion excepted to.
13. Deliberation and premeditation as constituting essential elements of the crime of murder in the first degree, may be inferred from the manner and circumstances of the homicide, in harmony with the provisions of sec. 519 of the criminal code.

APPEAL from Multnomah County. The facts are stated in the opinion.

J. G. Chapman and W. M. Gregory, for appellant.

Caples & Mulkey, for respondent.

By the Court, WATSON, C. J.:

The appellant, Alfred Anderson, was indicted by the grand jury of Multnomah county, on the 18th of December, 1882, for the crime of murder in the first degree, for the felonious killing of his brother, Carl Anderson, on Swan island, in said county, on the 9th of the preceding October. At the next January term of the circuit court of said county, he was tried upon said indictment, convicted, and sentenced to death. From this judgment he has appealed. The following rulings of the lower court have been assigned as

errors by appellant's counsel: 1. Error of
the defendant's motion to quash the indictr
The making a witness of the defendant be
jury in this case in the finding of the in
contrary to law. 3. Error of law in ove
murrer of the defendant to the indictment
ror of law occurring during the trial of th
cepted to by the defendant. 5. Misconduct
key, assistant district attorney, in this acti
trial of this cause. 6. Error of law in refu
structions to the jury, asked for by the def
ror of law in the instructions of the court g
and excepted to by the defendant. 8. Error
ruling the defendant's motion for a new tria
law in the form of the judgment in not s
for which the conviction had been had in s
The insufficiency of the evidence introduced
to the jury in this cause to justify the verc
the verdict of the jury herein is against
judgment herein is contrary to section 15 of
constitution of Oregon.

In the motion to quash the indictment m
first assignment of error, it is stated that
was not found and presented by any lawf
grand jury, as it appears by the records of
Geo. W. Phelps and John Coker constitute
said pretended grand jury presenting and
dictment. That it appears from the record
that Geo. W. Phelps and John Coker were
grand jury room at the time said indictment
and found by the grand jury, and at the tin
upon which said grand jury acted was h
Phelps and Coker were not a part of said gr

motion was filed after the arraignment and at the time the appellant was required to plead to the indictment. At the same time the demurrer mentioned in the third assignment of error was filed.

It is a sufficient answer to the first assignment of error to say that none of the facts stated in the motion to quash do appear in the record before us in any other manner than by the statements in the motion itself. The order overruling the motion is general in its terms; and the grounds of the ruling nowhere appear. Whether the decision made was upon the ground that the statements in the motion were untrue in fact, or insufficient in law, cannot be discovered from the record before us; and under such circumstances we must presume that it was right. The demurrer was, in effect, a general one, and as appellant's counsel have failed to point out any defect in the indictment, and we have not been able to discover any, we are driven to the conclusion that the demurrer was properly overruled.

The name "Alfred Anderson" appears inserted at the foot of the indictment as one of the witnesses examined before the grand jury. This is all the record shows upon the subject. If we ought to infer that such witness and the appellant is one and the same person, from identity of name, still we are unable to discover how the simple fact of his appearance as a witness before the grand jury which found the indictment against him, alone, and disconnected from every other fact and circumstance showing or tending to show imposition, abuse of authority, or even injury voluntarily incurred, can be successfully urged here as a ground for reversal. It does not appear that his attendance as a witness before the grand jury was not his own voluntary and considerate act; nor that any advantage was taken by the grand jury, or at the trial, of anything he said or did

before the grand jury; nor that he gave any testimony or furnished any proof to the grand jury whatever, touching the subject of Carl Anderson's death, or his own relation thereto, which had any effect in bringing about the finding of the indictment against him, or his conviction thereon; nor indeed that he gave any testimony or did any act upon that occasion that either was or could have been used to his detriment. Besides, it does not appear that this matter was ever brought to the attention of the lower court by motion to quash the indictment or otherwise, or that any ruling upon it was either obtained or sought in that court. It is plain that upon this state of facts the objection attempted to be made here on this ground cannot be entertained for a moment.

Under the fourth assignment of error, the appellant's counsel have specified several rulings made by the lower court during the progress of the trial upon the admission of testimony. One Frank Skow was a witness before the grand jury and his name was properly inserted at the foot of the indictment. In the copy delivered to the appellant at the arraignment, the name of this witness was written thus: "Frank S. Kow." When the witness was called by the prosecution to testify at the trial, it was shown to the court from his own testimony that he had been examined as a witness before the grand jury, and his further examination as a witness for the prosecution was objected to by appellant's counsel on the ground that his name did not appear as a witness upon the copy of the indictment delivered to the appellant upon his arraignment as aforesaid. The objection was overruled and an exception taken. Assuming that the case stood just as though the witness' name had not been inserted at the foot, or endorsed upon the indictment at all, as required by section 61 of the criminal code, still

we can perceive no ground of error in the ruling excepted to. It was the duty of the grand jury to insert the witness' name at the foot, or endorse it upon the indictment, before presenting it to the court as required by said section, and such provision was manifestly designed for the protection of the party accused by the indictment of the commission of crime. But we do not think the mere failure to do so, through inadvertence or mistake, and without any wrongful intention, should subject the prosecution to the loss of the witness' testimony altogether, where the accused has suffered no injury or prejudice from such omission. And the failure of the district attorney to see that the names of witnesses inserted at the foot or endorsed upon the indictment, properly appeared on the copy delivered to the accused on his arraignment, under like circumstances could at most be accorded the same effect. It is not claimed that the omission was intentional in this instance, or that the appellant was surprised or in any manner prejudiced by it with respect to his defense. Indeed, in view of the facts as they appear in the record, it seems extremely improbable that he was, or could have been misled by it; and such has been the construction placed upon a similar statute by the supreme court of California. (*People v. Lopes*, 26 Cal., 112.) We are satisfied, therefore, that this exception should not prevail.

The financial condition of the appellant immediately prior to the death of Carl Anderson, being a material subject of inquiry before the jury, the court below admitted evidence of his statements in regard thereto, as tending to establish the fact that he had no means prior to his brother's decease, but refused to admit evidence of other declarations made by him of a contrary purport. The appellant, by his counsel, duly excepted to the ruling of the court below in each in-

stance. They contend here that this evidence was not admissible on the ground that the statements were against the appellant's interest, for they were in accord with his interest *when made;* and that if admissible as part of the *res gestae* of his financial condition, those in his favor were admissible equally with those which were against him. But the admissibility of a party's own previous statements or declarations in respect to the subject in controversy, as evidence against him, does not in any manner depend upon the question whether they were for or against his interest at the time they were made, or afterwards. The opposite party has a right to introduce them if relevant and voluntarily made, no matter how they may stand or have stood in relation to the interest of the party making them. (1 Greenl. on Ev., sec. 169; Wharton's Crim. Ev., secs. 623, 631; *The State v. Lewis*, 45 Iowa, 20; *Fraser v. The State of Georgia*, 55 Ga., 325.) But the appellant had no right to introduce such declarations in his own behalf as part of the *res gestae*. This would permit the principal fact to be established wholly by proof of the *res gestae*, when the only office of the latter is to illustrate the character of the principal fact. This is not allowable. (1 Wharton's Law of Ev., sec. 266.)

Otto Permin, a witness for appellant, after testifying to having heard a conversation between the appellant and deceased about going out hunting, in the forenoon of the day on which the latter is supposed to have been murdered—evidence tending to show that the appellant and deceased did in fact go out hunting together that afternoon to Swan island, where the body of deceased was afterwards found, having already been introduced—appellant's counsel asked him the following question: "Was anything said that day when you were talking about hunting or when they were

talking about hunting, about your going hunting with them?" Counsel for the prosecution objected to the question, the objection was sustained by the court, and the appellant by his counsel excepted to the ruling. There was no proof introduced at the trial tending to show that the alleged design to murder the deceased during this proposed hunting excursion was contemplated by the appellant prior to or at the time of the conversation testified to by the witness Permin. If, then, it could have been shown by this witness that the appellant, during such conversation, pressed him to accompany him and his brother on their proposed hunting excursion that afternoon, it would have been clearly irrelevant. The only effect that could be claimed for it would be that it tended to prove the absence of any design to murder on the part of the appellant at the time of the conversation, and with respect to the particular occasion in view. And as the existence of such design had not been affirmed by any proof tending to that conclusion, introduced at the trial on either side, the declarations offered could have subserved no legitimate purpose, and their admission could only have tended to produce confusion and mistake on the part of the jury.

The appellant by his counsel also offered to introduce expert testimony to show the great danger and liability to accident existing where several persons go out hunting in company, for the purpose we suppose of making it appear, in connection with the other facts proved in the case, that the shooting of the deceased was probably an accident. The evidence was rejected, and exceptions taken. In the first place, the facts assumed by the hypothetical questions propounded to the expert witnesses had not been proved, nor attempted to be proved. And in the second place, the opinions sought to be elicited from such witnesses related

to matters as much within the ordinary observation and experience of men acquainted with the use of fire-arms and the common principles of human conduct, as almost any other subject which jurymen are called to pass upon. And either view is fatal to the exceptions upon this point. (*Guetig v. State*, 66 Ind., 95; *Muldowning v. R. R.*, 39 Iowa, 615; *Hill v. R. R.*, 55 Me., 438; *State v. Watson*, 65 *id.*, 74; *Linn v. Segsbee*, 67 Ill., 75.)

The appellant did not offer himself as a witness at the trial, as he had a right to do under the law. The alleged misconduct of M. F. Mulkey, assistant district attorney, referred to in the fifth assignment of error, is set forth in the bill of exceptions as follows: "And be it further remembered that, during the course of his address to the jury, M. F. Mulkey, assistant district attorney, said that the circumstances of the case lay locked up within the breast of the defendant; he knows all about it; he doesn't explain it; and then added, referring to the defendant: 'This man stands dumb before the law.'" The appellant by his counsel thereupon excepted to said remarks, and the court allowed the exception, but did not at the time rule on the right of the assistant district attorney to make the same. In the final charge to the jury, however, the court instructed them that "no inference or presumption could be drawn by the jury from the omission of the defendant to testify."

Our statute providing for the examination of a party accused of crime as a witness in his own behalf on the trial of such charge, when he requests to be so examined, declares that "his waiver of said right shall not create any presumption against him." (Laws of Oregon, 1880, p. 28.) The exception to the remarks of the assistant district attorney amounted to nothing. As shown in the bill of exceptions, they certainly were not proper. And if a course of remarks

of this kind had been persisted in on the part of the prosecution, under the permission of the court, and against the objections of the appellant, and exceptions properly taken, there is no doubt but that the judgment must have been reversed. (*Commonwealth v. Scott*, 123 Mass., 239.)

But such was not the case in this instance. The objectionable comments seem to have escaped the assistant district attorney in the heat of argument, and not to have been repeated after the interposition of the appellant's objection; and the court was also careful to charge the jury against any impression such comments might have left upon their minds. There was not only no exception to any ruling of the court, but there was no ruling of the court that could have been excepted to. Improper comments of counsel, either in a civil or criminal case, will not of themselves justify a reversal of judgment, under our system. They must be connected upon the record with error of the court, to produce such a result. And as no such error is shown here, the alleged exception cannot be sustained.

We come now to the consideration of the alleged errors mentioned in the sixth and seventh assignments, in the matter of instructions to the jury. The court below refused to give the jury, although requested by appellant's counsel so to do, any of the following instructions:

1. "The jury cannot find the defendant guilty of murder in the first degree committed whilst in the commission or attempt to commit rape, arson, burglary or robbery, because it is not so charged in the indictment.

2. "In criminal cases, it is necessary that every element constituting the crime be proven beyond a reasonable doubt; and an inference which the jury makes from any fact must be reasonably certain and satisfactory beyond a reasonable doubt; that is, be such an inference as the jury would act

upon without hesitation in matters of the utmost importance in their own concerns.

3. "It is not charged that the supposed killing in this case was perpetrated in the commission or attempt to commit any rape, arson, robbery or burglary, or in the commission or attempt to commit a felony, and therefore you will not consider the case in any such aspect.

4. "That you must be entirely satisfied of the guilt of defendant before you can convict, and that to be satisfied beyond a reasonable doubt is the same as being entirely satisfied.

5. "That possession of the property of the deceased by the defendant, even if the jury are satisfied from the evidence that he become wrongfully or criminally possessed of it, may be referred to some lesser degree of crime than that charged in the indictment.

6. "The jury should not find the defendant guilty of murder in the first degree by reason of any occurrences happening after the supposed killing, which do not directly tend to prove premeditation and deliberation."

In his charge to the jury, the court had said among other things: "Murder in the first degree is where a person purposely and deliberately and with deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery or burglary, kills another." And again, in the subsequent portion of the charge: "To constitute murder in the first degree, the killing must contain each and all the elements in the definition I gave you. If not committed in the commission or attempt to commit rape, arson, robbery or burglary, it must have been purposely done; that is, the killing must have been intended. The purpose to kill must not only have been in the mind at the time the act was done causing the death, but that purpose and intent

must have been deliberate and premeditated with malice before that time; it must have been thought over, considered and formed into a design to kill before the fatal deed was done."

By these references to the crime of murder in the first degree committed in the commission or attempt to commit rape, arson, robbery, or burglary, in giving an explanation of murder in the first degree generally, it is claimed by appellant's counsel, the court submitted the question whether the crime of murder in that degree, charged in the indictment to have been committed with "deliberate and premeditated malice," was committed in the commission or attempt to commit one of the felonies mentioned, namely, robbery, to the jury. And the first and third instructions asked by the appellant's counsel, as given above, were intended to preclude any such investigation by the jury. But it not only appears from the portions of the charge quoted themselves, but becomes manifest from an examination of the remainder of the charge, that such was not the purpose of the court, and could not have been the understanding of the jury. The court evidently was simply endeavoring to give a complete description of murder in the first degree in the abstract. And in the subsequent portion of the charge the jury are instructed, as the law governing them in the particular case, that before they can find the accused guilty of murder in the first degree as charged, they must not only be satisfied beyond a reasonable doubt that he caused the death of the deceased by shooting him with a gun, but that he did it "purposely and with deliberate and premeditated malice." And such is the purport of the charge throughout. Besides, there does not appear to have been any claim made on behalf of the prosecution that the murder was committed in the commission or attempt to commit any robbery,

nor any evidence introduced tending to show that such was the fact. We are fully convinced from an examination of the whole charge that no such question was submitted to the jury, and we find nothing in the record anywhere indicating that the jury were confused or misled by the action of the court, including in the general description of murder in the first degree given to them, the definition of a particular form of that crime, neither alleged in the indictment, nor disclosed in the proof. It is not necessary, therefore, to determine what the effect would have been if such question had been submitted, as claimed by appellant's counsel, to the consideration of the jury; or whether the instructions upon the point asked for by appellant's counsel would be proper even then.

The court also instructed the jury in the charge: "Before you can draw any inference from any fact proved, you must be satisfied of the correctness of the inference beyond a reasonable doubt." This is, in substance, what the court was asked to do by the second instruction presented by the appellant's counsel, and the only objection it seems open to is that it is too favorable to the defense. If the final result in a criminal case depended wholly upon a single inference, the rule would apply. But where independent inferences from distinct facts, no one of which separately might be sufficient to induce belief of the fact to be established, although tending to do so, all point in the same direction, their combined effect may be to engender the strongest conviction in regard to the existence of such fact. But the appellant has no cause for complaint since he received all that he asked. And so in respect to the fourth instruction asked on his behalf. The court gave the jury a correct definition of "reasonable doubt;" and while no question is made as to the correctness of the definition of the same

thing contained in this instruction, and the court might properly have given it, we cannot see that the refusal to do so was error. So the nature of a reasonable doubt was properly explained to the jury, we conceive the court below had the right to choose its own language and mode of explanation. The authorities cited by appellant's counsel on this point do not apply, for they only hold that there is no difference between being satisfied beyond a reasonable doubt, and being "entirely satisfied." (*People v. Padilla*, 42 Cal., 535; *People v. Kerrick*, 52 *id.*, 446.)

In the present case, the court below made no such distinction, but merely gave one definition of what constituted a reasonable doubt, which was correct, and refused to give another equally correct, which was preferred by appellant's counsel. The fifth instruction asked by the defense was given substantially in the general charge of the court to the jury.

The sixth and last instruction requested to be given, but refused by the court, is somewhat vague and uncertain. It assumes to distinguish between those "occurrences happening after the supposed killing" which did, and those which did not "directly tend to prove premeditation and deliberation," and the instruction is based on such supposed distinction. But we are unable to perceive any difference between an occurrence "directly tending," and one simply "tending" to prove a previous fact. In either case, it would only afford an inference if it afforded any proof at all as to such previous fact, but that would necessarily "directly tend" to prove it. Then if there is no such distinction, the instruction merely amounted to a direction to the jury not to find "premeditation and deliberation" from subsequent occurrences unless they afforded inferences to that effect. A general instruction of this nature would hardly be deemed

necessary in any case, as jurymen must be presumed to know their duty in this regard. In this view, the instruction was immaterial, and its rejection by the court below could not have operated to the prejudice of the appellant's defense.

The only exception to the charge of the court, besides those already considered in connection with its refusal to give the instructions asked by appellant's counsel, which is relied upon here to secure a reversal, was taken to the following portion: "And if you find that the man, Carl Anderson, was killed, and that the killing was criminal; if you find this question beyond a reasonable doubt, that is the body of the crime or *corpus delicti*. If you find that he was killed and that the killing was criminal; if you find these two questions beyond a reasonable doubt, then the body of the crime is made out." Appellant's counsel assume in their objection to this portion of the charge, that it was equivalent to telling the jury that if they were satisfied from the evidence beyond a reasonable doubt that the deceased was killed by the criminal act of the appellant, the crime of murder in the first degree charged in the indictment would be made out. That is, that the "body of the crime," referred to in this part of the charge, was the crime charged in the indictment. But this part of the charge is immediately followed by another which shows that such was not the intention or understanding of the court.

The court, after giving the definition of the *corpus delicti* as above, proceeds thus: "Then the question for you to determine is, who did the killing? Was it the defendant? That is the next question." This is followed up by directions to the jury in reference to the decision of this question upon the facts disclosed by the evidence, and also in respect to the determination of the intent, in case they

should find the appellant guilty of an intentional killing. Thus it becomes apparent from a consideration of the charge as a whole that there was no error in the particular portion excepted to.

It is next claimed by appellant's counsel that there was no evidence before the jury to justify the verdict rendered of murder in the first degree. It seems to be conceded that if the verdict had been for murder in the second degree or manslaughter, it could not be disturbed. But if the evidence justified the jury in finding the appellant guilty at all, we see no reason why they should not have found him guilty in the first degree of murder, as of any lesser crime. Section 519 of the criminal code, which provides that: "There shall be some other evidence of malice than the mere proof of the killing, to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation when necessary to constitute murder in the first degree shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion," does not affect the nature of the intent, or the time within which it may be formed, to constitute homicide murder in the first degree, but only the character of proof requisite to establish it. "Mere proof of the killing" alone will not suffice, but the manner and circumstances of the killing may still furnish all the proof of deliberation and premeditation which the statute requires. There was evidence before the jury in this case which justified them in finding that the appellant purposely killed the deceased by shooting him in the back of the head with a shot gun, in a lonely place on Swan island, in the Williamette river, on the 9th of October, 1882; that no one else was with them or near them at the time;

that he fired two shots to accomplish his design, only one of which, however, took effect; that his motive was gain, and that he immediately rifled the dead body of a pocket-book containing a considerable sum of money, which he knew previously to the killing was on the person of the deceased; that within a very few moments after the fatal shot was fired he was hastening from the spot with the booty in his possession, and carrying both the guns, with which he and the deceased had started out on their hunt, back to their owner; that not only to the owner of the guns on returning them, but to other parties making inquiries for the deceased, did he make false statements, and contradictory of each other; that in a short time—a day or two at farthest—he fled the state, taking with him all the money and effects of his deceased brother, evidently amounting to quite a large sum—he himself having had no means of his own previous to the homicide. No witness testified to having seen him fire the fatal shot, yet if he did fire it, as the jury were justified from the evidence in believing beyond a reasonable doubt, the nature and direction of the wound shows that he was behind the deceased at the time, and if the shot was fired purposely to kill, how is it possible for any reasonable mind to conceive of the act being otherwise than deliberate and premeditated? Then his immediately possessing himself of the pocket-book containing the money, and sudden departure from the scene with the two guns, which his reason told him had to be returned to their owner to avoid inquiry and exposure, all of which, according to the testimony of Captain Whitcomb, must have taken place within the shortest time possible for their accomplishment, after the shots were fired; the ready explanations he gave of his brother's sudden disappearance, and his taking possession of his money and effects, and flight, considered together

with the nature and direction of the wound causing the death, to us seem amply sufficient to justify the belief of the jury beyond a reasonable doubt, not only that he killed the deceased purposely, but that he did it with premeditation and deliberation; and that the proof fully satisfied the statutory requirements contained in said section 519. The objection to the form of the judgment and sentence is untenable, as the record shows that the appellant was duly tried and convicted of the crime of murder in the first degree as charged in the indictment. The only remaining exception, that the judgment is contrary to section 15 of art. I of the state constitution, we deem it hardly necessary to discuss. It must be regarded as settled in this state that the constitution does not prohibit the legislature from enacting laws for the infliction of capital punishment in proper cases. But if the question could be considered open at this time, we should not hesitate to decide that the construction claimed by appellant's counsel for the provision referred to was inadmissible. Having thus examined every point relied upon by appellant's counsel, and found no error in the proceedings and rulings of the court below in respect to any of them, we are constrained to affirm the judgment appealed from.

Judgment affirmed.

STATE v. CHADWICK, ET AL.

PUBLIC OFFICER—FAITHFUL DISCHARGE OF DUTY.—An official bond bound a public officer to a "faithful" discharge of his official duty; *Held*, That the condition was performed when the officer discharged his duty honestly and diligently with such skill as he actually possessed.

APPEAL from Marion County.

This action was brought by the state against Chadwick

and his bondsmen, to recover damages in the sum of $10,000, because the said Chadwick did not comply with the conditions of his bond in negligently and unfaithfully discharging the duties of the office of secretary of state, from September 14, 1874, to September 9, 1878.

The complaint alleges that at the regular June election of 1874 the appellant, S. F. Chadwick, was duly elected secretary of state of said state of Oregon. That afterwards, to-wit: On the 1st day of July, A. D. 1874, said defendant, S. F. Chadwick, as principal, and the defendants, Aaron Rose, Asher Marks and B. P. Smith, as sureties, duly executed a bond under their hands and seals to the state of Oregon, in the sum of $10,000, conditioned that if said defendant, S. F. Chadwick, should faithfully discharge the duties of his office as secretary of the state of Oregon, and also as auditor, and deliver over to his successor in office, or to any other person authorized by law to receive the same, all moneys, books, records, and all papers pertaining to the said office, then the obligation in said bond contained, on the part of said defendants, was to be void, otherwise to remain in full force. That afterwards, on the 14th day of September, 1874, said S. F. Chadwick duly entered upon the duties of his said office, and continued so to act by virtue of said election, until the 9th day of September, 1878. That during said time, and while said S. F. Chadwick was acting as secretary of state and auditor, he, the said S. F. Chadwick, did not faithfully discharge his duties as secretary of state and auditor, in this: That said S. F. Chadwick, as secretary and auditor aforesaid, at divers times between the said 14th day of September, 1874, and the said 9th day of September, 1878, did wrongfully, unlawfully, negligently and wilfully audit and allow to divers persons, for services specified, large amounts in addition to and in excess of the compensa-

tion actually and lawfully due such parties, for such services. Judgment is demanded for $10,000 and costs.

The appellant Chadwick, in his answer denies every material allegation in the complaint, and asks for judgment for costs.

The case was referred to Hon. M. P. Deady to take the testimony, and report his findings of fact and conclusions of law. The case was tried before him and he reported that the state was entitled to the relief asked for in the complaint. The report, which was confirmed by the circuit court, may be found in the appendix to this volume.

R. Williams and S. F. Chadwick, for appellants.

Addison C. Gibbs and W. G. Piper, for respondent.

Heard before WATSON, C. J., and WALDO, J.

WALDO, J.:

This is an action brought for a breach of the official bond of the appellant Chadwick, as secretary of state, conditioned to be void should he "faithfully discharge the duties of his office as secretary of state and also as auditor."

In *Union Bank v. Clossey*, 10 John., 271, it was held that a condition in the bond of the teller of a bank, faithfully to discharge the duties of his trust, applied to his honesty, but not to his competency. This case was cited as authority in *United States Bank v. Brent*, 2 Cr. C. C., 696; see, also, *Alexandria v. Corse*, 2 Cr. C. C., 263; *United States Bank v. Stearns*, 15 Wen., 316.

On the other hand, in *American Bank v. Adams*, 12 Pick., 316, it was held that a bond given by the teller of a bank, conditioned faithfully to discharge his duties, bound him to responsibility for reasonable and competent skill, as well as for honesty and diligence in the performance of his

duties. (Ang. & Ames on Cor., section 319; *Hoboken v. Evans*, 3 Vr., 342.) A more stringent rule of responsibility is held to apply to a receiver and disburser of public money. (*Boyden v. United States*, 13 Wall., 17; *United States v. Thomas*, 15 Wall., 337.)

The rule of interpretation seems to be that when a public officer gives a bond conditioned faithfully to discharge his official duties, the word "faithfully" is held to imply that he has assumed that measure of responsibility laid on him by law had no bond been given. That the object of a bond so conditioned is to get sureties for the performance of the duties of the office according to law, and that everything is unfaithfulness which the law does not excuse.

The rule laid down in *Union Bank v. Clossey*, 10 John., 271, above, S. C., 11 John., 182, however questionable in a case like that in which it was applied, seems to be the true rule in the case of a bond of a public officer, like conditioned. Public employment does not, like private employment, rest on contract. In the case of the *American Bank v. Adams*, 12 Pick., and *Minor v. Merchants Bank*, 1 Pet., 46, the bond was given by one private person to another, to secure the performance of a contract, which included in its implied terms that measure of responsibility covered by the bond. In the case of the appellant Chadwick, the bond is security against default in the performance of a public duty, which was not undertaken by appellant by virtue of any contract, express or implied, between him and the state. (*Wyandotte v. Drennan*, 46 Mich., 480; *Parker v. Pilsbury*, 4 Post, 51; *Gilbert v. Commissioners*, 8 Blackf., 81; *Riggs v. The State*, 26 Miss., 51; *County Commissioners v. Jones*, 18 Minn., 200; Cooley Con. Lim., 276.)

In *United States v. Wright*, 1 McLean, 509; *Gates v. Delaware County*, 12 Iowa, 406, and *State v. Clark*, 3

Nev., it is declared that an office may be resigned at any time. But in *State v. Ferguson*, 2 Vroom, 107, it is shown from the books that such is not the common law. S. P., *Hoke v. Henderson*, 4 Dev., 1; S. C., 25 Am. Dec., 699, 700.

At common law "an office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear." (*Edwards v. The United States*, 103 U. S., 473, Bradley, J., who cites and approves *State v. Ferguson*.) It follows that no citizen can of right decline public office. The state has the same right to summon him to civil as to military service, and in civil office, the same right to the service of the judge on the bench as of the juror in the box. The state may demand that a public officer shall execute a bond with sureties conditioned for the faithful performance of his official duties. This does not show that the state has now undertaken to deal with the officer on terms of contract in his official relations with the state. This action of the state goes no further than to make the loss of office a motive for executing the bond. It but makes use of an existing power to secure an additional remedy for unfaithfulness in office. The nature of the official relation is not affected thereby. The bond must still be held entirely voluntary. It is a collateral contract to perform the duties of the office according to its conditions, which, when voluntary and not *ultra vires*, is binding—the only sound legal reason for which would seem to be that it is a specialty. (Met. on Con., 2, and note e.) But for this, the bond should be void for want of consideration. The giving of the office, aside from its emoluments, cannot be held to be a consideration. This would be contrary to the nature of an office. That the officer shall be

permitted to take the emoluments of the office, can hardly be deemed a consideration, without implying a contract in relation thereto, whereas it is held that the emoluments lie wholly at the will of the state.

These principles determine the liability of the appellant for a default in the performance of his official duties. The bond in this case is a contract to perform in that measure the appellant would have been obliged to perform had no bond been given. It lays no additional liability on the appellant. Where an action would lie against him for a breach of the conditions of this particular bond, case by the public corporation would lie at common law. (*Franklin Ins. Co. v. Jenkins*, 3 Wen., 130; *Smith v. Hurd*, 12 Met., 384; Ang. & Ames on Cor., sec. 312; *United States v. Maurice*, 2 Brock, 96.) The law presumes, generally, that every one may be honest and diligent, but not that he is skilled in any particular art. Hence, since the appellant in the transaction of his appointment is not a party to a contract, the principles applicable in the case of a contracting party cannot apply to him. He executes a duty imposed by the public, and it would seem, therefore, that he should be held liable for that degree of skill only which he possesses. He who derives the advantage should bear the burden.

The learned referee found, first, that $558.90, principal, and $5.30, interest on said sum, of the claim of E. D. Foudray for reclaiming a fugitive from justice from Salt Lake City, Utah, was false and illegal, and as a conclusion that the appellant broke the condition of his bond when he audited such part of said claim and drew his warrant therefor. The learned referee took the ground that section 13 of the act of October 24, 1864, Gen. Laws, 1874, 605, governed the case. He also suggested that if that section did not govern, that then, under section 489, p. 403, Foudray could

be allowed only actual expenses. But section 13 of the act of 1864, beginning "All private persons performing services required by law, or in the execution of legal process," seems to refer to services undertaken by private parties within the state, in the stead of public officers—who may be required by law to perform the services. No person can be required, in the absence of express legislation, to go outside of the state in a civil capacity. (1 Bl. Com., 137.) In every case such a service must be undertaken on contract; and to fix rigidly, by law, the compensation to be allowed, were likely to cripple the executive arm. The executive should have power, according to the exigencies of the case, to offer compensation to an agent for the arrest of a fugitive. Under the rule that where a power is given by statute, everything essential for making it effectual, is given by implication, such construction may be put on secs. 487 and 489. If, however, the construction put on the statute was correct, there is one consideration decisive in favor of the appellant on the appeal—the findings of fact do not show how the misconstruction occurred. For aught that appears, it was the result of a mere error of judgment, and the appellant cannot be held liable for such an error. (*Kendall v. Stokes*, 3 How., 98-99; *Wilkes v. Dinsman*, 7 How., 131; *Alvard v. Barrett*, 16 Wis., 177; 16 Opin. Att'y Gen., 318.)

In *Drewe v. Coulton*, 1 East., 563, which was an action against the defendant as returning officer, for refusing the plaintiff's vote, Wilson, J., says: "In very few cases is an officer answerable for what he does to the best of his judgment in cases where he was compelled to act." "And in my opinion it cannot be said because an officer is mistaken in point of law, this action will lie against him." *Jenkins v. Waldron*, 11 John., 114, is to the same effect.

The question is, want of due care aside, did the appellant

act wilfully, that is, as explained in *Drewe v. Coulton*, "against his own conviction." Whether the appellant acted in good faith or not, is a point in issue between the appellant and the state, which must be determined by the jury.

It was also found that the appellant audited and allowed the claim of James Shinn, for the transportation of prisoners, for $166 in excess of what Shinn was entitled to by law, which said charge was false and illegal. The statute established the rule for computing the compensation to which Shinn was entitled. The fact that an excessive charge was allowed, was not legally made out, but, in any event, it is not found that the appellant acted wilfully or negligently, essential to charge him. The addition of 33⅓ per cent. to the fees of sheriffs, as elsewhere allowed by law, made to the fees of sheriffs east of the Cascade mountains, by the act of October 21, 1864, Gen. Laws, 1874, 741, applied on its face to criminal as well as to civil cases.

The appellant is also charged with the sum of $9.00 *per diem*, and $6.27 interest, on the claim of W. H. Watkinds, superintendent of the state penitentiary, for conveying convicts from the penitentiary to the insane asylum at Portland. The objection to this claim was, that W. H. Watkinds, a salaried officer of the state, was not entitled to a *per diem* for such services, and that interest could not be charged against the state without stipulation. But this was not a claim for the performance of official duty. It was no part of the superintendent's official duty to take convicts to the insane asylum. In rendering such service he acted as a private person, and was entitled to be paid as such. It is another matter if he thereby neglected his official duties.

The case of the *People v. Canal Commissioners*, 5 Den., 501, is a direct authority for the allowance of interest.

(See, also, 1 Opin. Att'y Gen., 71; *Risley v. Andrew County*, 46 Mo., 383; *Shipman v. The State*, 44 Wis., 458.)

The appellant was further charged with $1,116.75, found to have been illegally audited and allowed by him for clerical aid. The act of October 22, 1872, providing that his allowance for clerical aid should be $1,000 per annum, repealed (and it was so found by the learned referee,) the act of October 26, 1870. (*Burbank v. Crouch*, 10 Cal., 315; *Stingle v. Nevil*, 9 Or., 62.) It seems clear, however, that the misconstruction of the act of 1872 was not so clearly an error that the appellant could be charged, on the face of the act, without extrinsic evidence. The finding is merely of illegal auditing and allowing, which is insufficient.

The further sum of $1,400 was audited and allowed T. H. Cann as assistant secretary of state, while it was found that Cann was not such assistant in fact, and performed no services as such. The appellant is therefore charged with this sum. The compensation of the secretary of state is fixed by the constitution, and cannot be increased by any subterfuge whatever. (*Rooney v. Milwaukee County*, 4 Wis., 23.) But here, again, the same objection lies to the findings of fact.

The principles here laid down govern all the other issues joined, as also the findings of fact thereon. It follows that the judgment must be reversed and the cause remanded for a new trial, and it is so ordered.

Judgment reversed.

WATSON, C. J.:

I fully concur in the final conclusion reached by my associate, and in the views expressed in the opinion as to the requirement of skill in public office, in their application to this case. Where an executive officer is charged with the

exercise of functions judicial in their nature, he is responsible only for proper attention and good faith. The complaint in this case charges the appellant Chadwick with having, while secretary of state, audited and allowed certain fictitious and fraudulent claims against the state, knowing them to be such, which, by means of official warrants drawn by him, were paid out of the state treasury. This knowledge on his part is denied, and the findings of fact on which the judgment appealed from rests, do not in any manner impugn his attentiveness and good faith. If he was in fault in either of these respects, it should have been so found in express terms, and in the absence of such finding the judgment cannot stand.

CLINE v. CLINE.

DIVORCE—PERSONAL INDIGNITIES.—That condition which renders the life of the injured party burdensome must be shown to exist in fact, and not purely inferred from facts that go to establish personal indignities.

APPEAL from Multnomah County.

Bellinger & Gearin, for appellant.

Effinger & Bourne, for respondent.

By the Court, WALDO, J.:

A dissolution of the marriage contract may be declared at the suit or the claim of the injured party for (sub. 6, sec. 491, civil code,) "cruel and inhuman treatment or personal indignities rendering life burdensome." This suit is brought under this provision of the statute. Besides the testimony of F. Behl, which is without relevancy to the issues, there were but two witnesses on the part of the respondent—the respondent, herself, and her daughter of twelve years of age.

The testimony of the daughter is the evidence on which a cause of suit is sought to be made out. This daughter testifies to certain lewd and indecent conduct of the appellant toward her, of which she afterward told her mother, who thereupon immediately left the appellant and began this suit. Mrs. Fostner, daughter of the appellant by a former marriage, testifies that she firmly believes that this tale of the respondent's daughter and the separation alleged to have happened in consequence, was a scheme devised by the respondent to get hold of a share of the appellant's property, through the proceedings for a divorce, and the subsequent offer of reconciliation and other slight circumstances, gives some color to this view. Christina Gosner testifies to admissions of the respondent that she married appellant for his money, and it appears from the testimony of the respondent herself that the deed of a house and lot would have given satisfaction for all the suffering caused by the personal indignities to which she had been subjected.

But every word of the daughter's testimony may be conceded to be true and yet a cause of suit be not made out. It shows neither cruel nor inhuman treatment nor personal indignities offered to the respondent by the appellant. There is no evidence of cruel treatment. In *Kennedy v. Kennedy*, Church, C. J., cites and approves the following definition of cruelty: "There must be either actual violence committed with danger to life, limb or health, or there must be a reasonable apprehension of such violence." (See, also, *May v. May*, 62 Pa. St., 210; *Jones v. Jones*, 66 *id.*, 496; *Finley v. Finley*, 9 Dana, 52; *Shell v. Shell*, 2 Sneed, 716; *Close v. Close*, 9 C. E. Green, 239.) There seems no reason under our statute for enlarging on this definition.

The cause of suit must be made out, if at all, on the ground of personal indignities offered to respondent's person

WATSON, C. J.:

Ever since the decision in *Smith v. Smith*, 8 Or., 101, the doctrine of this court has been, as I understand it, that "cruelty or personal indignities rendering life burdensome" through their operation upon the mind and feelings, constitute a sufficient ground for divorce under the statute, although not affecting or endangering the bodily safety or physical health of the complainant. But a majority of the court are of the opinion that, assuming this to be the law, the evidence fails to show that the life of the complainant in this instance was rendered burdensome, in fact, by the indignities charged and proven. The facts in the case, as established by the evidence, appear to be about these: The parties intermarried on December 5, 1877, and lived together as husband and wife until about February 8, 1882, in Portland, Oregon, when the respondent, Mrs. Cline, left the appellant's house and instituted this suit. At the time of the marriage, the respondent had a daughter, then in her ninth year, named Ella Wertley, who was under her custody and dependent upon her for support. The complaint charges the appellant with having taken advantage of the youth and innocence of this child during the period that the parties lived together as husband and wife, to make the most indecent exposures of his person to her, and to endeavor to corrupt her mind and induce her to have sexual intercourse with him; and with having made repeated attempts to accomplish this design.

The testimony of the child, taken during the year 1882, fully sustains this charge. She testifies to a long series of such acts, on the part of the appellant, commencing soon after her mother's marriage with him, and extending up to about the time her mother left him, in February, 1882.

If her testimony is to receive credence, the appellant was persistently endeavoring, during almost this entire period, to corrupt her mind by representations of the rightfulness as well as the pleasure of having sexual intercourse with him, and by taking familiarities with her private person, and causing her to take similar liberties with himself; that he repeatedly attempted to have sexual intercourse with her; and that she was induced by appellant's threats to keep his conduct towards her secret from her mother, until the evening before her mother left him, as before stated. The appellant admits in his testimony that the child has taken the most indecent liberties with his person, but contends that it was without procurement or countenance on his part. But he also admits that he suffered her to caress him on such occasions, both before and after, and returned her embraces. He says that he did not tell her mother of this misconduct on her part because he did not wish to create any disturbance between them; that the mother was "so wrapt up in the child." The testimony of the child, corroborated as it is by these important admissions of the appellant, must, I think, be held sufficient to establish the charges made against him in the complaint. The question then arises whether these facts constitute a case of "cruel and inhuman treatment, or personal indignities rendering life burdensome," under the law?

I think the case is within the operation of the statute, under the construction put upon it by this court in *Smith v. Smith*, 8 Or., 101, and which has ever since been recognized as the established doctrine in this state. It is difficult to conceive of an indignity to the wife and mother more galling and intolerable. It is idle to suppose that the knowledge of such conduct, on the part of her husband, and the step-father of her infant daughter—a mere child, living

under the same roof, and wholly dependent upon her for protection and support—might not have wounded her sensibilities, and rendered her life with him burdensome. And the appellant has himself testified that the respondent was "so wrapt up in the child" was one reason he did not inform her of the latter's misconduct.

In my judgment, the decree of the circuit court granting the divorce as prayed for in the complaint, was not only just, but fully warranted by the law and the facts.

MARCH TERM, 1883.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OREGON,

MARCH TERM, 1883.

EDWARD B. WATSON, *Chief Justice.*
WILLIAM P. LORD, } *Associate Justices.*
JOHN B. WALDO, }

TAYLOR *v.* SCOTT.

FORCIBLE ENTRY AND DETAINER.—The action of forcible entry and detainer is intended for the benefit of him whose possession is invaded. The gist of the action, and that which gives a justice of the peace jurisdiction, is the force, either in the entry or detainer, or both. The object of the statute is to prevent and punish the use of forcible and violent means in such cases, irrespective of the question of actual title, and where these do not exist, the action cannot be maintained.

FORCIBLE DETAINER—MUST BE BY FORCE.—It is not indispensable to a recovery for a forcible detainer, that actual force be proven, but in the absence of such proof, threats of personal violence, or such conduct as clearly evinces a determination to resist by force the entry of the plaintiff, must be shown. The mere surmise, or apprehension of the plaintiff that if he attempts to regain the possession he will be repelled by force, is not enough, but the words or acts of the defendant must manifest the present purpose to resort to force to defeat the attempt then being made by the plaintiff to re-enter into possession of the premises.

APPEAL from Umatilla County. The facts are stated in the opinion.

Lucian Everts, for appellant.

J. H. Reed, for respondent.

By the Court, LORD, J.:

This was an action of forcible detainer, in which the plaintiff obtained a judgment for the restitution of the premises, and from which the defendant appeals to this court. The error assigned is the refusal of the circuit court to grant the motion of the defendant for a nonsuit, upon the grounds: 1. That the plaintiff failed to prove such a possession of the land in controversy as is sufficient to maintain this action; and 2. To prove that the defendant made use of any unlawful force in entering upon and detaining the same. It appears by the evidence in the bill of exceptions that the land in dispute is a part of the public domain of the United States, but belongs to that portion of it reserved from sale by the government, and known as railroad lands, and that neither party has any title to it. In substance, the testimony for the plaintiff is, that in April, 1881, he had two furrows ploughed around the quarter section in dispute, that in June he hauled some posts for fencing, and in August, lumber for a house, and in the fall of the same year did more ploughing, and also ploughed six or seven furrows around the section again; that in March, 1882, the plaintiff went back to the land, and found the defendant in possession and ploughing, did some ploughing himself, and also in April following, and at which time he gave the defendant written notice requiring him to deliver possession to him; that in October, 1882, "he went back to the land to seed it, and found that the defendant had stretched a single wire around the quarter section. At that time I attempted to go on the land, and the defendant told me, 'you cannot go on the land. I have got the land fenced, and I forbid you from coming inside.' I then turned away and came to Pendleton to consult lawyers as to my rights, and

about bringing an action to obtain possession." The evidence for the defendant is to the effect that in April, 1881, he had ploughed a furrow around the section in which the quarter section in question is situated; that the defendant and his hired man had ploughed during the month of March, 1882, about 30 acres, and that during that time some one, whom the defendant did not know, hauled away the lumber, but that it was not done at his request or upon his orders, and that he did not know anyone, or that the plaintiff claimed the land until the plaintiff notified him, and that he continued to occupy it when the plaintiff, in October following, came there and demanded possession, with the result as above stated.

The action of forcible entry and detainer is intended for the benefit of him whose possession is invaded, and without the possession, or the right of possession, when the action is commenced, the action cannot be maintained. What acts will be considered a sufficient visible *indicia* of possession is not always easy of solution. In *Bradley v. West*, 60 Mo., 63, the court say: "The owner is not bound to be always on the land, either by himself or his agent, for the sake of actual manual occupation, and for the purpose of warning off intruders or trespassers. If an entry is made with the intention of retaining the permanent possession, and clearing and improving the land, and fitting it for cultivation, it may be sufficient, and authorize the inference that the possession is actual." (*Miller v. Northrup, et al.*, 49 Mo., 400; *Powell v. Davis*, 54 Mo., 318.) But in *Preston v. Kehoe*, 15 Cal., 318, the court say: "When the land is that of the government, and the plaintiff has no further title than possession, that possession must be *possessio pedis*. He must show an actual inclosure, or something equivalent, as evidence of an actual exclusive appropriation and domin-

ion. If this were not so, a man might take up ten thousand acres of the public land by merely putting down stakes, or making a line of boundary." The consideration, however, of this question is not material to the decision of this case. The entry of the defendant is admitted to have been peaceable, and the relation of landlord and tenant does not exist between the parties. Let it be conceded, then, as was said in *Carter v. Van Dorn*, 36 Wis., 293, that "the plaintiff had a sufficient previous possession of the premises to maintain this action—a proposition, the correctness of which is denied, and may be well doubted, and that the entry upon the premises and the detention thereof by the defendant were unlawful, still the plaintiff is not entitled to recover in this action unless he proves that the defendant forcibly detains the premises from him." The language of our statute in such a case is: "and the possession shall be held by force;" and on this subject, Chief Justice Savage says, "the law is that the same circumstances of violence or terror which will make an entry forcible, will make a detainer forcible also;" (*People v. Rickert*, 8 Cow., 232,) and for a review of the authorities as to what constitutes a forcible entry, see note to *Evill v. Connell*, 18 Am. Dec., 139.

The real question, then, to be decided is, does the evidence tend to prove such forcible detainer? In our judgment, manifestly not. Merely saying to the plaintiff, "You cannot go on the land; I have got it fenced, and forbid you from coming inside," certainly does not tend to prove that the defendant would use force to keep possession of the premises. The defendant, like the plaintiff, claimed the right of possession as a settler, and it could hardly be expected he would so far recognize the right of possession in the plaintiff as to extinguish his own possession by yielding it up on demand without objection; and the language he

used was only declaratory of his conviction of his superior and exclusive right of possession to the premises. It contained no element of menace, or threats of personal violence, nor indicated any purpose or determination to resist the entry of the plaintiff with force. In *Hodgkins v. Jordan*, 29 Cal., 578, the court say: "It is not indispensable to a recovery for a forcible detainer that actual force be proven, but in the absence of such proof, threats of personal violence, or such conduct as clearly evinces a determination to resist by force the entry of plaintiff, must be shown. The mere surmise, or apprehension of the plaintiff that if he attempts to regain the possession he will be repelled by force, is not enough; but the words or acts of the defendant must manifest the present purpose to resort to force to defeat the attempt then being made by the plaintiff to re-enter into possession of the premises." And in *Carter v. Van Dorn*, *supra*, it was held, where the defendant entered peaceably upon lands occupied for pasture and fuel, and he ordered the plaintiff off the premises with angry words and shaking of fists, and attempted to throw off wood which the plaintiff had placed on his wagon, but used no actual force to drive him off, that the action did not lie, and the court did not err in nonsuiting the plaintiff. "The gist of the action, and that which gives a justice of the peace jurisdiction, is the force, either in the entry or the detainer, or both. The object of the statute is to prevent and punish the use of forcible and violent means in such cases, irrespective of the question of actual title; and where these do not exist, the action cannot be maintained." (*Winterfield v. Stanis*, 24 Wis., 400.) There is nothing in the testimony tending to show that the defendant detained the premises by force, or threats of personal violence. The action is not intended as a substitute for the action of ejectment, but it seems to us

such is the purpose in this case. Our conclusion is that the nonsuit ought to have been granted, and the judgment must be reversed.

Judgment reversed.

SAUBERT & CO., v. CONLEY & LEASURE.

ATTORNEYS.—R. D. S. & Co. placed accounts against divers persons in the hands of C. & L. for collection, and agreed that they should have ten per centum on the amount collected by them as compensation for their services. While such accounts were still in the hands of C. & L. for collection under said agreement, and they were exerting themselves to bring about their payment, the sums due on a large number of them were paid directly to R. D. S. & Co. In a suit for an accounting and settlement afterwards brought by the latter against the former in respect to the collection of such accounts; *Held*, That C. & L. should be allowed the stipulated commission on the sums so paid to R. D. S. & Co.

APPEAL from Umatilla County.

J. K. Kelly and L. B. Cox, for appellants.

J. H. Reed, for respondents.

By the Court, WATSON, C. J.:

The appellants brought this suit to compel the respondents to account for and pay over all sums of money collected by the latter on certain accounts placed in their hands for collection by the former, less ten per centum retainable as collection fees. The prayer of the complaint is: "First, That respondents be compelled to answer under oath and render an account of their collections." "Second, That respondents be decreed to pay over any balance thus found to be due to appellants." "Third, For costs and disbursements and general relief." The respondents answered, stating the amount collected by them on all the accounts, in gross, without specifying the particular sum collected on

any separate account. To this answer a general demurrer was filed by the appellants, which was overruled. They then filed a reply; and upon the issues of fact thus joined the evidence was taken. The court below found from the evidence that the respondents had no money in their hands belonging to the appellants to pay over, and dismissed the suit at the latter's cost. From this decree the appeal was taken.

We think the evidence fully sustains the decree. Part of the amount allowed the respondents as commissions for collection, by the court below, was the stipulated per centum on sums paid to the appellants directly upon said accounts while they were still in the hands of the respondents for collection. The evidence tends to show that these payments were made in consequence of the efforts of the respondents to collect the same themselves, and we think the per centum on such sums was properly allowed them under the circumstances.

We do not think the evidence shows, as is alleged in the replication and claimed here by counsel for appellants, that the authority of the respondents to collect such accounts was ever revoked. The complaint makes no such allegation, but seeks an account of all sums collected, and a decree for any balance due the appellants still remaining in the hands of the respondents, after deducting ten per centum for collection fees; and the replication in this respect is hardly consistent with it. But there is no proof in the case which would justify the conclusion that the authority of the respondents to make the collections was ever withdrawn, or that the contract between them and the appellants was ever rescinded. Such being our view of the decree of the lower court on the merits, it is not necessary to discuss any of the

other questions presented in the briefs of the respective parties. The decree must be affirmed with costs.

Decree affirmed.

DICK v. WILSON.

PLEADINGS—JURISDICTION MUST BE SHOWN BY.—It is a rule in pleading that so much of the proceedings of all inferior tribunals must be stated as will show jurisdiction. Whoever, therefore, sets up the judgment of an inferior court, must show affirmatively the jurisdiction of such court to render the judgment.

APPEAL from Benton County.

F. A. Chenoweth, for appellant.

J. W. Rayburn, for respondent.

By the Court, LORD, J.:

There should always appear sufficient on the face of the record of an inferior court to show that it had jurisdiction of the cause of which it takes cognizance. No presumptions can be indulged to aid its record for the purpose of conferring jurisdiction, but the authority to act, in every instance, must be made to affirmatively appear. (*Jones, et al., v. Craford*, 1 John. Cases, 20; *Shivers v. Willson*, 5 How. & Johns., 130; *Thompson v. Multnomah County*, 2 Or., 35; *Wright v. Warner*, 1 Douglass, [Mich.,] 384.) Whoever, therefore, sets up the judgment of an inferior court must show affirmatively the jurisdiction of such court to render the judgment. *Ford v. Babcock*, 1 Denio, 158; *Jolley v. Foltz*, 34 Cal., 321. The case before us is a proceeding based upon the judgment of a justice's court, in which there is no averment of the facts necessary to confer jurisdiction, and to which the court below sustained a de-

murrer, which is assigned as error. It is a rule of pleading that so much of the proceedings of all inferior tribunals must be stated as will show jurisdiction. (*Starr v. Trustees of Rochester*, 6 Wend., 566; *Hurd v. Shipman*, 6 Barb., 623.) Nor will a mere recital, unaccompanied by any facts to show jurisdiction, and only indicative of the opinion of the justice as to the legal sufficiency of the return, be sufficient to give validity and effect to the judgment in such proceedings. *Love v. Alexander*, 15 Cal., 296. All the facts necessary to show jurisdiction must be alleged whenever any rights are to be claimed or enforced by virtue of the judgments of such inferior tribunals. There was no error in sustaining the demurrer, and the judgment must be affirmed, and it is so ordered.

Judgment affirmed.

WOODWARD v. BAKER.

JURISDICTION—SERVICE OF SUMMONS.—From the time of the service of a summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.

IDEM.—In legal contemplation, the court acquires jurisdiction by the proper service of process, and the defendant is in court, and charged with notice of whatever action the court has taken during the pendency of the action.

IDEM—JUDGMENT—COLLATERAL ATTACK.—The fact that the defendant has not been given all the time allowed by law to plead, after proper service of the summons, will not so vitiate the judgment as to make it a nullity, and subject to collateral attack.

APPEAL from Multnomah County. The facts are stated in the opinion.

Sidney Dell, for appellant.

Killen & Moreland, for respondent.

By the Court, LORD, J.:

This was an action of ejectment. The complaint is in the usual form. The answer denies the allegations of the complaint, and alleges that the defendant is the owner and entitled to the possession of the land in controversy. It also alleges, as a further separate answer, that the city of Portland caused the said real estate to be sold for an assessment made by said city for a street improvement, and that said city became the purchaser thereof, and took a deed to the same, and thereafter conveyed the same to the defendant, &c.; all of which is put in issue by the reply. A jury was empaneled, and a verdict found for the defendant by direction of the court. The plaintiff claims title under a sheriff's sale made in an action of *Ira F. Powers v. C. M. Carter and Levi Estes* in the county court of Multnomah county. The judgment roll shows that the summons was served on C. M. Carter on the 23d day of March, 1876, and that judgment was rendered on the 3d day of April, 1876; and plaintiff claims that Carter is the owner of the land in dispute by virtue of a chain of conveyances, which we are not required by this record to consider, and to which further reference is unnecessary. The defendant, to maintain the issues on his part, put in evidence a chain of conveyances through which he claimed title; to all of which objections were made and exceptions taken, but the further consideration of which, as well as the exceptions taken to the evidence offered in rebuttal thereof, becomes immaterial to our present inquiry, as will now appear. After the case closed, the court instructed the jury that the judgment of the county court in the case of *Powers v. Carter & Estes* was void as to Carter, and directed the jury to find a verdict for the defendant, which was done accordingly. The

only question, therefore, we are called upon to determine by this record is, whether a judgment prematurely entered by default can be impeached collaterally upon that ground, where there has been personal service of summons and complaint on the defendant? From the time of a service of a summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. (Code, sec. 61.) It is the fact of service that gives the court jurisdiction, and when that fact is made to appear by the record, and a judgment is rendered against the party, such judgment is valid until set aside, or reversed by direct proceeding in that action. In *Whitwell v. Barbier*, 7 Cal., 63, it is said: "The true test is, whether the omission complained of is of the substance of the act required to be performed. If of the substance, the judgment is a nullity; if of form, only an irregularity. In the case before us, the judgment is attacked collaterally, upon the ground that the defendant, although served with process, was not given the time allowed by statute to appear and answer. The defendant having been summoned to appear on a day certain, it can not be said that the court had no jurisdiction of the person, so as to make its judgment a nullity." In legal contemplation, the court acquires jurisdiction by the proper service of process, and the defendant is in court, and charged with notice of whatever action the court has taken during the pendency of the cause, (*University v. Lassiter*, 83 N. C., 41,) and if judgment has been taken prematurely against him, he can only avoid it by a direct proceeding in that action. The judgment cannot be impeached collaterally upon that ground. (*Alderson v. Bell*, 9 Cal., 321.) The fact that the defendant has not been given all the time allowed by law to answer, after proper service of the summons, will not so vitiate the judgment

as to render it a nullity, and subject to collateral attack. (*Town of Lyons v. Coolidge*, 89 Ill., 529; *Glover v. Sedburn Holman, et al.*, 8 Heisk., 519; *Kipp v. Fullerton*, 4 Minn., 473.) Nor is *Hunsaker v. Coffin*, 2 Or., 107, in conflict with this principle, for in that case the attack upon the judgment was direct, not collateral, and between the same parties. The whole question is well summed up by Mr. Freeman when he says: "From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. The fact that the defendant is not given all the time allowed by law to plead * * * will not make the judgment void." What construction might be given to sec. 510 of the code is immaterial, for if the judgment in the action of *Powers v. Carter & Estes* was prematurely rendered, under the authorities cited, it was not void, nor subject to collateral attack upon that ground. The court having erred in declaring it so, and for that reason directed a verdict for the defendant, the judgment must be reversed and a new trial ordered.

Judgment reversed.

PHILLIPS v. THORP.

DIVORCE—AGREEMENT NOT TO DEFEND SUIT IS VOID.—The authorities are uniform in holding that any agreement between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce, to withdraw his, or her opposition, and make no defense, is void, as *contra bonos mores*.

IDEM.—Such agreements are a fraud upon the law which favors marriage, and will not give its sanction nor lend its aid to uphold or enforce the terms of any contract, nor countenance any contrivance which is designed to promote its dissolution.

IDEM.—Nor will equity interpose its jurisdiction to correct mistakes arising out of such illegal contracts, as suppression of them is far more likely to be accomplished by leaving the parties without remedy against each other.

IDEM.—Where the defense of illegality is interposed, it is allowed upon grounds of public policy and not out of any regard for the interests of the objecting party.

APPEAL from Polk County.

Warren Truitt, for appellant.

Tilmon Ford, for respondent.

By the Court, LORD, J.:

This was a suit to correct a mistake in a deed executed in pursuance of a stipulation or agreement, entered into between the plaintiff and defendant, *pendente lite*, for a divorce, in which it was agreed, in consideration of the same and to settle all questions of property and alimony, the plaintiff was to release all claim to the real and personal property of the defendant, and to prosecute to final determination the said divorce suit, paying all costs and expenses therefor, and the defendant was to make no defense therein. After the divorce was granted, a mistake, it is alleged, was discovered in the deed of the defendant to the plaintiff, by which the plaintiff is deprived of several acres of land which it is claimed that the deed was intended to include, and to correct which is the object of this suit. The question to be determined is, whether equity will interpose to afford the relief prayed for under such a state of facts. The welfare of society is so deeply interested in the preservation of the marriage relation, and so fraught with evil is regarded whatever is calculated to impair its usefulness, or designed to terminate it, that it has long been the settled policy of the law to guard and maintain it with a watchful vigilance. Although marriage, in the eye of the law, is a civil contract,

unlike any other civil contract, it cannot be rescinded or annulled by consent of the parties to it. By mutual consent, if the parties are of the proper age and capacity, the marriage relation may be created and receive the sanction of the law, but it cannot dissolve or terminate it. That high office can only be performed by a court of competent jurisdiction, for some specified cause prescribed by law, upon proof taken in a suit for that purpose. The good order and well being of society, as well as the laws of this state, require this. And so strict and careful are courts in the administration of this justice, out of regard for the public morals and the general welfare of society, that they will esteem it their duty to interfere upon their own motion whenever it appears the dissolution is sought to be effected by the connivance or collusion of the parties; and all contrivances or agreements, having for their object the termination of the marriage contract, or designed to facilitate or procure it, will be declared illegal and void as against public policy. In *Weeks v. Hill*, 38 N. H., 204, the court say: "Upon principles of public policy, contracts which provide for bringing about a marriage between two parties for a reward, called marriage brokage contracts, are held void, as tending to improvident and ill advised matches. (*Drury v. Hook*, 1 Verm., 412; *Smith v. Aykerill*, 3 Alk., 566; 1 Story Eq. Jur., sec. 260.) And when the marriage relation has been assumed, it is equally the policy of the law to sustain and uphold it. It, therefore, holds all contracts void which contemplate or provide for the future separation of the parties, or which are calculated to prevent future reconciliation; (Chit. on Cont., 673;) or which aim at effecting a dissolution of the marriage contract, except by a proper administration of the law in the due course of judicial proceedings." In *Adams v. Adams*, 25 Minn., 79, the court say: "The

authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce, to withdraw his or her opposition, and to make no defense, is void, as *contra bonos mores*, and that any note executed in consideration and pursuance of such agreement, is without valid consideration and void." (*Hamilton v. Hamilton*, 89 Ill., 349; *Comstock v. Adams*, 23 Kansas, 513; *Stoutenbury v. Lybrand*, 13 Ohio St., 228; *Belden v. Munger*, 5 Minn., 169; *Visci v. Bertrand*, 14 Ark., 266; *Muckenburg v. Holler*, 29 Ind., 140; *Sayles v. Sayles*, 1 Foster, 312.)

An unlawful agreement, it is said, can convey no rights in any court to either party, and will not be enforced in law or in equity, in favor of one against the other of two persons equally culpable. *Armstrong v. Armstrong*, 3 My. & K., 64. "All agreements," says Mr. Pomeroy, "directly or indirectly preventing or controlling the due administration of justice, are opposed to the universal and most elementary principles of public policy. Whatever be their form and immediate purpose, and however innocent may be the methods of the parties, they are plainly invalid." (Pomeroy Eq. Jr., vol. 2, 935 and notes.)

Throwing out of consideration that at the time the agreement was made in which the plaintiff releases all claim to the real and personal property, and the defendant executed to her the deed in question, that the parties were still husband and wife, the consideration for which these things were done, contemplated and included as an essential part of it, the prosecution to a final determination by the plaintiff of the divorce suit then pending, and to better facilitate and secure that result, the defendant was to withdraw all opposition—"make no defense." It was in effect but the

husband and wife coming together after the suit for divorce was instituted, and agreeing upon the terms upon which the property should be divided, and they be divorced. It is, in fact the refusal of the defendant to do what he agreed to do under the illegal contract, and what it is claimed was intended and supposed to have been done under such contract, that the plaintiff asks relief. But this only shows that the plaintiff still relies upon the illegal contract and its terms for relief. That contract was clearly against the policy of the law as one being entered into for aiding and procuring by collusion the dissolution of the marriage relation. It was a fraud upon the law which favors and sustains the marriage relation, and it will not give its sanction nor lend its aid to enforce or uphold the terms of any contract, nor countenance any contrivance which is designed to promote its dissolution. Nor will equity lend its power to correct mistakes arising out of such illegal agreements, as the suppression of such illegal contract is far more likely to be accomplished by leaving the parties without remedy against each other.

Where the defense, as in this case, is illegality, it is allowed upon grounds of public policy, and not out of any regard for the rights or interests of the objecting party. Although it may be unjust as between the parties, when one is in the enjoyment of the fruits of the agreement, to set up the illegality, the law sustains it out of consideration for the interests and welfare of society. It may be, as argued, that the objection comes with a bad grace from him who has reaped the benefit of the agreement, but on this subject, in *Holman v. Johnson*, Cowp., 343, Lord Mansfield said: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the latter. It is not for his sake, however,

the objection is allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice between defendant and plaintiff —by accident, if I may say so. The principle of public policy is, *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appear to arise *ex turpi causa*, or is a transgression of the positive law of this country, then the court says he has no right to be assisted. It is upon that ground that courts go, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. It may be, too, as argued, that this is not a commendable defense under the particular circumstances of this case, but as the same distinguished judge said, that is a matter for the consideration of the defendant and not for us. Decree reversed, and bill dismissed.

Decree reversed.

SEARS *v.* ABRAMS.

WAREHOUSEMEN—STORAGE—CONVERSION.—A warehouseman receiving grain on storage, and mixing it with other grain of the same nature and quality also stored in his warehouse, in the usual course of business, is not chargeable with a conversion by reason of such act alone.

IDEM.—In a suit in equity, brought by the mortgagee in a chattel mortgage to enforce his lien on the mortgaged property in the hands of several parties who have acquired possession since the mortgage lien attached to the property, a personal decree against one of such parties for the full value of the property based wholly on a mere technical conversion, not occasioning any loss of the security, nor in any manner interfering with the plaintiff's recourse upon it in the hands of another of said parties, also a defendant in the suit, cannot be sustained. It is not technical injury, but real loss, in respect of the security afforded by the mortgage lien, caused by the wrongful act of a defendant, that determines the question of his personal liability in a suit of this character.

APPEAL from Polk County. The facts are stated in the opinion.

Daly & Butler, for appellant.

W. H. Holmes, for respondent.

By the Court, WATSON, C. J.:

This suit was brought by the respondent, Jas. K. Sears, against J. B. Waver, B. F. McLench, J. E. Whitten, R. D. Phillips, The Salem Flouring Mills Co., and the appellant L. Abrams, to foreclose a chattel mortgage executed by said J. B. Waver to the respondent on January 1, 1880, and filed in the proper office February 10, 1880. The mortgage was given to secure the payment of a promissory note of the same date for $495.66, payable on or before October 1, 1880, with one per cent. per month interest from date, and containing the usual stipulation for reasonable attorney fees, in the event of suit or action being instituted to collect such note or any portion thereof, executed by Waver to the respondent. The property described in the mortgage consisted of two horses, a wagon, and "all of the two-thirds of all the grain, both wheat and oats, and hay," which at the time the mortgage was executed had been sown, and which should "be sown and grown" on a certain designated farm, then belonging to one E. C. Keyt.

In his complaint, the respondent charges that a large sum yet remains due and unpaid on his note, and that subsequently to the execution and recording of his mortgage, Waver sold all his interest in great portions of said property, in different lots and parcels, to his co-defendants respectively, and that "they now claim to be the owners thereof, or have disposed of or converted the same to their own use and benefit;" and that each took said property with notice of the rights of respondent. A demand and refusal as

to each defendant is also alleged. His prayer for relief is for a decree against Waver for the amount due on the note; and against the other defendants that they be required to disclose the portions of said property respectively received by them, and that the same be sold to satisfy the said decree and expenses of sale; and that all said parties be foreclosed of all rights or claims in or to said property; and if said defendants have converted any part of said property so that the same cannot be sold as above prayed for, that they be declared liable respectively for the value thereof, and the proceeds thereof applied to the satisfaction of the decree against Waver. There was no service upon or appearance by any of the defendants except The Salem Flouring Mills Co., and the appellant Abrams, so far as the record discloses. Abrams filed a general demurrer to the complaint, which was overruled. Afterwards both he and The Salem Flouring Mills Co. answered separately, denying all material averments in the complaint. The cause was then referred to a referee to take the testimony therein between the respondent and appellant, and report the facts found therefrom and the law arising upon such facts.

Substantially, the facts established by the evidence and reported by the referee, were that from the 22d of September to the 10th of October, 1880, Waver delivered to Abrams of the grain grown that season on the farm mentioned in the chattel mortgage, 196 bushels of oats of the value of $68.60, which Abrams used and disposed of on his own account; and 890 44-60 bushels of wheat of the value of $625.45, which Abrams received on deposit at his warehouse at Lincoln, Polk county, and for which at the time of delivery he gave Waver a receipt as follows:

"LINCOLN, OREGON, October 9, 1880.

"Received of J. B. Waver 890 44-60 bushels of sacked

merchantable wheat, to be delivered on boat at Lincoln, to order of bearer, upon payment of 4 cents per bushel, the damage of water and fire excepted.

(Signed) "L. ABRAMS."

Shortly afterwards, this receipt was purchased by the Salem Flouring Mills Company, endorsed by J. B. Waver. On the 15th of October, 1880, after Abrams had received notice of the purchase of the receipt endorsed by Waver, the respondent made a demand upon Abrams personally for the possession of this wheat, at the same time informing him of his right thereto under said chattel mortgage. Abrams refused to accede to such demand on account of the transfer of such receipt to the Salem Flouring Mills Company, of which he had been duly notified, and afterwards delivered to said company the amount of wheat called for by said receipt and took the same up. When Abrams received the wheat for storage, he run the same through the cleaner and mixed it with other wheat in the warehouse, so that its specific identity was lost. The circuit court confirmed the report, and rendered a personal decree for the respondent against Abrams solely for $560, the amount due on said note, with costs of suit.

Appellant claims that the complaint does not state facts entitling the respondent to any relief in equity, and that the demurrer thereto should have been sustained. Prior to the act of October 24, 1866, entitled "An act to regulate the foreclosure of chattel mortgages," the jurisdiction of courts of equity over the foreclosure of such mortgages was undoubted. (Title IV, chap. 5, code of civil procedure.) But by that act, particular modes of foreclosure were provided, which both seem to be, and to have been designed to be, comprehensive enough to meet every conceivable case, where such foreclosure might become necessary, and among which the

only judicial proceeding provided for is an action at law. It is also declared that, "Whenever in any mortgage of goods and chattels the parties to such mortgage shall have provided the manner in which such mortgage may be foreclosed, such mortgage, upon breach of the conditions thereof, may be foreclosed in the manner therein provided and not otherwise." (Chap. 39, Mis. Laws, 688.)

In the case before us, the manner of foreclosure was provided in the mortgage itself, and did not involve any resort to judicial proceedings. The respondent, however, demanded the possession of the property while it was in appellant's hands, in order to foreclose in the manner stipulated in the mortgage, but was refused as already noticed. This brings the respondent's case, in this respect, squarely within the rule laid down by this court at its July term, 1879, in the case of *Jacobs v. McCalley*, reported in 8 Oregon, page 124. It was there held that the mortgagor's refusal to deliver up the mortgaged property after the condition is broken, to the mortgagee, so that the latter might proceed to foreclose in the particular mode provided in the mortgage, absolved him from any further necessity to proceed in that mode, and that he might then resort to a suit in equity to foreclose. Whatever doubts may exist as to the technical correctness of this construction, the rule laid down by the court cannot possibly be deemed a bad one practically, and we deem it incumbent on us to follow it. Nor is it at all clear that the equity jurisdiction could not be sustained upon other grounds arising from the facts stated in the complaint. But upon this point it is not necessary to express any decided opinion. Adherence to the rule laid down in *Jacobs v. McCalley* conclusively settles this point adversely to the appellant. But we think the circuit court erred in rendering a personal decree against the appellant for a

greater amount than $68.60, the value of the oats converted by him to his own use, and thus placed beyond the reach of the respondent.

The entire scope and purpose of the suit was to subject the mortgaged property or its proceeds, in the hands of any of the defendants, where it might be found, to the satisfaction of the amount due on the respondent's note, by virtue of his mortgage lien. No defendant was sought to be made personally liable unless he should be found to have converted some portion of the property, so that the remedy against it, or its proceeds in specie, was lost. And this we understand to be the true measure of equitable relief in such cases. (Pomeroy's Eq. Jur., secs. 1079 and 1080; *Pierson v. Gilbert*, 57 Ala., 35; *Rowe v. Bentley*, 29 Gratton, 756; *Leedom v. Lambert*, 80 Pa. St., 381.)

The mixture of the wheat received from Waver by the appellant, with other wheat of similar quality also stored in his warehouse, in the usual course of his business, and with Waver's assent, which must be implied under the circumstances, was not a conversion by the appellant, nor did it destroy the legal identity of the wheat so received and mingled. (Story on Bailments, sec. 40.) And such wheat was not thereby placed beyond the reach of the respondent's remedy founded on his mortgage lien. But if the appellant's refusal to deliver the wheat to respondent, on demand, and his subsequent delivery thereof to his co-defendant, the Salem Flouring Mills Co., upon the surrender of his receipt, should be deemed a technical conversion, which, in an action at law, would entitle the respondent to recover the full value of the property as damages, it does not follow that equity will afford him the same measure of relief. It is not the mere technical conversion of the security, but the possession of its proceeds, its loss or removal beyond the

respondent's reach, in a proceeding in equity, founded on his mortgage lien, that entitles him to equitable relief in the form of a personal decree against the defendants, who have occasioned such loss by intermeddling with its possession.

Now it appears plainly from the proofs in this case, that the Salem Flouring Mills Co. got this wheat with the same constructive notice the appellant had when he received it from Waver, of respondent's mortgage lien. And this company, a co-defendant in the suit, and charged in the complaint with the purchase of this wheat from Waver with notice of respondent's lien, is just as much bound to account for it to respondent, as appellant is for the oats converted by him to his own use. Some other objections have been urged by appellant, but we do not deem them important in the view we have taken of his position in the case. The decree must be modified in accordance with the foregoing views. The appellant will recover costs on the appeal, but each party must settle his own costs of suit in the circuit court.

Decree modified.

STATE v. KIRK.

FELONY—AIDING AND ABETTING.—One present, aiding and abetting in the commission of a felony, may be convicted on an indictment charging him directly with the commission of the fact.

APPEAL from Lane County.

J. W. Hamilton and Geo. S. Washburn, for appellant.

E. G. Hursh, for respondent.

By the Court, WALDO, J.:

The appellant was indicted jointly with John Barnard

for the murder of Jack Kearns. The court gave the jury this instruction: "It is the theory of the state that John Barnard was the person who inflicted the mortal wound, and that this defendant was present, aiding, assisting and abetting or encouraging him in the commission of the crime. I instruct you, as the law in this case and governing the proof of the charge contained in the indictment against defendant, that it makes no difference whether this defendant cut, struck or stabbed Jack Kearns, the deceased, with a knife or sharp instrument, as in the indictment alleged. It is not necessary to prove these facts against this defendant as in the indictment alleged. If you find from the evidence, beyond a reasonable doubt, that this defendant was present, aiding, assisting, abetting or encouraging said Barnard, the joint defendant, in the commission of said crime, he is as guilty as the one who inflicted the fatal wound."

Counsel for appellant excepted to this instruction—the only exception they urged at the argument. The objection is that the appellant should not have been convicted as an aider and abettor unless charged as such in the indictment, and counsel cite sec. 11 of art. 1 of the state constitution, that the accused shall have the right to demand the nature and cause of the accusation against him, and sec. 69, 349 Gen. Laws, that the indictment shall contain a statement of the facts constituting the offense.

The accused is informed of the nature and cause of the accusation when he receives a copy of the indictment, charging the offense according to the principles of the common law; and an indictment so drawn states the acts constituting the offense within the meaning of the statute. The acts constituting the offense are stated when they are stated according to their legal effect. Thus: "If A, B and C are indicted for killing J. G., and that A struck him, and

that the others were present, procuring, abetting, etc., and upon the evidence it appears that B struck, and that A and C were present, etc., in this case the indictment is not pursued in the circumstance; and yet it is sufficient to maintain the indictment, for the evidence agrees with the effect of the indictment, and so the variance from the circumstance of the indictment is not material; for it shall be adjudged in law the wound (stroke) of every one of them, and is as strongly the acts of the others, as if they all three had held the weapon, etc., and had all three struck the deceased." (MacKalley's Case, 9 Co., 67. The statute is followed when the act is stated according to its legal effect. Bish. C. P., sec. 332; *Page v. Freeman*, 19 Mo., 421; *People v. Onteveras*, 48 Cal., 19.)

We confine ourselves to the case before us, in which a like conviction, on a like indictment, would have been good at common law. It is not necessary to determine whether the defendant may have been convicted on this indictment on evidence that he was an accessory before the fact. It follows that the instruction was correct.

Judgment affirmed.

DEFORCE v. WELCH, ET AL.

TIDE LANDS—RIGHTS OF ADJACENT OWNERS.—The legislature, recognizing the fact that the people had dealt with, and sold the tide lands adjacent to their other lands as their own, provided by the act of 1874, that the purchaser of any tide land from the owner of the land adjacent to such tide land, shall have the right to purchase the same from the state. By this act, the legislature recognizes the rights of purchasers from adjacent owners.

APPEAL from Clatsop County.

C. W. Fulton, for appellant.

Dolph & Simon, and J. Q. A. Bowlby, for respondents.

By the Court, Lord, J.:

Without recounting the particulars of the joint occupancy and subsequent division between Shively and Welch of the donation land claim to which Shively and wife several years afterwards obtained a patent from the United States, it is sufficient to say that in March, 1850, Shively deeded block 146, which is tide land, and includes that particular portion of land in controversy, to Welch, and in July of the same year Shively and wife deeded lot 1, in block 4, which lies immediately south of block 146, with a street intersecting them, to Ingalls, the grantor of plaintiff, and that these sales and deeds were made and executed according to a plat. That at the times these deeds were executed to the parties above mentioned to the property therein described, as above stated, the donation law had not been passed, and the legal title to lot 1 in block 4 was in the United States, and to block 146 in the United States in trust for the state of Oregon when she should become a sovereign state of the union, but that thereafter Shively and wife, in 1859, executed to Ingalls a confirmatory deed to lot 1 in block 4, which was a part of his donation claim, and in 1860 executed to Welch a confirmatory deed to block 146, which was tide lands and belonged to the state of Oregon, by virtue of its sovereignty. No action seems to have been taken by the state to dispose of the tide lands prior to the act of 1872, and the act of 1874, amendatory thereof (Session Laws, 1872, p. 129, and 1874, p. 76,) but for what reason is not now apparent, unless as suggested by Mr. Justice Boise in *Rodgers v. Parker*, 8 Or., 189, "that it was then thought that these lands were private property, and the subject of sale, as they were claimed as such property, being sold like lands above the high water," which is in accordance with the facts in this

case, and may serve to explain the dealings of the parties in respect to such tide lands. On the 18th day of September, 1876, Welch having previously made his application therefor, the state of Oregon, by its duly authorized agents, executed and delivered to him a deed of conveyance to all the tide lands in front of lot 1. Welch died in 1877, and the defendants claim through him. On the 28th day of September, 1876, Ingalls deeded lot 1 to the plaintiff, and, according to the record, on the same day he applied to the state authorities to purchase the tide lands in front of block 1, and on the same day the board of commissioners executed and delivered to the plaintiff a deed to the tide lands in front of lot 1, which is the same land previously deeded to Welch, and the tide land in dispute. Upon this state of facts, the plaintiff asks that the defendants may be decreed to hold the title to said lands in trust for him, and that they be required to execute a good and sufficient conveyance for the same. The ground upon which plaintiff claims this relief is that he is the owner of lot 1, and as such he is entitled to purchase the tide land in front thereof, and that his grantor had no notice of the application of Welch to purchase the same from the state. At the time of the original purchase of block 146, which includes the tide land in controversy, by Welch of Shively, block 146 was not the property of Shively. It was tide land, and, like all such lands, was held in trust by the United States for the state. By virtue of its sovereignty, the state has the absolute right to dispose of the tide lands. This is conceded. But the legislature, recognizing the fact that the people had dealt with and sold the tide lands adjacent to their other lands as their own, undertook, under certain conditions, to give legal effect to such purchases from adjacent owners. Upon this subject, Mr. Justice Boise, in *Parker v. Rodgers*, *supra*, says: "The

legislature seems to have assumed that these tide lands were the subjects of sale by the owner of the land adjacent above high water, in the act of 1874, where it is provided that the purchaser of any tide land from the owner of the land adjacent to such tide land shall have the right to purchase the same from the state. By this act, the legislature recognizes the rights of purchasers from adjacent owners." Now, irrespective of the fact that Ingalls purchased lot 1 by the plat which plainly showed that the tide lands had been laid off into blocks by the adjacent owner of whom he purchased, he also knew Welch had previously purchased the tide land in front of it when he bought block 146 of Shively. The evidence discloses that he had notice of Welch's application for the purchase of it from the state, and that he neither objected to it nor claimed any right to the land in dispute by virtue of his frontage, but on the contrary expressly disclaimed any right to it. As a purchaser from the adjacent owner, Welch made his application and received in 1876 his deed from the state to it. Subsequently, plaintiff purchased from Ingalls lot 1, and began proceedings to obtain the tide lands in front of it, but he certainly would have no better legal claim to it than his grantor. We think the facts show that Welch placed himself within the provisions of the act of 1874, and was entitled to receive the deed from the state. The decree of the court below is affirmed.

Decree affirmed.

CARO BROS. v. O. & C. R. R. CO.

PROCESS—SUBSTITUTED SERVICE—WHAT RETURNS MUST SHOW.—Substituted service of process on a corporation must show the facts which confer jurisdiction.

APPEAL from Douglas County.

B. F. Bonham, for appellant.

Joseph Simon, for respondent.

Service upon the clerk or agent of a corporation, under subdivision one of section fifty-four, session laws, 1876, is a substituted service, and the return of service must state the facts which authorize such substituted service. Therefore, where a service on the agent of a corporation in Douglas county, whose place of business was in Multnomah, a return of service as follows:

STATE OF OREGON,
COUNTY OF DOUGLAS, } ss.

I hereby certify that I served the within summons within said county, this 15th day of September, 1882, on the within named Oregon and California Railroad Company, by delivering a true copy thereof to F. H. Reed, paymaster, an agent of said company, together with a copy of the complaint, certified to by the clerk of said county to be a true and correct copy of the original and the whole thereof.

J. S. PURDOM,
Sheriff of Douglas county,

Is insufficient to give the court jurisdiction of the person of the corporation. (*Detroit Fire Ins. Co. v. Judge, etc.*, 23 Mich., 492; *Oxford Iron Co. v. Spradly*, 42 Ala., 24; *Talledyn Ins. Co. v. McCullough, id.*, 667; *The Southern Ex. Co. v. Hunt*, 54 Miss., 664.)

KING v. BENTON COUNTY.

ROADS AND HIGHWAYS—NOTICE OF PRESENTATION OF PETITION FOR.—The county court has no jurisdiction to act on a petition for a county road signed by persons whose names are not on the notice. Such persons are mere strangers to the proceedings, and if a county court orders a road to be laid out on a petition so signed, such order is *coram non judice*, and utterly void.

APPEAL from Benton County.

This was a proceeding instituted in the county court of Benton county for the establishment of a county road. The proof of service of notice of the presentation of the petition recites that notices were posted: "Three in public places in the vicinity of said proposed road, and one at the place of holding the county court for Benton county, Oregon, at least thirty days immediately prior to this (May, 1881,) session of said county court, * * * and the said notice and the petition for said road are signed by more than twelve householders of Benton county, Oregon, in the vicinity of said road." The record discloses the fact that there are thirty-two more names of petitioners on the petition than there are signed to the notice. Other facts necessary to understand the case are stated in the opinion.

R. S. Strahan and M. S. Woodcock, for appellant.

John Kelsay, for respondent.

By the Court, WALDO, J.:

The county court of Benton county, at its May term, 1881, made an order establishing a county road in said county over the land of the appellant, King, which order the appellant asks to have set aside on various grounds. It is decisive of the case that the order was made on a petition on which the court had no authority to act, because of the want of legal notice of the intended application.

It is common sense that the notice should give full information of the intended proceeding. Property owners to be affected, should be made acquainted by the notice with the parties that seek to appropriate their property to public uses. The petitioners for a county road exercise an authority which must be strictly pursued. Only those who give notice can become petitioners. A petitioner whose name is not on the notice has no standing in court, and cannot be heard any more than can a mere stranger. The court cannot listen to a petition signed by persons whose names are not on the notice.

In *Minard v. Douglas County*, 9 Or., 206, the court was called upon to decide what constituted notice. It follows from that case that it is the petitioners—not a part of them—but those making application, and those *only*, who are authorized by the statute to give the notice, and, consequently, a notice which does not have the names of the petitioners making the application subscribed to it, is fatally defective.

Counsel for the respondent objected to a very strict construction of the statute, because, he said, it would become a difficult matter to lay out a road over a man's land, without his consent. It ought to be a difficult matter to lay out a road over a man's land against his consent. Where principles of civil liberty prevail, it is no light matter to take private property for public uses, against the will of its owner. The proceedings should have been quashed.

Judgment reversed. WATSON, C. J., dissents.

OREGON RAILWAY AND NAVIGATION COMPANY v. GATES, ET AL.

GARNISHMENT.—A garnishment operates only on the legal rights of the defendant in the attachment or judgment—such rights as the debtor could, by action at law, enforce in his own name.

ATTACHMENT.—An attaching creditor cannot acquire through his attachment any higher or better rights to property or assets attached than the defendant had when the attachment was made, unless he can show some fraud or collusion by which his rights were impaired.

As a general rule, a court of equity will not interfere to relieve a defendant who has neglected to make his defense at law.

APPEAL from Wasco County.

W. Lair Hill, for appellant.

J. E. Atwater, *B. Whitten*, for respondents.

By the Court, LORD, J.:

This was a suit instituted for the purpose of restraining and enjoining an execution, issued upon a judgment obtained against the plaintiff under this state of facts: On the 12th day of July, 1881, Frank Cambloss, a timber inspector for the plaintiff, received of M. Groper a lot of railroad ties for the company. When the receipt of the ties were to be acknowledged, Groper and one Joseph Roemer were present, and by the direction of Groper, and with the consent of Roemer, who claimed to be interested in the ties, Cambloss made out the receipt to Roemer, acknowledging the receipt of the ties, and the sum of money due him from the company. Roemer assigned the receipt to one J. B. Condon, to whom the amount due for the ties was paid on the 8th day of August, 1881. On the 2nd day of August, 1881, the defendants sued Groper and garnished the plaintiff, by serving the writ of garnishment upon J. N. Fordyce, cashier and agent of the plaintiff at The Dalles, who gave to the

defendant, Sheriff Storrs, a certificate of indebtedness by the plaintiff to said Groper for the amount due for the aforesaid railroad ties by reason of an inadvertence or mistake in Cambloss in reporting to the company an account of said ties in favor of Groper, and upon this account and without any knowledge of the receipt, Fordyce gave the certificate. Judgment was rendered in the case of the defendants against Groper and plaintiff for $414.14 and execution ordered to compel the plaintiff to pay the judgment. As soon as the mistake was discovered by the plaintiff, a motion, supported by affidavits, was filed by the plaintiff for the purpose of setting aside the judgment as against the plaintiff, but the court refused to act in the premises, presumably for want of authority in the mode sought. The present suit was then instituted, and upon the facts as above stated, refused to grant the injunction, and to reverse which decree, and secure the injunction, the matter is brought to us by this appeal. A garnishment operates only on the legal rights of the defendant in the attachment or judgment—such rights as the debtor could by action at law enforce in his own name. The plaintiff acquires no greater rights against the garnishee than the defendant himself possesses, except when the garnishee is in possession of property of the defendant under a fraudulent transfer from him. Nor does garnishment have any retroactive effect, so as to affect prior transactions between the garnishee and the defendant. Only, therefore, such demands can be subjected to garnishment as the defendant in his own name would have a right to recover in an action at law. (Drake on Attach., secs. 458, 462; *Hassell v. Whitman*, 19 Ala., 135; *Cook v. Walthall*, 20 *id.*, 334; *Godden v. Pierson*, 42 *id.*, 390; *McDermott v. Donegan*, 44 Mo., 85.) At the time Fordyce gave his certificate to the sheriff, the plaintiff did not owe Groper for

the ties received by Cambloss. By consent of all the parties, that indebtedness for the ties was transferred to Roemer, or his assignee, and a certificate, or receipt given for it, which authorized the cashier to pay it when presented. Groper had no claim against, nor could he have collected pay for the ties from the plaintiff. Certainly, the defendants can only claim what Groper could have claimed—they are entitled to have what he was entitled to have and nothing more. It is not a case where liability has been incurred, or money or goods advanced on the faith of any liability of the plaintiff to Groper. The defendants are in Groper's place, and only entitled to enforce what he could enforce in an action at law and in his own name. Nor does it appear that at the time credit was given to Groper by the defendants, that it was done upon the suggestion, or in the expectation, that the plaintiff would pay them, or that the plaintiff had any knowledge of any indebtedness of Groper to the defendants. The action at law by the defendants against Groper was commenced nearly a month after the transaction had taken place, and when the defendants applied through the sheriff in that action to the cashier for a certificate of any indebtedness, he stated just what appeared on the books—it was the only guide he had—and answered that the company was indebted to Groper in the amount stated in the certificate. But it was not in fact true. The plaintiff owed Groper nothing, but had promised to pay what they did owe Groper for the ties to Roemer, or his assignee. It is true, that the timber inspector, by mistake or inadvertence, reported the ties as received from Groper, probably from the fact that the original dealing and delivery was with him in regard to the ties, but this mistake could not make the plaintiff indebted to Groper or in any way enlarge the rights of the defendants, for they stand in his shoes. There is no evi-

dence or pretense of any fraud or collusion or purpose to aid the defendant, Groper, in avoiding the indebtedness, or that the plaintiff ever knew of any such indebtedness to the defendants. They cannot acquire through their attachment any higher or better rights than the defendant, Groper, had when the attachment was made, unless they can show some fraud or collusion by which their rights were inpaired. Considering even that the timber inspector of the company was negligent or careless in the matter of his report, it did not work any injustice to the defendants—his mistake neither increased nor diminished their rights, nor did they lose or gain anything by it. Its effect was to make the books incorrect—certainly, a thing not to be desired by a corporation doing so large a business through the instrumentality of so many and different agents, in different localities—and to make the plaintiff indebted to Groper upon the face of them, when in fact and truth no such indebtedness to him existed. It is hardly necessary to pursue this inquiry further; the question is, will equity relieve against the judgment by perpetually enjoining it. When a defendant, after judgment, resorts to a bill in equity for the purpose of invoking the restraining powers of the court in respect to matters which would have afforded a good defense at law, he must show that his failure to make such defense is not attributable to any negligence or want of diligence on his part, but to accident, fraud, or the act of the opposite party. "When the facts existed before the trial at law, upon which relief in equity is claimed, and were known to the party suing in equity, or might have been known or discovered by the exercise of diligence, and were as much a defense at law as in equity, no redress can be ordinarily obtained." (Story Eq. Jr., 1572.) But relief will be granted when material facts have been discovered since the

trial at law, which could not by ordinary care and diligence have been discovered before the trial. (Kerr on Injunctions, 589.) In *Freeman v. Miller*, 53 Texas, 377, the court say: "The true rule in such cases is, that to entitle a party to relief in equity he must show: First, that his failure to make full answer was not attributable to his own omission, neglect or default; Second, that he has a good defense to the entire cause of action, or to such part of it as he proposes by his petition to litigate. It is not enough to show that he was not guilty of neglect in permitting the judgment to go by default, but he must also clearly show that it was inequitable and unjust to permit it to be enforced." (*Hair & Labrozan v. Lowe*, 19 Ala., 224; Drake on Attachments, sec. 655; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 335.) Now it certainly would be inequitable to compel the plaintiff to pay twice, and when the plaintiff was diligent to correct the mistake as soon as discovered. Each case of this sort must depend to a great extent upon its own circumstances. Mr. Pomeroy says, "The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for relief, if it appears that the other party has not been prejudiced thereby." (2 Pom. Eq., sec. 856; Leading Cases in Equity, vol. 2, title 2, 1308; *Snyder v. Ives*, 42 Iowa; *Hubbard v. Hobson*, Brown, [Ill.,] 190; *Felch v. Polk*, 7 Blackf., 563.)

It is our opinion that the judgment should be enjoined, and it is so ordered.

WELLS v. APPLEGATE.

ADMINISTRATOR—ACTION AGAINST.—In an action against an administrator it is essential that the complaint should show that letters of administration had been granted six months before the action was brought. An allegation in a complaint against an administrator, that on the 3d day of November, 1879, an order or determination of the county court was duly made appointing J. A. administrator of the estate of C. A., deceased, is not an allegation that letters of administration were granted on that day, as required by section 373, civil code. The form, (1 Este's Pl., 312,) is not applicable in this state.

MARRIED WOMEN.—Under the constitution of this state, a contract made by a married woman is not necessarily void. But the burden is on the party setting up such a contract to show that it was entered into for an object for which she could lawfully contract.

APPEAL from Douglas County.

Herman & Ball, Bonham & Ramsey, for appellant.

William R. Willis, for respondent.

By the Court, WALDO, J.:

This is an action on a promissory note made and delivered to the respondent by the appellant's intestate. The statute of October 11, 1862, Gen. Laws, 1874, p. 188, sec. 373, provides that, "an action may be commenced against an executor or administrator at any time after the expiration of six months from the granting of letters testamentary or of administration, and until the final settlement of the estate and discharge of such executor or administrator from the trust, and not otherwise." The complaint alleges, "that on the 3d day of November, 1879, at Roseburg, Douglas county, Oregon, an order or determination of the county court for Douglas county, state of Oregon, was duly made, appointing the defendant administrator of the goods, chattels and credits of said Chas. Applegate, and that he is now such administrator." The pleader seems to have followed the form in 1 Estee's Pl., 312, without noting that the form

was not applicable under the laws of this state. There is, or was no such section in the probate act of California as that above cited. Under our statute, the complaint must show that six months had elapsed after the granting of letters of administration before the action was brought. If this essential fact is not alleged, a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, will lie. (*Maine Central Institute v. Haskell*, 71 Maine, 487; *Ellerson v. Halleck*, 6 Cal., 386; *Gilbert v. Cameron*, 16 Wen., 579.) An order made on a certain day appointing a person administrator, is merely an order nominating the person to the office; such person does not thereby become an administrator. (*McKean v. Frost*, 46 Me., 239, 248.) The letters of administration are his commission of office, which, on their face, authorize him to act. But since he is not authorized to act until he has filed a bond, it seems to be proper construction of the statute that the bond is a condition precedent to the granting of letters. The appointee has no right to his office until he has filed his bond. It would hardly be legitimate to presume that he has letters of administration to which he is not legally entitled, and which he could not have without assuming, or having the means to assume, a false character. Section 373 clearly signifies that when letters of administration are granted, the bond has been filed, and the appointee has been fully installed in his office.

The word appointment, generally, may signify such actual installment in the administration office. It is so used in section 1080. But the complaint does not use the word in this general sense. Had it done so, it is doubtful whether such a form of allegation of the fact that letters of administration had been granted would have been good pleading. (*Beach v. King*, 17 Wen., 97.)

The other objections urged by the appellant are not well founded. The respondent swore that the promissory note set up in her complaint was made for a lawful consideration. Her testimony was not contradicted, although letter No. 17 seems to have been offered in evidence by the appellant with some design of that kind. But this design, if it existed, was not carried out. The letter might well have been ruled out as irrelevant, since there was no issue before the jury to which it was pertinent.

The instruction that the promissory note of a married woman was absolutely void, was not entirely correct. The rights of property secured to married women by the state constitution necessarily imply a power, under certain circumstances, to make contracts. (*Starr v. Hamilton*, Deady, 268; *Cooksen v. Toole*, 59 Ill., 515.) But when the respondent pleaded her coverture, the appellant should have set up matter, if any such there was, in avoidance of the plea. The burden was on the appellant to show an adequate consideration for the note set up by him in his counter claim. (*West v. Laraway*, 28 Mich., 464; *Nash v. Mitchell*, 71 N. Y., 199; *Broome v. Taylor*, 76 N. Y., 564; *Way v. Peck*, 47 Conn., 23.) He could not, in the absence of such proof of the validity of the note, make out that the instruction was error. However, since the case must go back, with liberty to the respondent to amend her pleadings, the appellant will have an opportunity, if the case comes to a second trial, to show, if the facts are with him, that the note is supported by a valid consideration.

Judgment reversed. LORD, J., concurs.

APPENDIX.

APPENDIX.

IN THE CIRCUIT COURT FOR THE COUNTY OF MARION AND STATE OF OREGON.

THE STATE OF OREGON *v.* S. F. CHADWICK, AARON ROSE and B. P. SMITH.

No. 2971—ACTION TO RECOVER DAMAGES.

Before Matthew P. Deady, Referee.

John M. Thompson and Addison C. Gibbs, for the plaintiff.

S. F. Chadwick, in propria persona, and for Rose and Smith.

The referee having heard the allegations and proofs of the parties and the arguments of counsel in the above entitled case, now finds and states the following conclusions of fact therein:

1. That at the general election held in the month of June, 1870, the defendant, S. F. Chadwick, was duly elected secretary of state for the state of Oregon; and that afterwards, to-wit: on July 15, 1870, said defendant Chadwick, as principal, together with the defendants, Aaron Rose and B. P. Smith, as his sureties, executed and delivered to the plaintiff their certain bond in the penal sum of $10,000 as alleged in the complaint herein, to be void among others, upon the performance of the condition following, to-wit: that said Chadwick would "faithfully discharge the duties of his office as secretary of the state of Oregon, and also as auditor," which bond was afterwards, to-wit: on July 19, 1870, duly deposited by said Chadwick, together with his oath of office, in the executive office of said state of Oregon, and then and there duly approved by the governor thereof; and that afterwards, to-wit: on September 12, 1870, said Chadwick, by virtue of the premises, entered upon the said office

of secretary of state and remained therein and performed the duties thereof until September 14, 1874.

[The findings of the learned referee are too lengthy for the space left in this volume, but the result of such findings were, in brief, that the defendant, Chadwick, had, while secretary of state, during his first term, audited and allowed, in excess of what was lawful, the following sums to the claimants named, to-wit:

E. F. Foudray, for reclaiming S. E. May, a fugitive from justice, from Salt Lake City, and delivering him to the sheriff of Marion county, the sum of $634.20.

Joseph Sloan, for services as agent of the state, in reclaiming Michael McCormick, a fugitive from justice, from Seattle, W. T., and delivering him to the sheriff of Clackamas county, the sum of $88.00.

J. M. McCoy, for services as the agent of the state, in reclaiming H. L. Palmer, a fugitive from justice, from the state of California, the sum of $149.

Thomas Howard, for services and expenses in arresting upon a bench warrant, E. E. Frink, and conveying him from Grant to Linn county, the sum of $74.46.

J. A. Shinn, the sheriff of Baker county, for conveying one insane person from said county to the insane asylum, $437.60.

T. H. Cann, as assistant secretary of state, the sum of $1,400.

For and on account of clerical aid in the office of secretary of state, the sum of $1,116.78.

W. H. Watkinds, the superintendent of the penitentiary, for conveying two insane persons from said penitentiary to the insane asylum, $15.27.—REP.]

OPINION OF THE REFEREE.

The answer in this case, beyond the plea of the statute of limitations, simply denies that the secretary wrongfully audited and allowed the several sums alleged in the complaint, except in the case of Foudray, where there is a further denial of information as to whether he wrongfully charged 107 days for executing the warrant of reclamation or not, but on the trial it was admitted that the return thereon showed that it was done in 26 days and that such was the fact.

It was also substantially admitted on the trial that the several accounts for transportation of convicts and insane, alleged in the complaint to have been unlawfully allowed, were allowed under §§ 5 and 6 of the act of January 12, 1859, (Or. L., p. 607) as for the hire and board of a horse, and that there was also allowed for conveying each of such convicts and insane, mileage, at the rate of 10 cents per mile.

Under these circumstances, the answer was considered and treated as a demurrer simply, and the case was tried accordingly.

The plea of the statute of limitations assumes that this action is brought upon a parol contract or liability, and was, therefore, barred in six years from the time the cause of action accrued (Or. code, § 6); whereas it is brought upon a sealed instrument—the bond of the defendants—and the several supposed causes of action stated in the complaint are merely statements of alleged breaches of the condition thereof. Such an action may be brought within ten years from the time it accrued. (Or. code, § 5.) The plea is clearly insufficient.

In the consideration of this case, two principal questions of law arise: (1), What was the compensation allowed by law for reclaiming fugitives and conveying convicts and insane to the penitentiary and asylum; and (2), what is the measure of the secretary's responsibility when acting as auditor of public accounts or claims against the state?

The constitution (§ 2, Art. II) provides that "by virtue of his office" the secretary shall be "auditor of public accounts;" and the statute (Or. Laws, p. 492,) makes it his duty "to *examine* and *determine* the claims of all persons

against the state, in cases where *provision for the payment thereof shall have been made by law*, and to endorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant upon the treasury for the same."

The statute also provides that "no account shall be audited, except the same be duly verified by the oath * * * of the claimant or his agent;" and authorizes the secretary to examine under oath "the person presenting" an account "orally or in writing as to any fact relating to the justness" of the same. A claimant who is dissatisfied "with the decision of the secretary" may have the matter referred to the legislature; and all claims against the state must be presented to the secretary, with the evidence in support of them, "to be audited, settled and allowed within two years and not afterwards." It will be seen from this that while the secretary is generally a ministerial officer, and not a judicial one, that in the auditing of accounts he acts in a judicial capacity. His duty is to *examine* and *determine* the justness of the account presented and the law applicable thereto. He is to judge of the law and the facts involved in the application. In so doing he is engaged in the exercise of the judicial function as much as though he was sitting on the wool sack.

Still, being a ministerial officer and not a judicial one, he cannot claim the full immunity with which the law in the interest of a "free and impartial administration of justice, * * uninfluenced by fear and unbiased by hope," clothes the judge. (*Taaffe v. Downes*, 3 Moore, P. C. 51.) The latter is not answerable *civilly* for any act done in his official capacity, whatever his motives, but the ministerial officer, even when acting judicially, is so liable whenever it appears that his act proceeds from or is the result of wilfulness, malice, corruption or gross negligence. In other words, he is responsible for good faith and ordinary care and competency.

In *Pike v. Megoun, et al.*, 44 Mo., 491, it was held that the defendants while acting as registration officers were not liable to the plaintiff civilly, for erroneously refusing to register him as a qualified voter, if such error was produced merely by a mistake in judgment, and not as the result of wilfulness, corruption or malice, or "knowingly wrongful and not according to their honest conviction of duty."

In *Walker, et al. v. Hallock, et al.*, 32 Ind., 239, it was held that the members of the common council of Evansville were not liable civilly for the consequences of their action in a matter committed by the law to their discretion and judgment—as, for instance, whether or not two-thirds of the adjacent property owners had consented to the continuance of a market house, unless they acted corruptly. In *Weaver v. Devendorf*, 3 Denio, 117, it was held that an assessor, in ascertaining and determining the value of taxable property, was acting judicially and therefore was not responsible civilly for the consequences of his action, however erroneous or *whatever his motives*. But, as was said in *Pike v. Megoun, supra*, this last remark as to motives, was not necessary to the decision of the case, and being clearly in the face of all the English and American cases upon the point, must be regarded as mere dicta. But the real doctrine of the case—that the assessor in determining the value of property is acting judicially—has been firmly followed by the courts of that state. See *Vail v. Owens*, 19 Barb., 22; *Barhyte v. Shepherd*, 35 N. Y., 238.

In *Bonner v. Adams, et al.*, 65 N. C., it was held that the auditor of the state, whose duty it was, like the defendant Chadwick's in this case, "to examine and liquidate the claims of all persons against the state in cases where there is sufficient provision for the payment thereof;" with power to examine claimants under oath concerning the correctness of such claim—when acting in the performance of this duty was not a mere ministerial officer, but one called upon to pass upon the *correctness* of a claim, and to *judge* if there is "sufficient provision of law for its payment."

It is true, that these decisions were all made in actions brought by private parties for injuries resulting to them from the actions of the officers in question.

But it has not been suggested that the secretary is under any other or different obligation in this matter to the state than the citizen, and I am unable to see why or how he should be, and therefore I think the cases are in point, as much as though the questions decided in them had arisen in proceedings directly between the state and the officer.

It follows from these authorities, and none have been found to the contrary, as well as the reason of the matter, that the secretary of state when acting as auditor of public

accounts and claims against the state is not the mere advocate or agent of the state to prevent the payment of doubtful or unjust claims, but rather the umpire or judge between the citizen and the state, whose duty it is to carefully weigh and examine the fact and the law and allow or disallow the claim according to the fair and reasonable estimation of the one and interpretation and application of the other.

And while it is doubtless his duty to be vigilant to detect and expose false and extravagant claims, and fearless to reject them, it is not his duty to reject or refuse to audit a claim and thereby put the claim to the delay and expense of a petition to the courts for a mandamus or the legislature for relief upon every question or quibble that may be made or suggested concerning its justice or validity. Such a rule of action would practically work a denial of justice to the creditors of the state.

From the very nature of the case, it would be unreasonable, unjust and impracticable to hold the secretary responsible for mere errors and mistakes of judgment committed in the performance of this duty.

Practically, such a rule would seriously impair the usefulness of the office, for who, that would be thought fit for it, would be foolish enough to undertake to audit and pass upon over two hundred thousand dollars of claims, yearly, of all amounts and kinds, and often arising under crude, confused and contradictory legislation, and give bond to be responsible pecuniarily for all mistakes he might make—and that, too, upon the scanty compensation of $1,500 a year?

Acting upon this theory of the duties and responsibilities of the secretary, I have considered and passed upon the demands in the complaint herein, amounting in the aggregate to $5,697.87, and allowed $4,198.01, and disallowed the remainder. The first three involve the question of the compensation of an agent for the reclamation of a fugitive from justice.

The criminal code authorizes the appointment by the governor of an agent to demand such a fugitive of the executive of the state where he may be found. Said code (§ 489) also provides that "The account of the agent, *embracing his actual expenses* incurred in performing the service, must be paid by the state, after being audited and allowed as other claims against the state."

This provision seems to assume what I have no doubt is true, that there need be no difficulty in obtaining a competent agent for this purpose upon the payment of all his expenses. At least it does not provide that he shall have anything else. But it is said there is an implication in the phrase—"*embracing* his actual expenses," that his account may contain a charge for something else.

But unless there is some other statute which may be construed as providing some further compensation, this is not sufficient to justify the payment of anything but expenses, although it may aid in the construction of some other statute to that effect.

§ 13 of the act of October 24, 1864, (Or. Laws, p. 603,) being the general fee bill, provides—that "All private persons performing services required by law, or in the execution of legal process, when no express provision is made for their compensation, shall be entitled to $2 for each day so employed, and mileage for any necessary travel, going and returning, at the rate of ten cents per mile." It is not a forced construction of this section to apply it to this agent so far as the per diem is concerned, but there is no reason for such application, so far as the mileage is concerned, that being in its nature only an allowance for traveling expenses which are expressly provided for in § 498, *supra*. Beyond these there is no provision for the compensation or expenses of such agent, nor is there any necessary.

But in the first of these three accounts—that of E. D. Foudray—it was assumed without a particle of authority that he was a sheriff engaged in conveying a convict to the penitentiary on horseback over the mud roads of Oregon, under the act of January 12, 1859—instead of a private person—the mere agent of the executive—traveling swiftly and comfortably by steamer and rail between Salem and Salt Lake, via San Francisco—and allowed to charge mileage for expenses and a per diem of $3 at the rate of one day for every 30 miles of travel whereby the 26 days actually employed were stretched out to 107; and not only this, but the like per diem and mileage for the fugitive, in addition to the sum of $321 for his transportation of 1609 miles—a sum just double the legal mileage or the probable actual cost of such transportation. It might be thought that assumption and ingenuity could go no farther than this, but

an item of $101.62 was added for interest during the nine months that the account was lying unaudited in the secretary's office awaiting an appropriation therefor. I have found that at least $634.20 of this account ought not to have been allowed under any circumstances, and therefore the defendants are liable for that amount.

Some excuses have been offered for the allowance of this claim, and while they have no legal effect, they may not be without weight, morally. The executive volunteered a certificate that the account was "correct," though he could know nothing of it as executive, that the secretary didn't. A committee of the house (H. J. 1872, p. 203,) said that they *believed* the claim "legal and just" and recommended an appropriation to pay it and other like claims "if found just and legal by the secretary." But it should be remarked in this connection, that the committee seems to have acted upon the prior recommendation of the secretary that an appropriation ought to be made to pay these claims, and that the delay in auditing them was caused by the want of such appropriation—all of which implied they were probably legal and just—particularly when there was not a hint or suggestion to the contrary. The other claims for similar services have been disposed of in the same way.

The claims for conveying convicts and insane involve the consideration of sundry statutes extending over many years, including questions of repeal by implication.

In 1855 (act Jan. 19, 1855, Or. L., 1854-5, p. 479,) the law allowed a sheriff for conveying a convict $4 a day—mileage for himself and convict, and the expenses of a guard. In 1859 (act Jan. 12, 1859, Or. L., p. 606,) it was provided that a day's travel in conveying a convict between the first of November and April should be 30 miles, and for the remainder of the year, 36—that a sheriff conveying convicts "on horseback" should be allowed pay for one horse for each convict "at the ordinary rates for horse hire in his county," and that the allowance for conveying convicts "in a wagon or other land vehicle" should not exceed that by horseback. This act, although containing a general repealing clause, was not considered to have repealed the provision in the act of 1855, *supra*, giving mileage for the sheriff and convict; and it could not have been so intended, for the board and lodging of the convict would cost at least from $2 to $3 a

day on the road, for which, in that event, the sheriff would get no compensation.

In 1864 (act Oct. 24, 1864, Or. L., p. 603,) the per diem of the sheriff was changed to $3 and the mileage and expense of guards was continued as before. Neither did this act repeal the act of 1859, even if it be admitted that it could have done so, under the constitution, by implication, because in the general repealing act of that year (Oct. 21, 1864, Or. L. 1864, p. 947,) said act was expressly excepted from the repeal, and because it is not to be presumed that it was so intended in the face of the well known fact that the mileage of 10 cents per mile would not, even then, in the greater part of the country, more than pay the transportation of the convict, leaving nothing to reimburse the sheriff for his board and lodging on the road. In the same year (act Oct. 21, 1864, Or. L. 1864, p. 741,) it was provided that the fees and compensation for sheriffs, and others east of the Cascade mountains "in *civil* actions, suits or proceedings" should be one-third more than elsewhere.

I have disallowed Warnick's claim of $276.66 for one-third extra compensation for conveying convicts from east of the mountains, and the like claim of Shinn's of $83 for conveying insane, for the reason that this act did not upon its face apply to any such transaction, being expressly limited to fees and compensation in *civil* suits, etc., and because as to Shinn's case it was expressly repealed by the act of October 29, 1870, (Ses. L., 108,) which by its terms took effect July 1, 1872.

This, I think, is a plain case of oversight or negligence, and the secretary is pecuniarily responsible to the state for the loss resulting therefrom.

In 1872 (act Oct. 23, 1872, Or. L., p. 603,) the fee bill was again revised and the per diem of sheriffs conveying convicts raised to $4, but the provision as to mileage and expense of guards was not changed, nor the act of 1859, *supra*, giving horse hire otherwise affected.

So were the statutes upon this subject during the period covered by this action. Assuming, what was generally understood until the case of *Grant Co. v. Sells*, 5 Or., 243, (decided in Dec., 1874,) that under § 22 of art. IV of the constitution a statute could not be repealed or amended by implication, (*Meyer v. Cahalin*, 5 Saw., 359,) there would

be no doubt but that a sheriff conveying a convict by land was entitled to the cost of a horse for the transportation of the latter, as well as mileage, because that was the plain letter of the statute. Upon this reasonable conclusion as to the state of the law, the secretary may be presumed to have acted during this period, and although it should turn out afterwards that the law was otherwise, he ought not to be held pecuniarily responsible for this error of judgment.

But I do not think the act of 1859 was even repealed by implication, because no statute passed after it was in the matter of mileage different from the one in force when it was passed. Repeals by implication are not favored; and a mere ministerial officer, though acting judicially, ought not to conclude in favor of such a repeal unless in a very clear case.

The truth is or may be that the country or its means of transportation had outgrown the necessity of the act of 1859, and that since 1870 the mileage was sufficient to transport a convict without the allowance for horse hire. *But that fact would not repeal the act.* It might be a good reason for the legislature doing so; and the law-makers or their advisers may have been remiss in this respect. But the secretary as auditor cannot be made the scapegoat for their sins. But it is not admitted that even now the mileage alone is sufficient to reimburse the sheriff for transporting a convict. Indeed, off the lines of railway and steamboats—probably over two-thirds of the country—I am very certain that it is not. The transportation alone on the overland stage between Roseburg and Jacksonville is now $14.75, and has never been less than $10, or about 10 cents a mile; and still there is the boarding and lodging of the convict, which will amount to $1.50 or $2 a day more.

Assuming, then, that the act of 1859 allowing a horse for the transportation of a convict was in force during the period of these allowances, or that there was reasonable ground for thinking so, the secretary is not personally responsible for allowing horse hire under the name of transportation, in addition to mileage, unless such allowance appears to have been so excessive, under the circumstances, as to warrant the belief that it was made without reference to the law—wilfully, or without sufficient care.

In Klippel's case there was an allowance of $153 for the

transportation of 3 convicts—the distance traveled, going and returning, being according to the statute, 490 miles. At 30 miles a day's travel, this allowance would be within a very small fraction of $2.75 a day, for a horse, rigging and board, which probably could not be had for less. Taking this allowance as a standard established by the secretary himself, in this and the two Wright cases, I found that the allowances for transportation or horse hire in excess of this rate were unauthorized and the result of wilfulness or insufficient care, and held the secretary responsible for the damage to the plaintiff.

In Watkind's case, it is more than doubtful if he was authorized to convey the insane convict to the asylum at all. § 7 of the act of September 27, 1862, (Or. Laws, p. 622,) did authorize the governor to cause an insane convict to be removed to the asylum, and it was under this authority that Watkinds probably acted. But by § 1 of the act of October 28, 1868, (Or. Laws, p. 623,) it was made "the duty of the sheriffs of the several counties," to convey to the asylum such persons as may be duly declared insane. As the convict in question was removed in 1872, it would seem that the service should have been performed by the sheriff. But waiving this, there is no law providing for the payment of removing an insane convict by the governor, and therefore the most than can be charged is what is reasonable under the circumstances, or $2 a day and mileage for the agent, under § 14 of the act of October 24, 1864, (Or. L., p. 605,) and expenses of transporting the convict.

But the person employed being the superintendent of the penitentiary, employed by the state upon a yearly salary, it was not reasonable nor proper that he should receive a per diem of $9 for going from Salem to Portland and back on the railway. As for the charge of interest in this and $9.17 in Shinn's case of October 23, 1872, whatever other objection there may have been to the payment of them, it is sufficient to say that there was no law for it. It is an elementary principle that the state never pays interest unless expressly required to do so, and therefore it is difficult to say why these items were allowed, unless their smallness secured them from criticism.

These remarks apply also to the item of interest allowed in Foudray's case; but as the plaintiff in the action has

allowed the interest upon the sum admitted to be due Foudray, I have not made any question about it.

The next item is the allowance of $1,400 for an *assistant* secretary of state when there was no such officer.

By §§ 8 and 9 of the Or. Laws, p. 491, the secretary is authorized, in his discretion, to appoint an assistant, who shall receive an annual salary of $400 a year "to be audited and paid for as the salaries of state officers."

In this case, the appointment having been overlooked or omitted for some reason, technically it was a plain violation of law to audit and allow an account for such services; and the plaintiff is therefore entitled to recover the amount back from the secretary. At the same time, it being always well understood that this assistant secretaryship, with its annual pittance of $400, was given to the secretary as a means of eking out his little salary, and that it was expected that he might make a nominal appointment of some boy or person otherwise employed, and do the work and receive the compensation himself, it is not probable that the legislature will refuse to relieve against this technical liability. It is not necessary to add, that such an arrangement is not up to the very highest standard of political morality, but it is just such a fetch as cheap governments have always been compelled to resort to.

The next and last item is the illegal allowance of $1,116.78 as "clerical aid."

In 1870 (act Oct. 26, 1870, Or. L., p. 494,) it was provided that the secretary should have $400 a year for clerical aid in his office, to be paid quarterly on his warrant. In 1872 (act Oct. 22, 1872, *id.*,) it was provided that this allowance should be $1,000 per annum. This latter act contained a preamble to the effect that the large increase of work in the department required a large increase of force, but it made no illusion to the act of 1870, and contained no express repeal of it.

From all the circumstances—particularly the great difference between $400 and $1,000—there is no reasonable doubt but that the legislature *intended* the latter act and sum to take the place of the former one. But acting upon what was supposed to be the legal effect of § 22 of art. IV of the constitution upon the amendment of statutes, as above stated, the compiler placed both acts in the compila-

tion of 1874, as being in force irrespective of the supposed intention of the legislature. But the supreme court having since held (*Grant Co. v. Sells*, *supra*,) that a statute may be repealed by implication, notwithstanding the constitution, it follows that the act of 1872 repealed and displaced that of 1870. In *Pierpont v. Crouch*, 10 Cal., 315, an act of the legislature having fixed the salary of the district attorney at $1,000 a year, two years thereafter another act was passed without in any way referring to the former one, fixing it at $600; the court, per Field, J., held that the latter act repealed the former one, because it was clearly evident that "it was intended as a revision or substitute of it." This case is *quatuor pedibus* with the case at bar.

The secretary, acting upon the assumption that both acts were in force by the operation of the constitution irrespective of the supposed intention of the legislature, drew both sums, and has not accounted for them otherwise than by an allegation in his answer, that "the state had the benefit of the money"—therefore he is legally liable for the amount claimed—the excess over $1,000. If it appeared, however, that the secretary had expended this money in clerk hire in his office, I should have no hesitancy in holding that it was such a mistake in judgment as excused him from personal responsibility for it. But instead of alleging in his answer that he drew the money and expended it for clerk hire and producing the vouchers or testimony in support of it, he merely alleges that the state got the benefit of it, and makes no attempt to prove it. This appropriation for clerical aid could not be lawfully drawn by the secretary except to pay for clerical labor in his office performed, not by himself, but by third persons whom he found it necessary to employ for that purpose. For his own services, the secretary is supposed to be compensated by his salary. But if the fact is as it should be, that the money was expended for clerical aid in the service of the state, make no doubt but that the legislature will grant the secretary relief.

As there is no specific claim for interest in the complaint and nothing was said by counsel on the subject, I have made no finding upon the subject. If interest is given, it should be allowed at least from September, 1874, to date.

Interest for 4 years upon the sum found due would be $1,691.60, which, added to the principal, would make $5,-920.60.

MATTHEW P. DEADY, Referee.

July 24, 1879.

IN THE CIRCUIT COURT FOR THE COUNTY OF MARION AND STATE OF OREGON.

THE STATE OF OREGON *v.* S. F. CHADWICK, AARON ROSE, ASHER MARKS AND B. P. SMITH.

No. 2972.—ACTION UPON AN OFFICIAL BOND.

Before Matthew P. Deady, Referee.

John M. Thompson and Addison C. Gibbs, for the plaintiff.

S. F. Chadwick, in propria persona, and for his co-defendants.

The referee having heard the allegations and proofs of the parties and the arguments of counsel, now finds and states the conclusions of facts herein as follows:

I. That at the general election held in June, 1870, the defendant, S. F. Chadwick, was duly elected secretary of state for the state of Oregon; and that afterwards, to-wit: on July 1, 1874, said defendant as principal, together with the other defendants herein, namely: Aaron Rose, Asher Marks and B. P. Smith, as his sureties, executed and delivered to the plaintiff their certain bond in the penal sum of $10,000 as alleged in the complaint herein, to be void upon the performance, among others, of the following condition, to-wit: that said Chadwick would "faithfully discharge the duties of his office as secretary of the state of Oregon, and also as auditor;" which bond was afterwards, to-wit: on July 7, 1874, duly deposited by said Chadwick, together with his oath of office, in the executive office of said state, and then and there duly approved by the governor thereof; and that afterwards, to-wit: on July 14, 1874, said Chadwick, by virtue of the premises, entered upon the said office as secretary of state and remained therein and performed the duties thereof until September 9, 1878;

II. That the defendant Chadwick during said period did not faithfuly discharge the duties of his said office as secretary and auditor, in this:

(1). That at divers and sundry times, he audited and allowed 57 different accounts, presented to him by the sheriffs of sundry counties in this state for mileage, claimed to have been earned in conveying 57 insane persons to the asylum for the insane, amounting in the aggregate to $5,942.30, and drew his warrants upon the treasurer of state in favor of said sheriffs respectively, for various sums in payment of said accounts, amounting in the aggregate to the sum aforesaid, by means whereof the said sheriffs wrongfully obtained the same from the treasury of the plaintiff, as alleged in the complaint herein;

(*a*). That said accounts for mileage so audited and allowed were false and illegal, because there was then no law that gave a sheriff mileage as such for said services, and because in addition thereto the accounts for the actual expense of said services were at the same time presented to said secretary by said sheriffs and by him audited and allowed, and warrants drawn upon the treasury therefor;

(2). That at divers and sundry times he audited and allowed 24 different accounts presented to him by the sheriffs of sundry counties in this state for mileage earned in conveying 24 convicts to the penitentiary, amounting in the aggregate to $3,871.50, and drew his warrants upon the treasurer of state in favor of said sheriffs, respectively, for various sums in payment of said accounts, amounting in the aggregate to the sum aforesaid, by means whereof the said sheriffs wrongfully obtained the same from the treasury of the plaintiff, as alleged in the complaint herein;

(*a*). That said last mentioned accounts for mileage, so audited and allowed, were false and illegal, because there was then no law that gave a sheriff mileage, as such, for said services and because, in addition thereto, the accounts for the actual expense of said services were at the same time presented to said secretary by said sheriffs, and by him audited and allowed, and warrants drawn upon the treasury therefor;

(3). That at divers and sundry times he audited and allowed three different accounts presented to him by the sheriffs of sundry counties in this state for a per diem earned

in conveying sundry convicts to the penitentiary and insane persons to the asylum, amounting in the aggregate to $150 and drew his warrants upon the treasurer of state in favor of said sheriffs, respectively, for various sums in payment of said accounts amounting in the aggregate to the sum aforesaid, by means whereof the said sheriffs wrongfully obtained the same from the treasury of the plaintiff, as alleged in the complaint herein;

(*a*). That said accounts for a per diem were false and illegal, because they were for 50 days in excess of the time actually employed by said sheriffs in the performance of said service;

(4). That at divers and sundry times he audited and allowed three different accounts for expense of guards and three different accounts for expense of hacks presented to him by the sheriffs of sundry counties in this state as incurred in conveying sundry convicts to the penitentiary, amounting in the aggregate to the sum of $120.50, and drew his warrants upon the treasurer of state in favor of said sheriffs, respectively, for various sums in payment of said accounts, amounting in the aggregate to the sum aforesaid, by means whereof the said sheriffs wrongfully obtained the same from the treasury of the plaintiff, as alleged in the complaint herein;

(*a*). That said accounts for the expense of guard were illegal because the guards were employed without the certificate of the judge or contrary thereto, and those for the expense of hacks were false and illegal because they were at least so much in excess of the actual cost thereof;

(5). That on December 1, 1874, and every three months thereafter, to and inclusive of September 1, 1875, he audited and allowed an account in favor of T. H. Cann, as assistant secretary of state, for the sum of $100, and drew his warrants upon the treasurer of state therefor, by means whereof the sum of $400 was wrongfully obtained by said Chadwick from the treasury of the plaintiff;

(*a*). That said accounts were all illegal, because said Cann was not during said period the assistant secretary of state, and did not act as such or perform the duties thereof;

(6). That on December 1, 1874, and on every three months thereafter to and inclusive of September 1, 1878, he audited and allowed an account for the sum of $400 and

drew his warrants upon the treasurer of state therefor, by means whereof he obtained $6,400 from the treasury of the plaintiff;

(*a*). That $2,400 of said accounts were illegal, because said secretary was not entitled to draw upon said treasury for clerical aid for a greater sum than $4,000;

(7). That as to the other breaches of the condition of said bond alleged in the complaint herein, to-wit: the illegal and excessive allowance of accounts presented by sundry sheriffs for stage and railway fare, jail fees, tavern bills or the like, amounting in the aggregate to $252.54, it does not appear that said Chadwick unfaithfully discharged the duties of his said office in auditing and allowing the same.

And as conclusions of law from the premises the referee now finds and states the following:

I. That the defendant Chadwick did not faithfully keep the condition of his bond in auditing and allowing the accounts aforesaid and drawing his warrants on the treasurer therefor, to-wit:

For mileage in conveying convicts.....	$5,942 30
For mileage in conveying the insane.....	3,871 50
For per diem in excess of the days actually employed.....	153 00
For expense of guards and hacks in excess of that incurred.....	120 00
For salary of assistant secretary.....	400 00
For clerical aid in excess of the amount allowed by law.....	2,400 00
	$12,887 30

To the damage of the plaintiff in said sum of $12,887.30.

II. That by reason of the premises the plaintiff is entitled to recover of and from the defendants herein the sum of $10,000, the full penalty of said bond, together with its legal costs and disbursements in this behalf expended.

OPINION OF THE REFEREE.

The answer in this case simply denies that the secretary did *wrongfully* audit and allow these several accounts as alleged in the complaint, and avers that the same "were presented and allowed in good faith."

Upon the trial, it was admitted that the *fact* of the auditing and payment of these accounts as alleged in the complaint was not denied by the answer, and therefore it was treated as a demurrer to the complaint.

The secretary, in auditing these accounts, though a ministerial officer, was acting judicially and therefore is not responsible for mere mistakes or errors of judgment as to the law or the facts, nor at all unless it satisfactorily appears that he acted from wilfulness, malice, corruption or that his conduct was the result of gross negligence. In other words, he is only responsible for good faith and ordinary care and competency. (See the opinion of the referee in *The State v. Chadwick, et al.*, No. 2971, *supra.*)

As to the accounts for the salary of the assistant secretary and clerical aid, the reasons for the findings concerning similar accounts in that case apply in this as well as the suggestions concerning the relief which the secretary is or may be entitled to in this behalf.

The other question of importance in this case is—was a sheriff entitled to mileage in addition to his actual expenses for conveying a convict or insane person, after the passage of the act of October 24, 1874?

Up to that time, a sheriff was entitled to charge mileage for himself and the convict and insane and the expense of guard, and the hire and board of a horse for each person conveyed.

Section 5 of the act of 1874, *supra*, (Ses. L., p. 125,) provides that:

"The sheriff shall receive for conveying a convict to the penitentiary, and delivering him to the proper officer thereof, three dollars a day for each day actually engaged, besides *necessary traveling expenses* for himself and each convict, and the necessary expenses incurred in guarding such convict during such conveyance, to be paid out of the state treasury." Then follows a proviso prohibiting any

allowance for guards between points where there is communication by railway or steamboat.

This act also repealed § 4 of the act of January 12, 1859, (Or. L., p. 607,) prescribing the number of miles for a day's travel; and took effect from its passage.

But notwithstanding this, the secretary continued to allow the sheriffs mileage for themselves, convicts and guard, in addition to their "traveling expenses." As mileage is only a fixed sum allowed for "traveling expenses," the result was that such expenses were allowed and paid twice—once actually and by name, and again constructively and under the name of mileage.

This result is so unreasonable, not to say unjust to the state, that the secretary is not excusable for allowing the accounts for mileage, unless he was compelled to do so by some plain and express provision of law.

The authority relied upon for this double payment of "traveling expenses" is § 14 of the act of October 24, 1864, (Or. L., p. 605,) which reads:

"Every officer or person *whose fees are prescribed in this chapter* who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage, at the rate of ten cents per mile, in going to and returning from the place where the service is performed."

The word "chapter" as it occurs in this section is the substitute of the compiler for the word "act" in the original. Read then, as it must be for the purposes of this inquiry—"Every officer or person whose fees are prescribed in this *act*"—that is, the act of October 24, 1864—it is clear that it does not apply to any officer whose fees are *not* prescribed by that act.

The act of 1874 relates solely to the fees of clerks and sheriffs. It is entitled "an act to repeal" certain acts and sections of acts therein named, relating to the fees of these officers, "and to precribe the fees of clerks and sheriffs."

Section 4 of the act of 1864 prescribed the fees of sheriffs, but the act of October 29, 1870, (Ses. L., p. 72,) *undertook* to substitute § 3 of itself for such section without specially repealing it or purporting to amend it; but the act of October 23, 1872, (Ses. L., p. 74,) expressly repealed both said sections 3 and 4 and amended and re-enacted the latter.

Section 4 of the act of 1864 may then be considered as in force in some form and as prescribing the fees of sheriffs until the passage of the act of 1874. In that view of the matter, the word "chapter" was, as a matter of convenience, substituted in the compilation for "act."

But the act of 1874 expressly repeals said § 4, and does not re-enact it. It is a new, distinct and independent act containing ten sections—two of which are taken up with repeals, one with the emergency clause, while the seven others are devoted to the subject of fees of clerks and sheriffs, the fifth of which prescribes the fees or compensation of sheriffs for conveying a convict to the penitentiary.

The allowance of this mileage cannot then be justified by said § 14, because the fees of sheriffs during the period covered by the complaint herein were *not* prescribed by the act of 1864, but that of 1874.

The fact that by the act of October 20, 1876, (Ses. L., p. 34,) § 14, *supra*, was amended so as to except assessors from its operation and to include all other persons whose fees are prescribed "in this chapter," does not affect the question, for the fees of sheriffs were not then prescribed by chapter 2 of the Miss. Laws, nor had they been since the passage of the act of 1874.

Neither do I think that said § 14 *ever* applied to the transaction or act of conveying a convict to the penitentiary. The compensation prescribed by the act of 1864, (§ 4) for such service, consisted of a per diem, mileage and certain expenses. These are not "fees" in the ordinary sense of that word, nor is the conveying of a convict, which consists in traveling to the penitentiary and back, a "service" that "is performed" at a particular "*place*," to which the sheriff goes for that purpose—as the serving of a summons or other process, and for which a specific "fee" is allowed.

But the convincing argument upon this point is derived from the fact that § 4 of the act of 1864—the very part of such act which prescribes the "fees" of sheriffs—contained a specific provision giving the sheriff mileage when engaged in conveying a convict. Now, if this mileage was a fee prescribed by the act within the meaning of § 14, then the sheriff would get double mileage for this service—once under § 4 as a *fee*, and once under § 14 as *mileage*. Such never was the intention or purpose of the act of 1864, and no one

ever claimed such a construction for it. But now that § 4 is repealed, and the "fees" of sheriffs are no longer prescribed by the act of 1864, there is no ground for claiming that § 14 is applicable to the compensation of conveying a convict.

There being, then, no plain and specific provision of law requiring the payment of mileage to sheriffs in such cases, and the manifest consequences of such payment being to give them double pay for "traveling expenses," while the act of 1874, which purports and was enacted to regulate the whole subject of sheriffs' fees, expressly repealed § 4 of the act of 1864, giving mileage in such cases, and substituted actual expenses therefor, I am unable to discover any reasonable or plausible ground upon which the secretary could have proceeded in allowing these sheriffs mileage in addition to the "necessary traveling expenses," and therefore have reluctantly concluded that in so doing he acted negligently and without sufficient care. This being so, he is responsible for the damage suffered by the plaintiff in consequence of his failure in this respect to faithfully keep the condition of his bond.

The law (act Oct. 28, 1868, Or. L., p. 623,) having provided that a sheriff "shall receive the same fees and compensation" for conveying the insane to the asylum as for conveying convicts to the penitentiary, it follows that the allowances by the secretary of mileage for conveying the former was also illegal and without any reasonable excuse.

If it appeared that there was any doubt or serious question of right or law involved in the matter of allowing this mileage, why, then, the secretary, having in good faith exercised his judgment in the premises, would not be responsible for the consequences even though it should turn out that he acted erroneously.

But although it may have required some examination of the statutes to ascertain what compensation sheriffs were entitled to for conveying convicts and insane since October 29, 1874, there was no difficulty in finding the law and applying it. In the act of 1874 was a plain and complete direction upon the subject, and it was only by going out of the way that § 14, *supra*, was brought into the question at all. And then by a palpable misapplication of it this mileage has been allowed—and that in the face of the manifest

purpose and intent of the legislature in passing the act of 1874, taking away mileage and giving actual expenses in place of it.

It is understood that the supreme court of the state, in the case of *Crossen v. Earhart*, decided last February, but not yet reported, held that a sheriff is not entitled, since the act of 1874, to mileage for conveying convicts, nor to any other compensation than that allowed by § 5 of that act. But I have not been furnished with the opinion or seen it, and therefore have not had the benefit of it in the examination of the subject.

As to the allowances for excessive per diem, expense of guard and hacks, the complaint explicitly alleges they were in excess of what was earned, authorized or expended, while the answer admits the fact of the allowances, but only denies that they were wrongful and avers that they were made in good faith.

Upon reflection I have concluded that the answer only raises the question of law, as to the legality of the allowances and the responsibility of the secretary on account of them. The per diem allowed by the complaint seems to be reasonable, as four days for conveying an insane person from The Dalles to the asylum, instead of 10, as charged and allowed; $64.50 of the allowance for guard is alleged to have been made contrary to the judge's order and $6 of it without it. These facts are not denied, and if they are true, the conclusion of the answer, that the allowance was not wrongful, is clearly incorrect. The amount allowed in the complaint for hack hire seems reasonable and correct, as $3 for conveying the sheriff, one convict and guard from Portland to the depot in East Portland, and from Salem to the penitentiary, instead of $10 charged by the sheriff and allowed by the secretary. And the very fact of allowance of such accounts forces the conclusion in my mind that it was done wilfully or negligently—without due consideration or care for the rights of the plaintiff. It is so well known to every person of the general intelligence and local experience of the secretary—or even much less—that the journey between Portland and The Dalles only occupies one day instead of four, and that hack hire from Portland to the east side depot is at most $1 instead of $3.33⅓, as charged

and allowed, that no other conclusion is possible from the premises.

As to the $252.54 that I have found upon in favor of the defendant, there was a lack of proof. The facts were not of such general notoriety, or the implied admission of the answer, owing to the nature of the charge in the complaint, was not sufficiently explicit to enable me to find against the defendants with certainty. Yet it is very probable that even some of those allowances are illegal because excessive.

For instance, in conveying seven convicts from Clatsop county to the penitentiary, a charge called "jail fees at Portland" of $19.94 was made and allowed. It does not seem reasonable that it should cost $2.84 a night to keep a convict in the public jail at Portland. But some portion, and probably the half of it, was a proper charge, and as I am unable without proof to say with certainty how much of it is excessive, I have found against the plaintiff upon it.

The same may be said of allowing a sheriff a hotel bill of $5 for one night at Salem instead of $2.50.

The findings of fact foot up $12,887.30 damages, but as this is a suit upon the bond of the defendants, judgment cannot be given against them in a greater sum than the penalty thereof—$10,000.

It may be unnecessary to suggest that I have reached these conclusions reluctantly and with regret, but such is the fact.

MATTHEW P. DEADY, Referee.

July 27, 1880.

[The following decision—the first ever printed west of the Rocky Mountains—was published in the *Oregon Spectator* over 36 years ago. While it may not be useful as a precedent under our present system of laws and jurisprudence, it is considered that its merits, as a fragment of the history of Oregon's primitive days, entitles it to the space it now fills.—REPORTER.

IN THE SUPREME COURT OF THE PROVISIONAL GOVERNMENT OF OREGON, JUNE TERM, 1847.

HENRY B. KNIGHTON, Plaintiff in error, *v.* HUGH BURNS, Respondent in error.

ERROR TO THE CLACKAMAS CIRCUIT COURT.

1. The prohibitory clause contained in the organic law, art. I., sec. 2, is taken in the substance of its provisions from the Constitution of the United States, prohibiting the passage of laws impairing the obligation of contracts.
2. Any deviation from the terms of a contract impairs it, and the objection to a law on the ground of its impairing the obligation of contracts can never depend upon the extent of the change which the law affects in it.
3. While the remedy to enforce the obligation of a contract may be modified, yet the obligation of the contract itself is inviolable.
4. Any construction of the act of December 12, 1845, entitled "An act relative to the currency, and subjecting property to execution," which would admit of scrip constituting the basis of a legal tender, impairs the obligation of a contract.
5. Parties are presumed to contract with reference to existing laws.
6. Independently of the organic law it is a general rule, subject to exceptions, that statutes shall have a prospective operation only.
7. The prohibition extends to all rights accruing under all contracts, whether written or verbal, whether expressed or implied, and whether arising from the stipulations of the parties or accruing by operation of law.

Burnett & Lovejoy, for plaintiff in error.

W. G. T'Vault, attorney for defendant in error.

By the Court, J. QUINN THORNTON, C. J.:

This cause came up from the circuit court upon a statement of facts presented in a bill of exceptions. On the 4th of November, 1845, the defendant executed to the plaintiff a note for $150, payable November 1, 1846. An action was brought upon this note before a Justice of the Peace, where judgment was rendered against the maker, from

which an appeal was taken to the Clackamas circuit court. This court rendered a judgment against defendant for $146.43, payable in currency, scrip excepted, together with costs. On the trial of the cause at the April term, 1847, the defendant, to maintain the issue on his part, proved that he had tendered to the justice of the peace, before whom the trial was originally had, the full amount of the debt, interest and cost, up to the time of filing of the plea of tender in Oregon scrip to the amount specified in the plea of tender. The defendant tendered in the circuit court also the full amount in Oregon scrip. The plaintiff objected to receiving the scrip in payment of the debt, interest and cost, which objection was sustained by the court.

The organic law, art. I., sec. 2, declares that "no law ought to be made or have force in said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud previously formed." This is a prohibition of great moment affecting extensively the legislative branch of the established government. It is taken in the substance of its provisions from the constitution of the United States, in which there is no prohibitory clause which has given rise to more various and able discussion or more protracted litigation. The first important case arising under the clause as found in that constitution was the case of *Fletcher v. Peck*, 6 Cranch, 87. In that case, it was decided that when a law was in its nature a contract and absolute rights have vested under that contract, a repeal of that law could not divest those rights. The supreme court went again and more largely into the consideration of this interesting and fundamental doctrine, in the case of *Territ v. Taylor*, 9 Cranch, 43. It was there held that a legislative grant, competently made, vested an indefeasible and irrevocable title. But it was in the great case of *Dartmouth College v. Woodward*, 4 Wheat., 518, that the inhibition to impair by law the obligation of contracts received the most elaborate discussion. In that case, the principles previously recognized were not only greatly elaborated, but efficiently and instructively applied to new cases. The late venerated and learned Judge Story added many new and interesting views of the nature of contracts which the framers of the constitution intended to protect. The argument of the court in this

celebrated case, the full and elaborate exposition of the constitutional sanctity of contracts, and the decision made in it, did much to throw an impassable barrier around all rights and franchises, and to give solidity to the institutions of the country. The same constitutional prohibition came again under discussion in the case of *Green v. Biddle*, 8 Wheat., 1, in which it was decided that any deviation from the terms of a contract impaired it, and that the objection to a law, on the ground of its impairing the obligation of a contract, could never depend upon the *extent* of the change which the law affects in it.

In the case of *Sturgis v. Crowningshield*, 4 Wheat., 122, the operation and effect of this constitutional prohibition was again extensively inquired into. This was a case which arose out of the restrospective operation of an act of the legislature of New York, passed in April, 1811, by which the defendant had been discharged as an insolvent debtor upon his single petition, from the obligation to pay two promissory notes executed by him in March of the same year, and upon his surrendering his property without the concurrence of any creditor.

In the opinion delivered by the late Chief Justice Marshall, a broad and well defined distinction was made between the contract and the remedy for the enforcement of that contract; and the court held that while the remedy to enforce the obligation of a contract might be modified as the wisdom of the legislature should direct, yet the constitution intended to restore and preserve public confidence completely, by establishing the great principle that the obligation of contracts should be inviolable. And all experience, even if this had been necessary to an understanding of the subject, hath shown that the framers of the constitution acted wisely in incorporating this prohibitory clause in that instrument, and that its expounders merit the gratitude of the nation for having had the firmness to give to it such a construction as affords an ample remedy for the consequences which must otherwise result from the temporary expedients of legislators. The supreme court admitted in this case that the states might by law discharge debtors from imprisonment, and that they might pass statutes of limitation, because these relate only to the remedy affecting only the means of coercion, while the obligation of the con-

tract is left where the parties chose to place it. But that a law which discharges a debtor from his contract to pay by a given time, without performance, and releases him entirely from any future obligation to pay, impaired, because it entirely discharged the obligation of the contract. Any construction, therefore, of the act of the legislature of Oregon territory, December 12, 1845, which would admit scrip constituting the basis of a legal tender on the part of the defendant, would contravene the organic law, art. I, sec. 2, because, although it would not entirely discharge the defendant from the payment of the note, yet it would impair the obligation of the contract embraced in the note, by making that a lawful tender which was not contemplated by the parties at the time of its date, to-wit: November 4, 1845. The supreme court of New York, in *Mather v. Bush*, 6 John. Rep., 233; the Chief Justice of Massachusetts, in *Blanchard v. Russell*, 13 Mass. Rep., 1; the Court of Chancery of New York in *Hicks v. Hotchkiss*, 7 John. Ch. Rep., 187, took a distinction between the case of a contract made before, and one made after the passage of the act; and they held that an insolvent act in force when the contract was made, did not, in the sense of the court, U. S., impair the obligation of that contract, because *the parties are presumed to contract with regard to existing laws.* Were this rule applied to the case now before the court, it would of itself determine the question presented. The laws existing at the time the contract was made for the payment of the money, did not recognize scrip as constituting any part of the legal currency of the country, nor did it do so until more than one month after the execution of the note. But the supreme court of the United States, in *McMillan v. Neill*, 4 Wheat., 209, carried this doctrine much farther, and held that a discharge under a state insolvent law, *existing when the debt was contracted*, impaired the obligation of a contract. As the decisions now stand, the debt, in order that a discharge may extinguish the remedy against the future property of the debtor, must be contracted after the passage of the act *within* the *state*, and between citizens of the state. The principles thus settled are the law of the present case, in which the contract was made *before* the passage of the law.

The supreme court of Indiana, 1 Blackford's Rep., 220, in *Lewis v. Breckenridge*, following the current of decisions,

decided that this constitutional provision must be considered as rendering void any statute which is retrospective, and which destroys a vested right of action arises *ex contractu;* but that the legislative power to regulate the time and manner in which rights shall be legally demanded, does not interfere with the rights themselves. It was also held, independently of the constitution, to be a general rule, subject, however, to exceptions, that statutes shall have a prospective operation only. The constitutional provision, therefore, that no law impairing the obligation of contracts shall ever be made, extends to all rights accruing under all contracts, whether written or parol, whether expressed or implied, whether arising from the stipulation of the parties, or accruing by operation of law. Persons, therefore, who contract to pay a given sum in cash will be required to make payment in cash; and persons who contract to pay in a named sort of funds or property, will be held to the fulfillment of their engagements, or be required to pay in coin an amount equal to the funds or property contracted to be paid. (4 Kent Com., 412, 421.)

It is clear, therefore, that the plea of tender was bad, and that payment can be made in only that which might been legally tendered in payment of debts, November 4, 1845.

Judgment below affirmed with costs.

EXTRA ANNOTATION

TO

PRECEDING VOLUME

NOTES

ON THE

OREGON REPORTS.

CASES IN 10 OREGON.

10 Or. 21-27, KITCHERSIDE v. MYERS.

Equity.—Objection to Jurisdiction on Ground of Adequate Remedy at law comes too late after defendant has answered to the merits, p. 23.

Cited in O'Hara v. Parker, 27 Or. 171, 39 Pac. 1007, Larch Mountain Inv. Co. v. Garbade, 41 Or. 134, 68 Pac. 11, Killgore v. Carmichael, 42 Or. 620, 72 Pac. 637, and Hume v. Burns, 50 Or. 128, 90 Pac. 1010, all approving and applying the rule; Municipal Sec. Co. v. Baker County, 33 Or. 343, 54 Pac. 175, holding that defendant setting up equitable demands in his answer cannot question power of court to grant it.

Explained in Maxwell v. Frazier, 52 Or. 188, 189, 96 Pac. 550, 18 L. R. A., N. S., 102, holding the doctrine restricted to cases of concurrent jurisdiction and inapplicable where there is an entire lack of matter of equitable cognizance.

Public Lands.—Pre-emptor's Right to Possession of Land taken for the purpose of a homestead is a valuable right which equity will protect against one unlawfully withholding it, pp. 26, 27.

Cited in Kaylton v. Kaylton, 45 Or. 130, 78 Pac. 333, approving the rule; Hindman v. Rizor, 21 Or. 117, 27 Pac. 13, holding settler's possessory right a valuable property right which courts will enforce; Pacific Livestock Co. v. Gentry, 38 Or. 283, 61 Pac. 425, refusing to enforce contract in violation of the pre-emption law; Browning v. Lewis, 39 Or. 17, 64 Pac. 306, enjoining trespass on mining rights; Jones v. Hoover, 144 Fed. 223, holding that equity will restrain a trespass interfering with settler's performing acts necessary to perfect his title.

Distinguished in Moore v. Halliday, 43 Or. 247, 251, 99 Am. St. Rep. 724, 72 Pac. 802, 804, holding that settler whose title is inchoate cannot maintain suit to quiet title.

10 Or. 27-31, STATE v. LEE PING BOW.

Indictment.—Surplusage may be Disregarded, pp. 28, 29.

Cited in United States v. Clark, 46 Fed. 638, approvingly.

Criminal Law.—Record Herein Held to Show a correct arraignment, p. 29.

Cited in State v. Abrams, 11 Or. 171, 8 Pac. 328, holding that record showing that defendant personally appeared in open court and was duly arraigned is sufficient.

Criminal Law.—To Save Exceptions to remarks of counsel court must be requested to rule on them, p. 31.

Cited in State v. Hatcher, 29 Or. 316, 44 Pac. 586, applying the rule. Cited in notes in 46 L. R. A. 645, 646, on reversal of conviction because of unfair or irrelevant argument or statements by prosecuting attorney.

10 Or. 31–38, 45 Am. Rep. 129, note, HAWLEY v. JETTE.

Bills and Notes.—Bank Checks and Inland Bills of exchange defined and distinguished, pp. 34–36.

Cited in Erickson v. Inman etc. Co., 34 Or. 46, 54 Pac. 950, holding an order on a third person a bill of exchange; Harrison v. Nicollet Nat. Bank, 41 Minn. 489, 16 Am. St. Rep. 718, 43 N. W. 336, 5 L. R. A. 746, holding a draft on a bank a bill of exchange; Forster v. Mackreth, 4 Eng. Rul. Cas. 215, and Peacock v. Purssell, 4 Eng. Rul. Cas. 530, not accessible. Cited in notes to 16 Am. St. Rep. 721, and 118 Am. St. Rep. 348, on what amounts to acceptance of check at bank.

Bills and Notes.—Presentment and Notice of Dishonor are not excused by insolvency of drawee, p. 36.

Cited in Jackson v. McInnis, 33 Or. 531, 72 Am. St. Rep. 755, 54 Pac. 885, 43 L. R. A. 128, approvingly. Cited in note in 68 L. R. A. 490, on effect of failure of holder to make demand or give notice of dishonor of paper held as collateral or conditional payment.

10 Or. 39–41, RUBLE v. COYOTE G. & S. M. CO.

Injunction.—In Absence of Malice, No Action for damages lies for wrongful injunction, p. 40.

Cited in Mitchell v. Silver Lake Lodge No. 84 I. O. O. F., 29 Or. 301, 45 Pac. 800, applying the rule to wrongful attachment and stating the basis of its existence.

10 Or. 41–42, DAWSON v. CROSSEN.

This case has not been cited.

10 Or. 42–48, BOEHREINGER v. CREIGHTON.

Deeds.—Description is Sufficiently Definite, when the location of the boundary marks can be established by parol proof, p. 44.

Cited in House v. Jackson, 24 Or. 99, 32 Pac. 1029, upholding a similar description; La Vie v. Tooze, 43 Or. 595, 74 Pac. 211, admitting parol evidence to apply the instrument to its subject matter.

Attachment.—Attaching Creditor Without Notice of prior unrecorded deed is entitled to the same protection as a bona fide purchaser, p. 45.

Cited in Bloomfield v. Humason, 11 Or. 233, 4 Pac. 835, Dickey v. Henaire, 15 Or. 356, 15 Pac. 467, and Haines v. Connell, 48 Or. 473, 120 Am. St. Rep. 835, 87 Pac. 266, all applying the rule.

Distinguished in Dimmick v. Rosenfeld, 34 Or. 105, 55 Pac. 101, where the records disclosed that the judgment debtor had no title.

10 Or. 48–51, SEARS v. McGREW.

Judgment.—Several Judgment is Proper Whenever the Defendants might have been sued alone, p. 50.

Cited in Cox v. Alexander, 30 Or. 443, 46 Pac. 795, to the same effect; Hamm v. Basche, 22 Or. 518, 30 Pac. 501, holding that plaintiff may dismiss as to one of several joint defendants severally liable; Tillamook Dairy Assn. v. Schermerhorn, 31 Or. 312, 51 Pac. 439, holding that judgment may be given against those jointly or severally liable and the others be dismissed.

10 Or. 51–52, DE LASHMUTT v. SELLWOOD.

Appeal.—Leave to File New Undertaking should not be granted when there is no showing of mistake excusing omission in first one, p. 52.

Cited in Newberg Orchard Assn. v. Osborn, 39 Or. 371, 65 Pac. 82, holding that leave should be refused when there has been negligence in remedying the defect after its discovery.

Distinguished in Mendenhall v. Elwert, 36 Or. 380, 52 Pac. 23, holding the rule applicable only to some patent omission in the execution of the instrument, not to a difference of opinion as to what constitutes the statutory requirements.

10 Or. 52–56, SIMON v. DURHAM.

Elections.—Powers of Board of Canvassers, pp. 53, 54.

Cited in Dalton v. State, 43 Ohio St. 688, 3 N. E. 707, and State v. Elder, 31 Neb. 186, 47 N. W. 715, 10 L. R. A. 796, following the decision.

Election Boards can Consider No Papers as election returns except such as appear to be so on their face, p. 54.

Cited in State v. McFadden, 46 Neb. 674, 65 N. W. 802, stating what constitutes election returns; Rice v. Board of Canvassers of Coffey Co., 50 Kan. 153, 32 Pac. 135, holding that tally sheets are part of the returns.

Elections.—Mandamus Lies to Compel Canvassing Board to reconvene and make correct returns, pp. 53–56.

Cited in State v. Barber, 4 Wyo. 73, 32 Pac. 20, approvingly.

Evidence.—Court will not Take Judicial Notice of the record in a different case before it, p. 55.

Cited in Lownsdale v. Gray's Harbor Boom Co., 54 Wash. 547, 103 Pac. 835, and Ollschlager's Estate, 50 Or. 59, 89 Pac. 1050, reaffirming the rule.

10 Or. 56–58, CREIGHTON v. VINCENT.

Statute of Limitations.—Effect of Payments by debtor, p. 57.

Cited in Blaskower v. Steel, 23 Or. 110, 31 Pac. 254, Dundee Mortgage etc. Co. v. Horner, 30 Or. 561, 48 Pac. 176, Sheak v. Wilbur, 48 Or. 378, 86 Pac. 376, and Sterrett v. Sweeney, 15 Idaho, 422, 128 Am. St. Rep. 68, 98 Pac. 420, 20 L. R. A., N. S., 963, and Ah How v. Furth, 13 Wash. 553, 43 Pac. 640, all following the decision; In re Smith's Will, 43 Or. 609, 75 Pac. 137, holding that payment by one joint debtor continues the liability as to all.

10 Or. 58–63, STATE v. STURGESS.

Statutes.—A General Law will not Repeal a special act previously enacted simply because it has inconsistent provisions, p. 62.

Cited in Hall v. Dunn, 52 Or. 488, 97 Pac. 816, 25 L. R. A., N. S., 193, approvingly. Cited in note to 88 Am. St. Rep. 283, on implied repeal of statutes.

10 Or. 63–65, BRISCOE v. JONES.

Trial.—When There is No Evidence to Disprove a certain fact, the court may so instruct, p. 64.

Cited in Montour v. Grand Lodge A. O. U. W., 38 Or. 47, 62 Pac. 526, approvingly.

10 Or. 65–66, MULTNOMAH COUNTY v. SLIKER.

Highways—Taxes.—Power of Legislature to Delegate its authority over highways and uniformity of taxation for such purpose reaffirmed, pp. 65, 66.

Cited in City of Oregon v. Moore, 30 Or. 218, 46 Pac. 1018, holding that city may control funds applicable to improvement of roads within its limits; Huddleston v. City of Eugene, 34 Or. 354, 55 Pac. 870, 43 L. R. A. 444, holding that legislature may delegate to city power to lay out roads; Yamhill County v. Foster, 53 Or. 130, 99 Pac. 288, holding that taxation must be uniform throughout the taxing district, state or local. Cited in note in 29 L. R. A. 406, on poll taxes.

10 Or. 66–73, STATE v. GROVER.

This case has not been cited.

10 Or. 73–76, WEISSMAN v. RUSSELL.

Appeal.—Objections Going to the Jurisdiction may be considered, though not assigned, p. 74.

Cited in Wyatt v. Henderson, 31 Or. 52, 48 Pac. 791, approvingly.

Trial.—What Amounts to a Separate Statement of findings of fact and conclusions of law, p. 75.

Cited in Overbeck etc. Co. v. Roberts, 49 Or. 42, 87 Pac. 160, applying the rule; Moody v. Richards, 29 Or. 286, 45 Pac. 778, stating what findings of fact should cover.

10 Or. 76-82, SHIVELY v. HUMR.

Waters.—Right of Riparian Owner to Undiminished Flow recognized, p. 77.

Cited in Hough v. Porter, 51 Or. 411, 98 Pac. 1099, holding the rule altered by the inauguration of irrigation systems. Cited in notes to 67 Am. St. Rep. 665, 668, on what are percolating waters; 51 Am. Rep. 549, on rights in subterranean streams; 41 L. R. A. 744, on correlative rights of upper and lower proprietors as to use and flow of stream.

10 Or. 82-85, NICHOLS v. GAGE.

Cited in note to 24 Am. St. Rep. 815, on conversion by cotenant.

10 Or. 86-90, BOARD OF SCHOOL L. COMMRS. v. WILEY.

This case has not been cited.

10 Or. 93-102, JACKSON v. SIGLIN.

Officers.—Clerk is not Entitled to Commission on money not received or disbursed by him and as to which he performed no service, p. 96.

Cited in Coleman v. Ross, 14 Or. 351, 12 Pac. 648, holding that sheriff is not entitled to commission on execution sale of property bid in by the creditor for the amount of the debt.

Officers can Demand Only Such Fees as the law has authorized, p. 96.

Cited in Wallowa County v. Oakes, 46 Or. 34, 78 Pac. 892, Baker County v. Benson, 40 Or. 212, 66 Pac. 817, Houser v. Umatilla County, 30 Or. 489, 49 Pac. 868, and Pugh v. Good, 19 Or. 92, 23 Pac. 830, all applying the rule.

10 Or. 103-111, GODDARD v. PARKER.

This case has not been cited.

10 Or. 111-117, CROSSEN v. WASCO COUNTY.

County Court When Acting as County Commissioners has limited and inferior jurisdiction, p. 114.

Cited in Frankl v. Bailey, 31 Or. 288, 50 Pac. 187, holding that the county court may recall warrants issued by it.

Counties.—Decisions of County Court which can only be reviewed by certiorari are judicial in their nature, p. 114.

Cited in Pruden v. Grant Co., 12 Or. 310, 7 Pac. 308, holding the auditing of an account for services a judicial act; Flagg v. Columbia County, 51 Or. 177, 94 Pac. 186, holding that the refusal to pay a claim is the exercise of a judicial function.

Counties.—When the Law Prescribes Fees to be Paid to officer when services are rendered, the county court has nothing to do but pay them, p. 114.

Cited in Wallowa County v. Oakes, 46 Or. 36, 78 Pac. 893, approvingly.

Counties.—County Court as Fiscal Agent of county, p. 115.

Cited in Stout v. Yamhill County, 31 Or. 319, 51 Pac. 443, holding that contracts made by the county court need not be entered in the court records.

10 Or. 117-123, HARVEY'S HEIRS v. WAIT.

Judgment.—Court may Correct the Record at a subsequent term, but it cannot then change or modify a judgment, pp. 120, 121.

Cited in Cochran v. Baker, 34 Or. 556, 52 Pac. 520, approving the rule; Dray v. Bloch, 29 Or. 352, 45 Pac. 774, holding that court cannot change or modify its judgment after term of entry; Krause v. Oregon Steel Co., 50 Or. 92, 92 Pac. 811, stating power of supreme court over its decisions after expiration of term of entry.

Appeal.—Final Judgment is not Altered by an order made at a subsequent term modifying it, pp. 121-123.

Cited in State v. Downing, 40 Or. 314, 58 Pac. 864, defining a final judgment.

10 Or. 123-129, LANE v. COOS COUNTY.

Sheriffs.—Imposing Duties of Tax Collector on Sheriff does not create a distinct office entitling him to extra compensation, p. 129.

Cited in Baker County v. Huntington, 46 Or. 279, 79 Pac. 189, holding that moneys coming into the hands of the sheriff as tax collector come by virtue of his office. But see the following citing case.

Distinguished in Columbia County v. Massie, 31 Or. 296, 48 Pac. 695, holding that bonds given as sheriff and bonds given as tax collector are independent.

10 Or. 129-133, ROWLAND v. WARREN.

Cited in note to 7 Am. St. Rep. 431, on estates tail.

10 Or. 133-139, CARMAN v. WOODRUFF.

Injunction.—Tax-payer may Maintain Suit to enjoin illegal disposition of public funds, pp. 103, 104.

Cited in White v. County Commrs., 13 Or. 325, 57 Am. Rep. 20, 10 Pac. 487, Brounfield v. Houser, 30 Or. 537, 49 Pac. 844, and Burness v. Multnomah County, 37 Or. 468, 60 Pac. 1007, all applying the rule.

Modified in State v. Pennoyer, 26 Or. 209, 37 Pac. 907, adding that the tax-payer must show equitable grounds for the relief demanded. Cited in note in 54 Am. Rep. 846, on registration as qualification of voter.

10 Or. 139-145, 45 Am. Rep. 134, CORVALLIS v. CARLISLE.

Municipal Corporations.—Charters are Strictly Construed and convey only those powers which are expressly granted or necessarily incident thereto, p. 141.

Cited in Hubbard v. Town of Medford, 20 Or. 316, 25 Pac. 640, Lawrey v. Sterling, 41 Or. 528, 69 Pac. 464, MacDonald v. Lane, 49

Or. 532, 90 Pac. 182, Scott v. City of La Porte, 162 Ind. 44, 68 N. E. 281, Adams v. City of Shelbyville, 154 Ind. 495, 77 Am. St. Rep. 484, 57 N. E. 125, 49 L. R. A. 797, Ex parte Simms, 40 Fla. 442, 25 South. 282, City of Joplin v. Jacobs, 119 Mo. App. 139, 96 S. W. 220, State v. Butler, 178 Mo. 313, 77 S. W. 570, and Van Antwerp v. Dell Rapids Township, 3 S. D. 309, 53 N. W. 83, further illustrating and applying the rule; The Laundry License Case (In re Wan Yin), 22 Fed. 702, holding that the power to regulate includes the power to license. Cited in notes to 110 Am. St. Rep. 151, and 17 L. R. A., N. S., 52, 68, on power of municipality to punish act also an offense under state law.

Breach of the Peace.—Peace Defined, p. 143.

Cited in Town of Neola v. Reichart, 131 Iowa, 494, 109 N. W. 6, approvingly.

Breach of the Peace.—Extent of Power of City to secure peace, p. 143.

Cited in Theisen v. McDavid, 34 Fla. 446, 16 South. 338, 26 L. R. A. 234, applying the rule.

10 Or. 145-153, 45 Am. Rep. 138, STATE v. POWERS.

Jury.—Incompetency of Juror is Cured by verdict, pp. 150-152.

Cited in Commonwealth v. Wong Chung, 186 Mass. 236, 237, 71 N. E. 294, Queenan v. Territory, 11 Okl. 272, 71 Pac. 221, 61 L. R. A. 824, and Raub v. Carpenter, 187 U. S. 164, 23 Sup. Ct. Rep. 72, 47 L. ed. 122, applying the rule; State v. Pickett, 103 Iowa, 718, 73 N. W. 347, 39 L. R. A. 302, and Faville v. Shehan, 68 Iowa, 244, 26 N. W. 131, 132, both holding that, in civil cases, a party who accepts a juror without examination, waives disqualifications subsequently discovered. Cited in note in 18 L. R. A. 478, on new trial for disqualification of juror.

10 Or. 153-154, HILL v. COOPER.

This case has not been cited.

10 Or. 154-157, READ v. BENTON COUNTY.

This case has not been cited.

10 Or. 157-158, JACKSON v. NEW IDRIAN C. M. CO.

This case has not been cited.

10 Or. 158-162, BROWN v. RATHBURN.

Suretyship.—Release of Property Held as Security for the debt discharges the surety, p. 161.

Cited in American & General Mtg. etc. Co. v. Marquam, 62 Fed. 962, applying the rule; Denny v. Seeley, 34 Or. 368, 55 Pac. 977, holding that where some of the property given to secure the debt, the surety is only released pro tanto; Hoffman v. Habighorst, 38 Or. 262, 63 Pac. 611, 53 L. R. A. 908, holding that creditor is bound to act so as not to diminish the remedies of the surety; Cellers v. Meachem, 49 Or. 189,

80 Pac. 427, 10 L. R. A., N. S., 133, stating effect of appending the word "surety" to the signature on a note.

Distinguished in White v. Savage, 48 Or. 607, 87 Pac. 1042, holding that a failure to proceed against the principal debtor does not release the surety. Cited in note to 115 Am. St. Rep. 95, on duty owed by creditor to surety.

10 Or. 162-166, OREGONIAN R. CO. v. WRIGHT.

Appeal.—Motion for New Trial is not Part of judgment-roll, and it must be brought up by bill of exceptions, p. 166.

Cited in Chung Yow v. Hoh Chong, 11 Or. 224, 4 Pac. 329, and Freeburgh v. Lamoureaux, 12 Wyo. 47, 73 Pac. 547, approving the rule; Ankeny v. Fairview Millings Co., 10 Or. 395, holding that only the technical judgment-roll prescribed by statute can be considered; Newby v. Rowland, 11 Or. 134, 1 Pac. 709, refusing to consider irregularities during trial where there was no bill of exceptions; Farrell v. Oregon Gold Min. Co., 31 Or. 423, 49 Pac. 879, holding that all papers not part of the judgment-roll must be brought up by bill of exceptions. Cited in note to 56 Am. St. Rep. 662, on modification of written contract by subsequent parol agreement.

10 Or. 166-170, WHITLOCK v. MAUCIET.

Trial.—Findings of Court Should be Given such construction as comports with the pleadings and supports the judgment, p. 168.

Cited in Kennedy & Shaw Lumber Co. v. S. S. Construction Co., 123 Cal. 586, 56 Pac. 457, approvingly; Master v. Miller, 2 Eng. Rul. Cas. 695, not accessible. Cited in note to 86 Am. St. Rep. 104, on unauthorized alteration of written instruments.

10 Or. 170-175, LUHRS v. STURTEVANT.

Nuisance.—Private Person Seeking to Restrain public nuisance must show special injury, p. 172.

Cited in Waltz v. Foster, 12 Or. 249, 251, 7 Pac. 24, 26, stating when obstruction of highway may be enjoined; Esson v. Wattier, 25 Or. 11, 34 Pac. 757, applying the rule to the obstruction of a navigable stream; Fleischner v. Citizens' Real Estate etc. Co., 25 Or. 129, 35 Pac. 176, holding that whenever a nuisance will cause irreparable injury or a multiplicity of suits, injunction will be granted; Van Buskirk v. Bond, 52 Or. 237, 96 Pac. 1104, holding that the fact that damages to plaintiff are greater than that of the public at large is insufficient; Lyon v. Fishmongers' Co. etc., 23 Eng. Rul. Cas. 161, not accessible. Cited in note in 7 L. R. A., N. S., 76, 77, on injunctive relief as to fences or gates.

10 Or. 175-180, LONG v. LAUDER.

Trial.—Order of Proof is Discretionary with trial court, p. 178.

Cited in Osmun v. Winters, 30 Or. 188, 46 Pac. 784, approvingly.

Appeal.—The Presumption is in Favor of the Correctness of the ruling of the court below, p. 179.

Distinguished in Carney v. Duniway, 35 Or. 135, 57 Pac. 193, holding that where error is affirmatively shown it will not be presumed that it was harmless.

10 Or. 181-185, KEARNEY v. SNODGRASS.

This case has not been cited.

10 Or. 185-193, STATE v. DOUGLAS COUNTY R. CO.

This case has not been cited.

10 Or. 193-198, STATE v. CARTWRIGHT.

Criminal Law.—Record of Conviction for a Felony must show the presence of the accused when verdict was received, p. 194.

Cited in State v. Walton, 50 Or. 145, 148, 91 Pac. 491, 492, 13 L. R. A., N. S., 811, holding that record must affirmatively show arraignment and plea; State v. Swenson, 18 S. D. 205, 99 N. W. 1116, holding that where record showed presence of accused at every other stage of the proceedings, failure to allege his presence when verdict was given was not fatal; Kie v. United States, 27 Fed. 358, not accessible to the editor.

10 Or. 198-202, STATE v. DOUGLAS COUNTY R. CO.

Quo Warranto.—Private Relator is not a Party to the proceeding, p. 200.

Cited in State v. Des Moines etc. Ry. Co., 135 Iowa, 711, 109 N. W. 874, stating what parties have sufficient interest to maintain quo warranto under Iowa statutes.

Quo Warranto.—Discretion of District Attorney to bring and control proceedings, p. 201.

Cited in State v. Guglielmo, 46 Or. 257, 79 Pac. 580, 69 L. R. A. 466, holding that district attorneys have the same discretionary power that the attorney general had at common law; State v. Cook, 39 Or. 379, 65 Pac. 90, stating effect of statute abolishing writ of quo warranto; Everding v. McGinn, 23 Or. 19, 35 Pac. 179, holding that mandamus will not lie to control district attorney's discretion to bring quo warranto to try title to office; State v. Lord, 28 Or. 528, 43 Pac. 479, 31 L. R. A. 473, holding that the mere signature of the attorney general will not give the bill of a private relator a public character; State v. Metschan, 32 Or. 384, 46 Pac. 793, 41 L. R. A. 692, upholding the right of the district attorney to enjoin the misapplication of public funds.

10 Or. 202-206, CAPITOL LUMBERING CO. v. HALL.

Replevin.—Defendant is not Entitled to Return of property on dismissal unless he plead and prove his right thereto, p. 205.

Cited in Ulrich v. McConaughey, 63 Neb. 12, 88 N. W. 151, holding that a general denial will sustain a judgment for the return of the property.

Denied in Liebmann v. McGraw, 3 Wash. 523, 28 Pac. 1106, holding that where plaintiff dismisses, the property must be returned to the defendant or judgment entered for its value.

10 Or. 207-212, LADD v. RAMSBY.

Pleading in the Alternative is Bad, pp. 208, 209.

Cited in Turney v. Southern Pac. Co., 44 Or. 298, 75 Pac. 149, approvingly.

10 Or. 215-230, STATE v. BROWN.

State.—Decision of Secretary on Claim presented to him for allowance is not judicial in character nor conclusive, p. 227.

Cited in Sheahan v. City of Chicago, 127 Ill. App. 630, applying the rule to a like decision of a commissioner of public works. Cited in note in 42 L. R. A. 61, on what claims constitute valid demands against a state.

10 Or. 230-242, CLINE v. GREENWOOD.

Officers.—A New Office not Yet Filled is as much vacant as an old one whose incumbent has died or resigned, p. 236.

Cited in Yates v. McDonald, 123 Ky. 601, 96 S. W. 866, applying the rule.

Constitution.—Practical Construction by the Legislature, though not binding on courts, is entitled to great respect, p. 240.

Cited in Wallace v. Board of Equalization, 47 Or. 590, 86 Pac. 366, holding that practical construction is a strong argument in favor of validity; Eddy v. Kincaid, 28 Or. 557, 41 Pac. 157, stating effect of "practical exposition" of constitution on its construction by courts, upholding power of legislature to appoint railroad commissioners.

Statutes.—Construction Should Favor Validity and law should be declared void only when repugnancy to constitution is free from doubt, p. 241.

Cited in Cook v. Port of Portland, 20 Or. 582, 27 Pac. 264, 13 L. R. A. 533, Ellis v. Frazier, 38 Or. 464, 63 Pac. 642, 53 L. R. A. 454, and Kadderly v. City of Portland, 44 Or. 144, 74 Pac. 719, all applying the rule.

10 Or. 242-250, PORTLAND v. BESSER.

Evidence.—Public Officers are Presumed to do their duty, p. 248.

Cited in State v. Neilon, 43 Or. 174, 73 Pac. 324, applying the rule.

10 Or. 250-261, WALSH v. OREGON R. & NAV. CO.

Negligence.—Plaintiff must Show That the Injury was not the result of his own negligence, p. 253.

Explained in Grant v. Baker, 12 Or. 331, 332, 334, 7 Pac. 320, 321, holding that contributory negligence is a matter of defense to be pleaded and proved by the defendant; Johnston v. Oregon S. L. etc. Co., 23 Or. 99, 31 Pac. 284, holding that plaintiff need not negative contributory negligence; Conroy v. Oregon Construction Co., 23 Fed.

72, 10 Saw. 630, holding such negligence a matter of defense and the point cited dictum.

Negligence.—Contributory Negligence bars recovery, p. 253.

Cited in Massey v. Seller, 45 Or. 271, 77 Pac. 398, approvingly.

Negligence.—Ordinary Care defined, p. 256.

Cited in Cronk v. Chicago etc. Ry. Co., 3 S. D. 98, 52 N. W. 422, reviewing authorities defining ordinary care; Western & A. R. Co. v. Young, 81 Ga. 416, 12 Am. St. Rep. 320, 7 S. E. 914, on ordinary care.

Negligence.—When Negligence is a Question of law, p. 259.

Cited in Massey v. Seller, 45 Or. 272, 77 Pac. 399, approvingly; Lynch v. Northern Pac. R. Co., 69 Fed. 88, 16 C. C. A. 151, holding contributory negligence is a question of fact when the circumstances are complicated.

Master and Servant.—Care of Master in Furnishing safe appliances and of servant in doing his work are questions of fact, p. 260.

Cited in Duntley v. Inman etc. Co., 42 Or. 342, 70 Pac. 531, not in point; Anderson v. City etc. Ry. Co., 42 Or. 509, 71 Pac. 660, having similar facts; Potter v. Detroit etc. Ry. Co., 122 Mich. 183, 81 N. W. 81, on safe place to work; Potter v. Detroit etc. Ry. Co., 122 Mich. 200, 81 N. W. 87, dissenting opinion; Wilson v. New York etc. R. Co., 29 R. I. 160, 69 Atl. 370, on duty to warn servant of dangerous appliances; St. Louis, Ft. S. & W. R. Co. v. Irwin, 37 Kan. 710, 1 Am. St. Rep. 266, 16 Pac. 151, on safe appliances.

10 Or. 261-267, INVERARITY v. STOWELL.

Appeal.—Where the Provisions of a Decree are not so mutually dependent that a reversal as to one would necessitate a reversal as to all, a party may accept the benefit of some provisions and still retain his right to appeal, p. 266.

Cited in Tyler v. Shea, 4 N. D. 383, 50 Am. St. Rep. 660, 61 N. W. 470, holding that, when it is possible to obtain a more favorable judgment in the appellate court without the risk of a less favorable judgment from a retrial of the whole case there or in the lower court, the acceptance of what the judgment gives is not inconsistent with an appeal for the sole purpose of securing a more advantageous decision.

Distinguished in Bush v. Mitchell, 28 Or. 96, 41 Pac. 156, holding that in action at law, the entire case is either affirmed or reversed and appeal cannot be taken from part of a judgment and the balance of it be accepted; Portland Const. Co. v. O'Neil, 24 Or. 57, 32 Pac. 765, stating when acceptance of benefits does and when it does not bar right to appeal.

Appeal.—When Error is Shown Injury is Presumed, unless the contrary affirmatively appear from the record itself, p. 266.

Cited in Carter v. Wakeman, 45 Or. 430, 78 Pac. 363, applying the rule.

Cited in Pacific States Telephone Co. v. City of Salem, 49 Or. 112, 89 Pac. 145, reaffirming the rule; City of Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 85, 50 Pac. 1089, holding that right to relief must be clear and free from doubt.

10 Or. 331–336, SAVAGE v. SAVAGE.
This case has not been cited.

10 Or. 337–340, BERGMAN v. TWILIGHT.
This case has not been cited.

10 Or. 340, CORBITT v. BAUER.
This case has not been cited.

10 Or. 341–342, PETTYJOHN v. PARMENTER.
This case has not been cited.

10 Or. 342–345, WISNER v. BARBER.
Damages.—General Damages Need not be Specially Pleaded, p. 344.
Cited in Sunny Side Land etc. Co. v. Willamette etc. Co., 20 Or. 47, 26 Pac. 836, approving and applying the rule; Dose v. Toose, 37 Or. 16, 60 Pac. 381, and Bussard v. Hibler, 42 Or. 503, 71 Pac. 643, both holding that, under allegation of pecuniary injury, plaintiff may recover the amount of loss necessarily sustained through the act complained of. Cited in note in 53 L. R. A. 35, 43, 66, on loss of profits as element of damages for breach of contract.
Damages.—General and Special Damages Defined, p. 344.
Quoted in Hoskins v. Scott, 52 Or. 278, 96 Pac. 1114, approvingly.

10 Or. 345–349, CRESAP v. GRAY.
Election.—In Election Contest the Court may Count legal votes which were returned too late for the canvassers to count, p. 348.
Cited in State v. Elder, 31 Neb. 186, 47 N. W. 715, 10 L. R. A. 796, to point that legal returns received after proper time should be counted. Cited in note to 83 Am. Dec. 751, on essentials to validity of elections.
Statutes.—Construction Should Favor Validity, p. 349.
Cited in Ellis v. Frazier, 38 Or. 464, 63 Pac. 642, 53 L. R. A. 454, reaffirming the rule.

10 Or. 349–359, 45 Am. Rep. 143, HENEKY v. SMITH.
Assault and Battery.—Conveyance of Property After Assault and bringing of suit is admissible to show consciousness of guilt or weak cause, p. 356.
Cited in Pelkey v. Hodgdon, 102 Me. 429, 67 Atl. 219, approvingly.
Assault and Battery.—Admissibility of Evidence of pecuniary condition of parties, pp. 353–355.
Cited in Jones v. Peterson, 44 Or. 162, 74 Pac. 661, further illustrating the rule. Cited in note to 67 Am. Dec. 566, 567, on pecuniary circumstances of parties as affecting measure of damages.

Appeal.—Erroneous Admission of Evidence not Injurious to appellant is harmless error, p. 358.

Cited in Montgomery v. Somers, 50 Or. 262, 90 Pac. 676, applying the rule.

10 Or. 359-361, DELL v. ESTES.

Execution.—Duty of Court to Confirm Sale regularly made, p. 361.

Cited in Otis Bros. & Co. v. Nash, 26 Wash. 45, 66 Pac. 113, on conclusiveness of order of confirmation.

10 Or. 362-364, BERRY v. CHARLTON.

Attachment.—Order of Sale Does not Preclude Recovery of property as exempt, pp. 363, 364.

Cited in Schultz v. Levy, 33 Or. 374, 54 Pac. 184, approving and applying the rule; Adamson v. Frazier, 40 Or. 276, 66 Pac. 811, stating effect of order of sale of attached property on rights of third persons.

10 Or. 364-365, MARSH v. PERRIN.

Judgment.—When, Through Fraud of Plaintiff, defendant had no opportunity to make his defense, the judgment will be set aside, p. 365.

Cited in Nelson v. Meehan, 2 Alaska, 491, holding that judgment obtained by fraud and perjury may be vacated, even after it has been affirmed on appeal.

10 Or. 365-367, STATE v. LEE YAN YAN.

Indictment Following the Form Given in the Code Appendix is sufficient, p. 366.

Cited in State v. Ah Lee, 18 Or. 542, 23 Pac. 425, State v. Woolridge, 45 Or. 394, 78 Pac. 335, State v. Guglielmo, 46 Or. 253, 79 Pac. 579, 69 L. R. A. 466, and United States v. Clark, 46 Fed. 640, all approving the form.

Criminal Law.—Where Bill of Exceptions Does not Purport to give all the evidence, court will presume that instructions were amply supported by proof, p. 367.

Cited in Thomas v. Bowen, 29 Or. 262, 45 Pac. 769, State v. Mayers, 35 Or. 527, 57 Pac. 199, and Carney v. Duniway, 35 Or. 135, 57 Pac. 193, applying the rule to variant facts.

10 Or. 367-370, HAYDEN v. WAYMIRE.

This case has not been cited.

10 Or. 370-371, WOLCOTT v. MADDEN.

Vendor must Tender Conveyance Before Suing on Note given for purchase price, pp. 370, 371.

Cited in May v. Emerson, 52 Or. 269, 96 Pac. 456, holding that execution of deed and tender of purchase money are concurrent acts.

10 Or. 371–383, 45 Am. Rep. 146, SHAW v. OSWEGO I. CO.

Navigable Waters.—What Streams are Public Navigable Waters, pp. 378–383.

Cited in Haines v. Hall, 17 Or. 181, 186, 20 Pac. 838, 871, 3 L. R. A. 609, in dissenting and concurring opinions, majority limiting application of rule, so as not to include short streams; Salem Imp. Co. v. McCourt, 26 Or. 106, 41 Pac. 1107, taking judicial notice of the navigability of the Willamette; Hallock v. Suitor, 37 Or. 12, 60 Pac. 385, and Kamm v. Normand, 50 Or. 11, 126 Am. St. Rep. 698, 91 Pac. 449, 11 L. R. A., N. S., 290, both holding that streams useful for part of the year for the transportation of logs are public waters; Hough v. Porter, 51 Or. 411, 98 Pac. 1099, stating change of law effected by inauguration of irrigation systems; Hot Springs Lumber etc. Co. v. Revercomb, 106 Va. 181, 55 S. E. 581, 9 L. R. A., N. S., 894, stating that stream sufficiently navigable at seasons to be of substantial public use is a navigable stream. Cited in notes to 126 Am. St. Rep. 729, and 42 L. R. A. 318, on what waters are navigable; 42 L. R. A. 171, on title to land under water.

10 Or. 383–387, PORTLAND v. KAMM.

Municipal Corporations.—Mode of Estimating Damages for street improvement, pp. 385, 386.

Cited in Blagen v. Thompson, 23 Or. 259, 31 Pac. 654, 18 L. R. A. 315, holding that witness may state probable value of land with and without the proposed improvement; Seattle etc. Ry. Co. v. Gilchrist, 4 Wash. 514, 30 Pac. 749, admitting evidence of value of land before and after taking for railroad right of way; Grant v. Village of Hyde Park, 67 Ohio St. 180, 65 N. E. 895, stating measure of damages in street improvement cases.

Street Improvement.—Probable Grade and Condition of Street when opened and in use may be considered by the jury in estimating damages, p. 386.

Cited in Orth v. City of Milwaukee, 92 Wis. 233, 65 N. W. 1030, approvingly.

10 Or. 387–390, ROGERS v. WALLACE.

Evidence.—Where the Evidence is Equally Balanced, party having the burden of proof must lose, p. 389.

Cited in United States v. Lee Huen, 118 Fed. 457, reiterating the rule.

10 Or. 390–402, ANKENY v. FAIRVIEW MILLING CO.

Appeal.—Papers and Affidavits as Part of Record without bill of exceptions, p. 395.

Distinguished in Farrell v. Oregon Gold Min. Co., 31 Or. 475, 49 Pac. 879, holding bill of exceptions necessary to bring up questions of fact.

Nuisance.—Duty of Court to Issue Warrant of abatement, pp. 396–398.

Cited in Kotenberthal v. City of Salem, 13 Or. 605, 11 Pac. 387, holding that verdict for plaintiff in a law action does not conclusively demand a warrant for its abatement.

10 Or. 402–418, SHEPPARD v. YOCUM.

Trover.—Action to Recover Damages for Wrongful Taking of money is an action of trover, p. 406.

Cited in Sheppard v. Yocum, 11 Or. 237, 3 Pac. 825, adhering to the doctrine as the law of the case.

Witnesses.—To Lay Foundation for Impeachment by Showing Contradictory Statements, attention of witness must be called to time, place and person to whom statement was made, p. 412.

Cited in State v. Hunsaker, 16 Or. 499, 19 Pac. 606, State v. Welch, 33 Or. 40, 54 Pac. 215, State v. Bartmess, 33 Or. 117, 54 Pac. 169, State v. Deal, 41 Or. 442, 70 Pac. 534, and State v. Gray, 43 Or. 453, 74 Pac. 930, all applying the rule; Granger v. George, Wilkinson v. Verity, 16 Eng. Rul. Cas. 215, not accessible. Cited in note to 32 Am. St. Rep. 65, on evidence to show credibility or bias of witness.

Witnesses.—Evidence to Sustain Reputation for Truth should not be admitted, pp. 413, 414.

Cited in Osmun v. Winters, 25 Or. 272, 35 Pac. 254, holding that evidence to sustain reputation for truth is only admissible when such reputation has been assailed.

Evidence.—Declarations of Conspirators at the Time of committing the act are evidence against all participants, p. 417.

Cited in Osmun v. Winters, 30 Or. 187, 46 Pac. 783, and State v. Tice, 30 Or. 463, 48 Pac. 369, approvingly.

Evidence.—Declarations of Conspirator not Made at Time of committing the act are not admissible against co-conspirators, p. 417.

Cited in State v. Magone, 32 Or. 209, 51 Pac. 453, and Pacific Live Stock Co. v. Gentry, 38 Or. 288, 61 Pac. 427, approvingly.

10 Or. 418–422, COX v. SMITH.

Suretyship.—Satisfaction of Judgment Against Surety satisfies judgment against principal for a larger amount, p. 421.

Cited in Dick v. Dumbauld, 10 Ind. App. 511, 38 N. E. 79, holding that satisfaction of judgment against principal satisfies judgment for larger amount against surety.

10 Or. 423–436, STATE v. CHADWICK.

Pleading.—Mere Irregularity in the Verification is waived by pleading over, p. 427.

Cited in German Savings & Loan Soc. v. Kern, 38 Or. 233, 62 Pac. 789, and State v. Bunsi, 105 Mo. App. 328, 80 S. W. 39, approving and applying the rule; Allsop v. Joshua Hendy Mach. Works, 5 Cal. App. 231, 90 Pac. 41, not accessible to the editor. Cited in note to 96 Am. St. Rep. 63, on application of payments.

10 Or. 437-439, POPPLETON v. NELSON.

Appeal.—Necessary Parties, p. 437.

Cited in Shirley v. Burch, 16 Or. 8, 10, 18 Pac. 347, 349, discussing parties to appeal.

Appeals.—Bond may be Filed on Same Day notice is served, p. 438.

Cited in Dahl v. Tiballs, 5 Wash. 261, 31 Pac. 869, approvingly.

Appeal.—Notice of Appeal must be Signed by Attorney of *record*; the signature of appellant in person is insufficient, p. 439.

Criticised in Shirley v. Burch, 16 Or. 2, 6, 7, 18 Pac. 344, 346, intimating that attorney's authority ends with entry of final decree and holding notice of appeal signed by another attorney than the one in the original record sufficient.

10 Or. 440-443, SAVAGE v. GLENN.

Damages.—Measure of Damages for Breach of Contract to build a brick building should include probable loss of rent, p. 442.

Cited in Hoskins v. Scott, 52 Or. 279, 96 Pac. 1115, applying the rule to a breach of contract to furnish an engine to run a mill; Glenn v. Savage, 14 Or. 572, 575, 13 Pac. 444, 447, involving the admissibility of the judgment in the former case as a bar or estoppel. Cited in note in 53 L. R. A. 51, on loss of profits as element of damages for breach of contract.

10 Or. 444-446, OREGON R. & NAV. CO. v. OREGON R. ESTATE CO.

Eminent Domain.—Action to Appropriate Right of Way over lands of another cannot be maintained without alleging and proving that parties were unable to agree as to compensation to be paid, p. 445.

Cited in United States v. Oregon Ry. & Nav. Co., 16 Fed. 527, 9 Saw. 61, involving the right of the federal government to condemn lands in Oregon for a canal.

Tender.—Payment into Court is a Positive Admission of damages to the amount of the tender, and the tender becomes the property of the party to whom it is made, p. 445.

Cited in Dechenbach v. Rima, 50 Or. 542, 98 Pac. 465, reaffirming the rule; West Portland Park Assn. v. Kelly, 29 Or. 421, 45 Pac. 903, 32 L. R. A. 738, holding that acceptance of amount tendered is no waiver of right to recover more.

Eminent Domain.—Land can Only be Taken for the Particular Use for which it is sought to be appropriated—for the purpose of a railway an easement is all that can be acquired, p. 445.

Cited in Pacific Tel. Cable Co. v. Oregon & C. R. Co., 163 Fed. 969, holding that an easement may be taken for public use.

10 Or. 446-447, SETTLEMIRE v. NEWSOME.

Execution.—Land Sold for Less Than the Judgment Debt, and redeemed by debtor's successor, may be resold for the balance due; the title never passes, p. 447.

Cited in Flanders v. Aumack, 32 Or. 21, 28, 67 Am. St. Rep. 504, 51 Pac. 448, 450, and Brand v. Baker, 42 Or. 437, 71 Pac. 324, both applying the rule; Williams v. Wilson, 42 Or. 304, 95 Am. St. Rep. 745, 70 Pac. 1032, and Willis v. Miller, 23 Or. 363, 31 Pac. 830, stating the legal effect of a foreclosure decree and deficiency judgment; Keenan v. City of Portland, 27 Or. 547, 38 Pac. 3, applying the rule to a purchase of property sold for street assessment; Kaston v. Storey, 47 Or. 153, 114 Am. St. Rep. 912, 80 Pac. 218, holding that redemption restores property to same condition as if no sale had been made; Jacobson v. Lassas, 49 Or. 473, 90 Pac. 905, stating effect of redemption from foreclosure decree; Scaman v. Galligan, 8 S. D. 284, 66 N. W. 460, to point that redemption renders sale void. Cited in note to 67 Am. St. Rep. 511, on effect of redemption from execution sales.

10 Or. 448-465, STATE v. ANDERSON.

Criminal Law.—Error not Brought to the Attention of the lower court will not be considered, p. 452.

Cited in United States Mortgage etc. Co. v. Marquam, 41 Or. 405, 69 Pac. 42, to point that error not objected to cannot be considered.

Criminal Law.—Declarations as Res Gestae, p. 454.

Cited in State v. Smith, 43 Or. 110, 71 Pac. 973, stating what declarations are admissible as part of the res gestae.

Expert Witness.—Hypothetical Question must be Based on facts previously proved, p. 455.

Cited in Maynard v. Oregon R. Co., 43 Or. 74, 72 Pac. 594, reaffirming the rule; Crosby v. Portland Ry. Co., 53 Or. 508, 100 Pac. 304, holding the rule inapplicable to the facts herein.

Evidence.—Matters of Common Knowledge are not Subject of proof by experts, pp. 455, 456.

Cited in Farmers' & Traders' Nat. Bank v. Woodell, 38 Or. 299, 61 Pac. 838, Hildebrand v. United Artisans, 50 Or. 166, 91 Pac. 545, State v. Nevada Cent. R. Co., 28 Nev. 215, 113 Am. St. Rep. 834, 81 Pac. 105, Lincoln Nat. Bank v. Davis, 32 Neb. 8, 48 N. W. 894, approving and applying the rule; Scott v. Astoria R. Co., 43 Or. 38, 99 Am. St. Rep. 710, 72 Pac. 598, 62 L. R. A. 543, defining an expert.

Criminal Law.—Improper Comments of Counsel are not Ground for reversal unless connected upon the record with error of the court, p. 457.

Cited in Watson v. Southern Oregon Co., 39 Or. 484, 65 Pac. 986, State v. Abrams, 11 Or. 172, 8 Pac. 328, State v. Olds, 19 Or. 446, 24 Pac. 408, and State v. Foot You, 24 Or. 68, 32 Pac. 1033, all holding the rule inflexible, that no objection can be heard on appeal which is not based on alleged error in judicial action below; Boyd v. Portland General Electric Co., 37 Or. 570, 62 Pac. 379, 52 L. R. A. 509, approving the rule; Huber v. Miller, 41 Or. 116, 68 Pac. 404, holding that nature of remarks of counsel are usually within the discretion

of the trial court; Kelley v. Highfield, 15 Or. 284, 14 Pac. 747, stating that argument must be based on evidence admitted and not comment on that which was excluded; State v. Hatcher, 29 Or. 316, 44 Pac. 586, holding that the court must be requested to rule upon the argument.

Distinguished in State v. Blodgett, 50 Or. 346, 347, 92 Pac. 827, reversing conviction for failure to curb argument of prosecutor or sufficiently instruct against its consideration.

Criminal Law.—Whole Charge of Court must be Considered in determining whether a given instruction is erroneous, p. 460.

Cited in State v. Savage, 36 Or. 215, 60 Pac. 617, Smitson v. Southern Pac. Co., 37 Or. 97, 60 Pac. 915, Farmers' & Traders' Nat. Bank v. Woodell, 38 Or. 306, 61 Pac. 841, State v. Megorden, 49 Or. 269, 88 Pac. 310, and State v. Bartmess, 33 Or. 126, 54 Pac. 172, all holding error in instruction harmless when the instructions as a whole are substantially correct and fair.

Homicide.—That Accused Took a Purse from the Body of deceased after shooting tends to prove motive, p. 464.

Cited in State v. Barnes, 47 Or. 602, 85 Pac. 1001, 7 L. R. A., N. S., 181, admitting proof of possession of property of deceased six weeks after his death.

Homicide.—Deliberation and Premeditation may be Inferred from manner and circumstances of killing, pp. 463–465.

Cited in State v. Anderson, 53 Or. 488, 101 Pac. 201, applying the rule to similar facts.

10 Or. 465–474, STATE v. CHADWICK.

Officers.—Condition in Bond to "Faithfully" Discharge Duty is performed by discharging duty honestly and diligently to the best of his ability and judgment, pp. 467–473.

Cited in United States v. McClane, 74 Fed. 154, not accessible.

10 Or. 474–480, CLINE v. CLINE.

Divorce.—Evidence Reviewed and Held not to Establish such cruelty as to warrant the granting of a divorce, pp. 475–477.

Cited in Patterson v. Patterson, 45 Wash. 299, 88 Pac. 198, seemingly not in point, being based on desertion fully proved. Cited in notes to 65 Am. St. Rep. 82, on cruelty as ground for divorce; 2 L. R. A., N. S., 670, on bringing another woman into home as cruel and unhuman treatment.

10 Or. 483–488, TAYLOR v. SCOTT.

Forcible Entry.—Appeal Lies from Judgment of circuit court on appeal from justice court in forcible entry cases, p. 484.

Cited in Wolfer v. Hurst, 47 Or. 160, 80 Pac. 420, reviewing authorities and upholding the rule as an established practice.

Forcible Entry.—The Gist of the Action is "force" in the entry, the detainer, or both, p. 487.

Cited in Harrington v. Watson, 11 Or. 148, 149, 50 Am. Rep. 465, 3 Pac. 176, 177, Hislop v. Moldenhauer, 21 Or. 209, 210, 27 Pac. 1052, Twiss v. Boehmer, 39 Or. 362, 65 Pac. 19, and Wolfer v. Hurst, 47 Or. 167, 82 Pac. 22, all following the rule. Cited in note to 121 Am. St. Rep. 391, on right to civil action for forcible entry and detainer.

10 Or. 488-490, SAUBERT v. CONLEY.

This case has not been cited.

10 Or. 490-491, DICK v. WILSON.

Judgment.—No Presumption is Indulged in Favor of Records of inferior courts; the authority to act must affirmatively appear, and whoever sets up the judgment must show affirmatively the jurisdiction of the court, p. 490.

Cited in Northern Pacific etc. Co. v. City of Portland, 14 Or. 27, 13 Pac. 707, holding that record of county court in proceedings to locate a road should affirmatively show that the law has been strictly complied with; Willits v. Walter, 32 Or. 414, 52 Pac. 24, applying the rule in pleading judgment of justice court; Munroe v. Thomas, 35 Or. 175, 57 Pac. 420, holding that jurisdiction of justice must affirmatively appear from an inspection of the transcript of its proceedings; Rutenic v. Hamaker, 40 Or. 450, 67 Pac. 199, holding the rule inapplicable to proceedings of county court in probate matters; Malheur County v. Carter, 52 Or. 620, 98 Pac. 491, applying the rule to complaint on bail bond and recitals in such bond; Hunter v. Eddy, 11 Mont. 264, 28 Pac. 300, applying the rule to justice's docket entry which stated the conclusions of the justice instead of the facts showing jurisdiction.

Modified in Ashley v. Pick, 53 Or. 414, 100 Pac. 1105, on account of statute changing the rule of pleading judgment of court of special jurisdiction.

10 Or. 491-494, WOODWARD v. BAKER.

Judgment by Default Entered Before Expiration of Time to answer is voidable only and not subject to collateral attack, p. 493.

Cited in Altman v. School Dist. No. 6, 35 Or. 88, 76 Am. St. Rep. 468, 56 Pac. 292, and Ex parte Howard-Harrison Iron Co., 119 Ala. 489, 72 Am. St. Rep. 936, 24 South. 518, reaffirming the rule; Morrill v. Morrill, 20 Or. 102, 23 Am. St. Rep. 95, 25 Pac. 364, 11 L. R. A. 155, to point that erroneous judgment is binding until reversed or annulled; McFarlane v. Cornelius, 43 Or. 528, 74 Pac. 330, holding voidable judgment good on collateral attack; Leonard v. Sparks, 63 Mo. App. 602, holding that judgment prematurely entered cannot be collaterally impeached.

10 Or. 494-499, PHILLIPS v. THORP.

Contract Having for Its Object the Dissolution of Marriage or the facilitating of divorce is void, p. 497.

Cited in Loveren v. Loveren, 106 Cal. 512, 39 Pac. 802, Smutzer v. Stimson, 9 Colo. App. 327, 48 Pac. 315, Stebbins v. Morris, 19 Mont. 122, 47 Pac. 645, and Shirk v. Shirk, 75 Mo. App. 579, approving and applying the rule; Newman v. Freitas, 129 Cal. 289, 61 Pac. 909, 50 L. R. A. 548, holding attorney's contract to obtain divorce for contingent fee void; Birch v. Anthony, 109 Ga. 350, 77 Am. St. Rep. 379, 34 S. E. 562, holding contract to dissolve marriage relation illegal and void; Blank v. Nohl, 112 Mo. 169, 20 S. W. 479, 18 L. R. A. 350, applying the rule to agreement not to move for new trial after divorce decree was granted; Branson v. Branson, 76 Neb. 781, 107 N. W. 1011, dismissing divorce suit on ground of collusion; Palmer v. Palmer, 26 Utah, 47, 99 Am. St. Rep. 820, 72 Pac. 8, 61 L. R. A. 641, construing articles of separation as contract to facilitate divorce and holding it void. Cited in notes to 117 Am. St. Rep. 524, on contracts, consideration for which has partly failed or is partly illegal; 113 Am. St. Rep. 724, 725, on rule of pari delicto.

10 Or. 499–505, SEARS v. ABRAMS.

This case has not been cited.

10 Or. 505–507, STATE v. KIRK.

Criminal Law.—Person Aiding and Abetting Crime may be indicted and convicted as principal, p. 507.

Cited in State v. Steeves, 29 Or. 92, 43 Pac. 949, approving the rule; State v. Branton, 33 Or. 540, 56 Pac. 268, holding that the conviction of one charged as principal is not an acquittal of another separately charged as principal; Albritton v. State, 32 Fla. 362, 13 South. 956, to point that offense charged against all parties is the same.

10 Or. 507–510, DE FORCE v. WELCH.

Public Lands.—The Rights of Purchasers of Tide Lands from riparian owners was recognized by the state by the act of 1874, giving them the right to purchase from the state, p. 510.

Distinguished in Wilson v. Shiveley, 11 Or. 219, 4 Pac. 326, involving only the right of the riparian owner as against one fraudulently representing himself to be such. Cited in note in 40 L. R. A. 639, on right to erect wharves.

10 Or. 510–511, CARO v. OREGON & C. R. CO.

Process.—Return of Substituted Service on Corporation must show facts which confer jurisdiction, p. 510.

Cited in Weaver v. Southern Oregon Co., 30 Or. 350, 48 Pac. 172, and Hildebrand v. United Artisans, 46 Or. 139, 114 Am. St. Rep. 852, 79 Pac. 349, approving rule; Bailey v. Malheur etc. Co., 36 Or. 59, 57 Pac. 912, stating what the jurisdictional facts are.

10 Or. 512–513, KING v. BENTON COUNTY.

Highways.—Notice of Presentation of Petition is essential to jurisdiction to lay out a road, p. 513.

Criticised in Vedder v. Marion County, 22 Or. 269, 29 Pac. 621, as making road proceedings too strict and technical.

Distinguished in Ames v. Union Co., 17 Or. 606, 22 Pac. 120, where the notice was given and it was sufficiently specific. Cited in note in 26 L. R. A. 828, on discontinuance or vacation of highway by acts of authorities.

10 Or. 514–518, OREGON R. & NAV. CO. v. GATES.

Garnishment.—Plaintiff Acquires No Greater Rights against the garnishee than his debtor had, p. 515.

Cited in Case v. Noyes, 16 Or. 332, 19 Pac. 106, applying the rule; Baker v. Eglin, 11 Or. 334, 8 Pac. 280, holding that creditor acquires no greater rights against garnishee than his debtor had; Meier v. Hess, 23 Or. 601, 32 Pac. 756, holding that the code places an attaching creditor in the same position as a bona fide purchaser.

Equity.—Relief will be Granted When Material Facts have been discovered since the trial at law which could not by ordinary care have been discovered before, p. 518.

Cited in Rader v. Barr, 37 Or. 457, 61 Pac. 1028, applying the rule to taxation of costs. Cited in notes in 30 L. R. A. 362, on injunctions against judgments in garnishment proceedings; 30 L. R. A. 787, 799, on injunctions against judgments obtained by fraud, accident, mistake, surprise and duress.

10 Or. 519–521, WELLS v. APPLEGATE.

Executors and Administrators.—Complaint Against Administrator must show that six months had elapsed after the granting of letters of administration before the suit was brought, p. 520.

Cited in Aiken v. Coolidge, 12 Or. 247, 6 Pac. 714, intimating that failure to allege matters of this kind are waived by failure to plead them in abatement.

10 Or. 525–538, STATE v. CHADWICK.

State Secretary, in Allowing Claims Against the State, is the judge between the citizen and the state, whose duty is to carefully weigh and examine the fact and law and he is not responsible for mere errors of judgment, p. 530.

Cited in State v. Chadwick, 10 Or. 543, appendix, holding secretary responsible only for good faith and ordinary care and competency.

10 Or. 539–548, STATE v. CHADWICK (Mem.).

This case has not been cited.

10 Or. 549–553, KNIGHTON v. BURNS (Mem.).

Constitutional Law.—Obligation of Contracts and what impairs it, pp. 549–553.

History.—This is the first judicial opinion ever printed west of the Rocky Mountains; it was decided by the supreme court of the provisional government of Oregon in June, 1847.

1 II

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

TERRITORY OF UTAH,

FROM THE

ORGANIZATION OF THE TERRITORY, UP TO AND INCLUDING THE JUNE TERM, 1876.

ALBERT HAGAN,
REPORTER.

VOLUME I

EXTRA ANNOTATED EDITION

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JUSTICES

OF

THE SUPREME COURT,

1876.

HON. MICHAEL SCHAEFFER.....CHIEF JUSTICE.
HON. P. H. EMERSON..... } ASSOCIATE JUSTICES.
HON. J. S. BOREMAN..... }

OFFICERS OF THE COURT:

SUMNER HOWARD.....*U. S. District Attorney.*
E. T. SPRAGUE.....*Clerk.*
WILLIAM NELSON.....*U. S. Marshal.*

PLACE OF HOLDING COURT:

SALT LAKE CITY.

TERMS OF COURT:

SECOND MONDAY IN JANUARY. FIRST MONDAY IN JUNE.

GOVERNORS

APPOINTED SINCE THE ORGANIZATION OF THE TERRITORY.

TERRITORY ORGANIZED, SEPTEMBER 9, 1850.

NAME.	WHEN APPOINTED.
BRIGHAM YOUNG	September 28, 1850.
ALFRED CUMMING	July 11, 1857.
JOHN W. DAWSON	October 8, 1861.
STEPHEN S. HARDING	March 31, 1862.
JAS. DUANE DOTY	June 2, 1863.
CHAS. DURKEE	July 15, 1865.
J. WILSON SHAFFER	January 17, 1870.
VERNON H. VAUGHAN	November 1, 1870.
GEORGE L. WOODS	February 2, 1871.
S. B. AXTELL	February 11, 1875.
GEORGE W. EMERY	July 1, 1875.

LIST OF CHIEF JUSTICES

OF UTAH TERRITORY, SINCE THE ORGANIZATION OF THE TERRITORY.

NAME.	WHEN APPOINTED.
Lemuel G. Brandeberg	March 12, 1851.
Lozarus H. Read	August 31, 1852.
John F. Kinney	August 24, 1853.
Delana R. Eckels	July 13, 1857.
John F. Kinney	June 27, 1860.
John Titus	May 6, 1863.
Charles C. Wilson	July 25, 1868.
Jas. B. McKean	June 17, 1870.
David P. Lowe	March 19, 1875.
Alexander White	September 11, 1875.
Michael Schaeffer	April 20, 1876.

LIST OF ASSOCIATE JUSTICES

SINCE THE ORGANIZATION OF THE TERRITORY.

Perry E. Brocchus	September 28, 1850.
Z. Snow	September 28, 1850.
Leonidas Shaver	August 31, 1852.
G. P. Stiles	August 1, 1854.
C. W. Drummond	September 12, 1854.
E. D. Potter	July 6, 1857.
C. E. Sinclair	August 25, 1857.
John Cradlebaugh	June 4, 1858.
R. P. Flennicken	May 11, 1860.
Henry R. Crosbie	August 1, 1860.
Charles P. Waite	February 3, 1862.
Thos. J. Drake	February 3, 1862.
Sol. P. McCurdy	April 21, 1864.
Enos D. Hoge	July 27, 1868.
O. F. Strickland	April 5, 1869.
C. M. Hawley	April 19, 1869.
P. H. Emerson	March 10, 1873.
J. S. Boreman	March 20, 1873.

DISTRICT COURTS.

FIRST DISTRICT.

PHILLIP H. EMERSON.....*Judge*
O. W. EMERSON.....*Clerk*

PLACE OF HOLDING COURT.—Provo City.

TERMS OF COURT.—The third Monday in the months of February, May, September and November of each year.

COUNTIES COMPOSING THE DISTRICT.—Utah, Juab, Millard, Sevier, Sanpete and Wasatch.

SECOND DISTRICT.

JACOB S. BOREMAN.....*Judge*
J. R. WILKINS.....*Clerk*

PLACE OF HOLDING COURT.—Beaver.

TERMS OF COURT.—The first Monday in the months of March, May, September and December of each year.

COUNTIES COMPOSING THE DISTRICT.—Beaver, Iron, Washington, Kane and Piute.

THIRD DISTRICT.

MICHAEL SCHAEFFER.....*Judge*
O. S. HILL.....*Clerk*

PLACE OF HOLDING COURT.—Salt Lake City.

TERMS OF COURT.—First Monday in February, second Monday in April, fourth Thursday in September, and second Monday in November of each year.

COUNTIES COMPOSING THE DISTRICT.—Salt Lake, Tooele, Cache, Box Elder, Rich, Weber, Davis, Morgan and Summit.

WILLIAM NELSON.....*U. S. Marshal*
SUMNER HOWARD.....*District Attorney*

UNITED STATES COMMISSIONERS:

EZRA T. SPRAGUE.....Salt Lake City
HARMEL PRATT.....Salt Lake City
O. W. EMERSON.....Provo City
J. R. WILKINS.....Beaver City

CASES REPORTED.

RULES

OF THE

SUPREME COURT

OF THE

TERRITORY OF UTAH.

RULE 1. The Clerk of this Court shall keep his office at the place where the sessions of this court are held. Three days before each term, he shall prepare a calendar for each member of the Court, and one for the bar, wherein the causes brought into this Court shall be entered in the following order, viz:

First. Causes arising under laws of the United States.

Second. Criminal causes arising under laws of the Territory; and

Third. All others in the order of the filing of the transcript.

And in the titles of all cases in this Court, the plaintiffs below shall be first named.

Cal. Rule 15.

Court bound by its own Rules. Hanson vs. McCue, 43 Cal. 178. 45 Cal. 269.
Rule 1. See 43 Cal. 42, 87.

RULE 2. In all cases where an appeal shall be perfected, the transcript of the record shall be filed in this Court within thirty days after such appeal shall have

been perfected, unless further time be allowed by the Court, or one of the Justices.

Cal. Rule 2.

Courts cannot by Rule deprive one of *statutory* right. 31 Cal. 108.

This Court not presumed to know the rules of lower Courts. 32 Cal. 655.

RULE 3. If a transcript be not filed within the time prescribed or allowed, the appeal may be dismissed, on motion, during the first week of the term, without notice, and at any time afterwards, on notice; a cause so dismissed, without notice, may be restored during the same term, on notice of five days to the adverse party, and for good cause shown; and unless so restored, the dismissal shall be final, and a bar to any other appeal in the same cause.

Cal. Rule 3.

See 2 Cal. 16. 8 Cal. 297. 25 Cal. 599.

RULE 4. On such motion, there shall be presented to the Court the certificate of the Clerk of the Court below, under the seal of such Court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the statement on appeal, if there be one; the fact and date of filing the notice of appeal, and the fact, date and mode of service thereof; the fact and date of filing the undertaking on appeal, and that the same is in due form; and also that the appellant has received a certified transcript of the record, or that he has failed to request one, or, if he has made such request, that he has failed to pay or tender the lawful fees therefor, if the same have been demanded. But in case where the transcript has been certified by the attorneys of the respective parties as hereinafter provided, the fact and date thereof may be shown in this Court by affidavit of any one of them.

Cal. Rule 4.

36 Cal. 127. 42 Cal. 629. 43 Cal. 54.

RULE 5. All transcripts of records in civil causes hereafter sent to this Court shall be printed on unruled white

paper, of the size and style now used in the Supreme Court of the United States; but the judge who tried the cause below, may, on application direct that a printed transcript be dispensed with.

Cal. Rule 5.

43 Cal. 178.

RULE 6. When a printed transcript is used, the same shall be certified to be correct by the attorneys of the respective parties, or by the Clerk of the Court from which the appeal is taken, and the party filing the same, shall, at the same time, deposit with the Clerk three copies thereof for the use of the Court, and he shall also, at or before filing the same, serve a copy thereof upon the attorney of the adverse party. If a party or his attorney in any case, shall present to the attorney of the adverse party a transcript on appeal, either printed or written, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed by him incorrect, shall neglect or refuse, for a like period of time, to serve upon the party making such request a written statement of the particulars in which the transcript tendered is incorrect, or upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate, the cost of procuring a certificate of the Clerk to such transcript, shall be taxed against the party whose attorney so refuses or neglects, and may be enforced by an appropriate order without regard to the final disposition of the cause. A party filing a transcript, may, at his option, print the same, or transmit to the Clerk of this Court, the record authenticated as aforesaid, with the costs of printing the same, and the Clerk shall thereupon cause the same to be printed and certify the printed copies required to be correct. The expense of printing transcript not to exceed one dollar for each page may be taxed as other costs. The pleadings, proceedings and papers shall be chronologically arranged in the tran-

script and each transcript shall be prefaced with an alphabetical index, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness.

Cal. Rules, 6, 10, 9.

See 25 Cal. 512.

RULE 7. For the purpose of brevity, the Clerk of the Court below, or the attorneys of the respective parties, where they join in certifying a transcript, may omit from the transcript the formal indorsements on papers, except the date of filing; also the summons where the parties have appeared generally in the Courts below, and there is no question of jurisdiction of their persons; also all repetitions of the title of the Court and cause on separate papers after the pleadings in the cause. And in all cases at law, where the appeal is from any special order made after final judgment (except on motion in arrest of judgment and for a new trial), it shall not be necessary to include in the transcript the entire judgment roll in the case, but a transcript of the final judgment and of the motions and papers upon which the same was heard, together with a transcript of the order and of the settled or agreed statement, if there be one, shall be sufficient for a review of such order. A folio shall be computed at one hundred words (counting each figure as a word), and their number shall be computed upon the record as a whole, and not upon each separate paper, and when there is an access of over fifty words, the same shall be computed as a full folio, and when there is an excess of less than that number, it shall not be computed. Where a map or survey forms part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed in this Court; and reference thereto may be made in other copies and briefs. The appellant shall contract for and furnish the same, and if entitled to costs, shall be allowed reasonable charges for the same. Evidence not necessary to present the points relied on upon an appeal, should not be embodied in the record, and in-

stead of incorporating in the record copies of deeds and other instruments of writing, on which no question of construction arises, a brief statement of the character and purport of the instrument should be given. Costs shall not be allowed for matter unnecessarily included in the record.

Cal. Rule 7, 11.

Map. See Franklin vs. Goodwin, 31 Cal. 458.

RULE 8. For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing to this Court, specifying such error or defect, and obtain an order that the proper Clerk certify the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel in open Court before argument. If the attorney of the adverse party be absent, or if the fact of the alleged error be controverted by him, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

Cal. Rule 12.

Wakeman vs. Coleman. 28 Cal. 58. Hihn vs. Curtis, 31 Cal. 398.

RULE 9. Exceptions or objections to the transcript, statement or undertaking on appeal, to the notice of appeal, or to its service or proof of service, or any technical objections to the record, affecting the right of the appellant to be heard on the merits of a cause, must be taken at the first term or adjourned term after the transcript is filed, and must be specified in writing, filed at least one day before the cause called for argument, or they will not be regarded. Such objections must be presented to the Court before any argument upon the merits

Cal. Rule 13.

Lynch vs. Dunn, 34 Cal. 578. Solomon vs. Rees, 34 Cal. 28.

Objections not waived, by failing to except to the record. Todd vs. Winants, 36 Cal. 181.

RULE 10. All motions shall be in writing, subscribed by counsel, and filed by the Clerk, and in cases where a

notice of motion is required, the time prescribed therefor may be shortened by any Justice of the Court as well as by the Court.

See Cal. Rule 2.

RULE 11. All stipulations and agreements of parties or their attorneys in respect to a cause shall be reduced to writing, signed by them and filed with the Clerk, or stated in open Court, and entered by the Clerk; otherwise the same will be disregarded. Counsel obtaining any order or judgment, may be required by the Court to furnish to the Clerk the form of the same.

RULE 12. All briefs shall be printed, and counsel shall file with the Clerk, for each Justice, a copy of their points and authorities in each case, before the commencement of the argument; the appellant shall serve on the respondent a copy of his points and authorities at least five days before the hearing, and the respondent shall serve on the appellant a copy of his points and authorities at least one day before the hearing.

Cal. Rule 2.

RULE 13. Any cause may be submitted on briefs, by stipulation filed with the Clerk; and either party may submit a cause, on his behalf, on brief filed, and without oral argument.

RULE 15. The Clerk shall not permit any record or paper to be taken from his office without an order of the Court, or by one of the Justices for his own use; but the same shall be free for inspection of parties and their attorneys, who may procure or make copies thereof.

Cal. Rule 24.

RULE 16. Counsel on each side shall be allowed one hour to be divided among associates as they may desire, but the Court will in special cases allow further time. Each defendant who has appeared separately in the Court below, and an intervener may be heard through his own counsel.

Cal. Rule 18.

RULE 17. All opinions of the Court after being finally

corrected, shall be filed with and recorded by the Clerk, and his fees therefor shall be taxed as costs.

Cal. Rule 19.

RULE 18. Where a judgment or decree of the Court below is reversed or modified, a certified copy of the opinion and decision in the case shall be transmitted with the remittitur to the Court below. In each case, a remittitur shall be sent to the Court below at the expiration of ten days after judgment, unless otherwise directed by the Court, or proceedings be stayed by appeal or writ of error.

Cal. Rule 23.

RULE 19. All motions for a re-hearing shall be upon petition, which shall be filed within ten days after judgment shall be rendered. When filed during the term, it shall operate as a stay of proceedings, until a decision of the motion, or until further order of the Court.

Cal. Rule 21, 26.

No power to stay proceedings, to obtain citation or writ of error to the U. S. Supreme Court. 25 Cal. 614.

See also 1 Cal. 198. 7 Cal. 330. 16 Cal. 220. 10 Cal. 589. 18 Cal. 28. 30 Cal. 458.

Not a matter of right. 43 Cal. 178.

RULE 20. In cases where an appeal is manifestly for delay, damages may be allowed to the respondent at a rate not exceeding ten per cent. upon the amount of the judgment, in the discretion of the Court.

RULE 21. Applicants for admission to practice as attorneys and counselors of this Court, shall be admitted on proof, presented at the time of application, of good moral character, and on the favorable report of an examining Committee appointed for that purpose; or on the production of a certificate or proof of previous admission to practice in the highest Court of any State or other Territory of the United States. A person admitted to practice in this Court shall be entitled to practice in all Courts in this Territory.

Cal. Rule 1.

Ex parte Snelling 44 Cal. 553. 22 Cal. 318.

RULE 22. Any party aggrieved may appeal from a judgment of a Probate Court to the District Court of the District embracing the county where such Probate Court is held at any time within six months after the rendition of such judgment, in the same manner and with like conditions and provisions as are now made by law for appeal from the District Courts to the Supreme Court, the provisions in that behalf of the "act to regulate proceedings in civil cases in the Courts of Justice of this Territory," etc., approved February 17, 1870, are hereby adopted and made applicable to such appeals from the Probate Courts, *mutatis mutandis*, except that on such appeals, causes shall be tried *de novo* in the appellate Court.

See Poland Bill section 3.

NOTE.—This rule is intended to supply the *manner* in which appeals can be taken from the judgments of the Probate Court.

Rule 23 is intended to provide for the *cases* in which an appeal can be taken.

RULE 23. An appeal may be taken to the District Court of the District embracing the county in which such Probate Court is held, from an order, decree or judgment of said Probate Court, when the estate or amount in dispute exceeds three hundred dollars, in the following cases, to-wit:

1st. For or against granting or revoking letters testamentary, or of administration, or of guardianship.

2nd. For or against admitting a will to probate.

3rd. For or against the validity of a will, or revoking the probate thereof.

4th. For or against setting apart property as homestead, or making an allowance for a widow, or child, or children.

5th. For or against directing the sale or conveyance of real estate.

6th. On the settlement of any account of an executor, administrator or guardian.

7th. For or against declaring, allowing or directing the payment of a debt, claim, legacy, or distributive share.

15 Cal. 571.

RULE 24. Such appeal may be taken within sixty days after the order, decree, or judgment is made and entered, and shall be by filing with the Clerk of such Probate Court, a notice stating the appeal from the order, decree, or judgment, or some specific part or parts thereof, and by executing an undertaking or giving surety in the same manner and to the same extent, or in case of appeal to the Supreme Court from a District Court; Provided, that in cases of appeal by an executor or administrator, who has given official bonds, no additional undertaking need be given.

RULE 25. The trial of such appeal from the Probate Court shall be *de novo* in the District Court, but when the appellant in his notice specified only some specific part or parts of an order, decree or judgment appealed from the trial in the District Court shall be confined to the part or parts so specified, and the balance of such order, decree, or judgment, shall stand unaffected by such appeal. Appeals shall be allowed from the orders, decrees and judgments of the District in such appeal cases to the Supreme Court, in the same manner and upon the same terms as provided by law in other cases.

RULE 26. From all orders, decrees or judgments specified in Rule XXIII, entered since the 23d of June, 1874, appeals may be taken in the manner by the foregoing rules provided, within sixty days from the publication of these rules.

Rules 23 to 26 inclusive were adopted at the June Term, 1874.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF UTAH,

FROM THE

ORGANIZATION OF THE TERRITORY

UP TO AND INCLUDING

THE JUNE TERM, 1876.

THE PEOPLE, &c., *Respondent*, *v.* MORONI GREEN, *Appellant.*

POWERS OF A GRAND JURY IN THE DISTRICT COURTS.—A Grand Jury summoned from the body of the Judicial District in which the Court is held, has the right to inquire into the violations of the Territorial criminal laws, co-extensive with the District.

CONSTRUCTION OF SECTION 17 OF THE ACT REGULATING THE MODE OF PROCEDURE IN CRIMINAL CASES.—Section 17 of "An Act regulating the mode of procedure in criminal cases," approved January 21st, 1853, does not apply to proceedings in the District Courts.

THE COMMON LAW IN FORCE IN UTAH.—Section 17, of the Organic Act of Utah Territory, approved September 9th, 1850, extends the Common Law over the Territory of Utah, and a Grand Jury impanneled for the District Courts must consist of twenty-three persons.

APPEAL from the District Court of the First (now Third) Judicial District, Great Salt Lake County.

The Defendant was indicted in October, 1855, by the

Grand Jury of said District, for the crime of an assault with intent to kill and murder one Nathan Tanner, and upon the trial was convicted and sentenced to imprisonment for the term of six months. The indictment contained two counts, and the Defendant pleaded "not guilty" as to both. The verdict was as follows:

"We, the jury, find a verdict of guilty on the second count in the indictment unanimously by imprisonment for the term of six months." A. L. FULLMER, *Foreman.*

The Defendant made a motion in arrest of judgment, which was overruled. The other facts are stated in the opinion of the Court.

A. W. Babbitt, Attorney for Appellant.

Albert Carrington, Attorney General, for Respondent.

DRUMMOND, Justice, delivered the opinion of the Court:

Upon the trial of this cause in the Court below, we find the following bill of exceptions was taken, a proper construction and understanding of which will most fully and clearly settle all the points and questions raised in this case, to-wit:

"Be it remembered that on the trial of this cause A. W. Babbitt, Esq., Attorney for the prisoner, moved to quash the indictment on the ground that the Jury who found the Bill of Indictment was not taken from the body of Great Salt Lake County, but from the First Judicial District of the Territory of Utah, which motion the Court overruled, holding and deciding that although the crime charged in the indictment was against the laws of the Territory of Utah, and the Court was doing Territorial business, yet its jurisdiction was co-extensive with the District, and the Grand Jury had a right to inquire into the violations of the Criminal Laws of the Territory within the said First Judicial District. To which the defendant excepted and prays the Court sign and seal this Bill of Exceptions, which is accordingly done.

J. F. KINNEY, *Judge.*

Nov. 2d, 1855. First District."

It seems that the defendant in the Court below moved the Court to quash the indictment on the ground and for the reason that the Grand Jurors who found the bill of indictment were from the body of the First Judicial District, and not from the body of the County of Great Salt Lake, in which County it is alleged the crime was committed, and in support of his position relies on the 17th section of "An Act regulating the mode of procedure in criminal cases," found on page (459) four hundred and fifty-nine of the R. S. of Utah, 1855. The words of the Statute are: "When necessary, the Court shall issue an order requiring an officer to summon fifteen judicious men, residents of the County for a Grand Jury, who shall be sworn to inquire faithfully into offences, and present indictments by the agreement of at least twelve of their number against offenders who should be prosecuted; and the foreman shall have power to swear witnesses and compel their attendance." Were we to decide this Statute of the Territory of Utah to be applicable to the District Courts, we would make a decision in derogation of the Common Law, which is most positively extended over the Territory of Utah by the express language of the Act of Congress providing a Territorial Government for Utah, approved September 9th, 1850, the 17th section of which was relied on by the plaintiff in error, and reads as follows, viz: "That the Constitution and Laws of the United States, are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable." We are most fully of the opinion that the jurisdiction of the Court is co-extensive with the District, and that it is competent to take both Grand and Petit Jurors from the body of the District, irrespective of the county in which the crime was committed. We are further of the opinion that the Act of the Legislature in question was never intended by the legislators, or the most obtuse minds, to apply in any manner possible to the Federal or District Courts, and

to give a decision of that kind would be wholly unwarranted in the history of adjudications in this country; a violation of the spirit and most express provisions of the Organic Act of the Territory of Utah, and an entire abrogation of all the authorities, both English and American, upon the rights of man in connection with the boasted liberty of a trial by Jury from the vicinage (most clearly in this case meaning the jurisdiction of the Court). From the peculiar phraseology of the language in the 17th section of the Act of the U. T. Legislature, we cannot come to any other conclusion than that the Act was intended to apply to County Courts, and to County Courts only; it cannot by any rule of science known to the law, nor by only forced or far stretched construction of the English language, be made to apply in any way whatever to the Federal District Court. But we hold that the number of Jurors in those Courts must be twenty-three Grand Jurors, as at Common Law, and no act of the Utah Legislature made in derogation thereof can take away that law or that power. It is fixed by the Organic Law of the Territory, and is as binding in all its efficacy and provisions as the Constitution of any of the States of this Union. Indeed, the Organic Act of the Territory is to this Territory what a Constitution is to a State, and all laws attempted to be passed by the Legislature must strictly comply with its provisions, or they are *void ab initio,* and no length of time or the consent of parties can make them anything but *coram non judice.* The Court decided correctly in overruling the motion to quash the indictment.

The Counsel for the appellant in his argument seemed to be quite zealous in obtaining a decision from this Court in favor of the enactments of the Utah Territorial Legislature, and insisted on a decision on the Territorial Laws in this case under the provisions and spirit of Sec. 6 of the Organic Act of this Territory. That part of the section relied on reads as follows: "And be it further enacted that the Legislative power of said Territory shall extend to all rightful subjects of Legislation consistent with the Con-

stitution of the United States and the provisions of this Act." To say that men unlearned in the science of the law are competent at all times, although ever so honest or blessed with ever so many heavenly gifts and blessings, to determine the technical legal bearing and proper construction of an act of their own making, or the law of Congress, is something that this Court cannot concede. The law must be construed by men learned in the Law, and not by virtue of any Priesthood, and while we are willing to make due and proper allowance for the inexperience of the Utah Legislators, duty to the law of the land and particularly to the form of the American Judiciary requires us to say that the acts of the Legislature of this Territory in encroaching on the provisions of the Organic Act are unwarranted in law. They have no right, nor indeed can they increase or diminish the powers of the Federal Courts of this Territory. They are fixed, to be altered only by a higher Legal Tribunal than this Court, or by the Congress of the United States; and it is noonday madness to contend that the Legislature of Utah Territory is competent in power to overthrow that instrument, or add to, or take from its provisions. We can see no analogy in legal parlance, between the 6th section of the Organic Act, and the act of the U. T. Legislature. If it is to be conceded that the doctrine contended for by the Counsel for the appellant is the true doctrine, then the Legislature would have a right to say as they virtually have, that a Grand Jury should consist of fifteen men, a Petit Jury of three men, and a verdict rendered when two out of three, or eight out of twelve, should agree. Thus the Legislature has attempted to do. See R. S. 1855, page 134, sec. 13. Not only so, but they would have a right to create an inferior Court with co-equal jurisdiction with the Federal Courts, to curtail the jurisdiction of the Federal Courts and confine them to chancery causes alone, or confine them to law and chancery business and give all Criminal business to inferior Courts, or confine the Federal Courts to an amount limited in dollars and cents, and all beyond that amount handed

over to an inferior Court. By the same rule of legislating and the same rule of construction the Federal Courts could be shorn of comparatively all the powers confirmed upon them by the American Congress, and it is asking by far too much of this or any other Court to make a decision fraught with so many evils and pregnant with so many disastrous consequences. The spirit of the Law, reverence for the age in which we live, and regard for the happiness of unborn millions, as well as a duty paramount to all else which we owe to the judiciary, forbid that this Court should be the first in America to establish a doctrine so hateful in its features and so repugnant to all the finer feelings of man in an improved and scientific age, and filled with all the blasts and mildews of an ever intelligent and hopeful confiding American Judiciary.

The Appellant relied some little upon some other authorities, as quoted and referred to in this opinion; but as we deem them wholly inapplicable to the question at issue herein, a reference to or a discussion of them is deemed wholly useless.

True it is that there was another bill of exceptions in the case made after the verdict of the Petit Jury was received, and to the same tenor and effect of the one already so fully discussed, and as the same doctrine and same ruling must forcibly apply to a Petit Jury as to qualifications, age and vicinage, as to a Grand Jury, we deem it unnecessary to say anything further on the subject of either Grand or Petit Jurors, other than to say that as the jurisdiction of the United States District Judges is equal and co-extensive with their Districts, it is proper and right to select both from the body of the entire District. And the force of this rule and argument is the more apparent when it is a fact notorious that there are many unorganized counties in this Territory, and many others organized with a population too small and few in number to obtain a Grand Jury of twenty-three, and a Petit Jury of twenty-four competent men. The reasoning of the Counsel for the Plaintiff in Error might apply with force and vitality to

Probate Courts of this Territory, were they legally ed with the powers which the legislature of the Ter- r of Utah have sought to confer upon them but can- pply with any degree of legal lore to the Federal ts. Upon the whole, after a careful examination of the arising in this case, and a due examination of the d, we can see no error in the ruling and decisions in the Court below. We are of opinion that that of the verdict and judgment of the Court below, h relates to the imprisonment of the Defendant, be and y is affirmed. But as the case for which Green was cted seems to have been an aggravated one, this Court remit the costs of the prosecution, both in this Court in the one below. It is therefore ordered by this t that the Defendant be conveyed to the Penitentiary tah Territory by the United States Marshal of this tory, within ten days from this date, and there deliv- to the Warden of said Penitentiary, to serve for and g six months' term of imprisonment in the said Pen- iary of Utah.

dgment affirmed.

LIAM MURPHY, *Appellant*, *v.* M. A. CARTER, *Respondent.*

DINGS IN AN ACTION FOR LIBEL.—In an action for Libel here the Defendant pleads first the general issue, then pleads pecially matters in avoidance, the matters thus pleaded in voidance, although impliedly admitting the declaration and nconsistent with the general issue, does not supercede the neces- ity of Plaintiff proving the allegations of his complaint.

Defendant in such cases has the right at Common Law not nly to plead, but on the trial to rely upon as many different lefenses as he may choose to put upon the record.

action for Libel a plea of the general issue, and the pleas of ustification, are not inconsistent.

PPEAL from the District Court of the Third Judicial rict.

The facts are stated in the opinion of the Court.

C. C. Wilson, C. J., delivered the opinion of the Court.

The original complaint in this case was filed in the District Court of the Third Judicial District of this Territory, July 25th, 1867, to which the Defendant demurred. The Court sustained the demurrer, and gave the Plaintiff leave to file amended complaint, which having been filed, the Defendant by his Counsel filed as answer thereto, three separate and distinct pleas as follows, to-wit: First, not guilty; Second, justification; Third, that the Plaintiff has not been damaged in his character or reputation by said libel and slander.

To these pleas the Plaintiff replied separately. Thereupon, the issues being joined, the cause came on to be heard and tried before Hon. John Titus, Judge, and a Jury empaneled for that purpose January 10th, 1868. The Respondent, then Plaintiff below, to maintain the issues on his part, opened the case to the Jury and read the pleadings in the case, viz.: the complaint, answer, and replication, and thereupon rested, declining to introduce any testimony, claiming that the Defendant had admitted all the material allegations of the complaint by his said plea of justification. The Defendant here moved the Court for a non suit, which motion was then and there overruled; the Court holding and ruling that the Defendant should first introduce his evidence in support of his plea of justification, also at the same time ruling that the said plea of justification, notwithstanding the same was pleaded in connection with the general issue, was an admission of the publication of the libel, and the utterance of the slander set forth in the complaint, and that the burden of proving the issues joined was on the Defendant. To all of which rulings the Defendant then and there excepted. The cause was then tried in conformity with the said rulings, and the Jury found a verdict for the Plaintiff below on all the issues so joined, and judgment was then and there entered by the Court on said verdict. The Defendant below brings

by appeal to this Court, assigning several errors; view taken by this Court of the said rulings of the elow, makes it unnecessary to discuss any of the ors assigned.

rst question which seems to present itself to the or consideration, is, does the Defendant's plea of ion admit the publication of the libel and the utter- the slander, and should it have been received as idence?

proper adjudication of this question leads us to the ation of authorities, as the rule must be established by some express statute, adjudication expressly on int, or by a continued course of practice for a long showing a common consent and general understand- that effect.

horities were examined by the Court apparently sus- g both sides of this proposition, and must therefore termined by the weight of authority and what seems Court the more just and reasonable ground after a nd full examination of the same.

e rule at Common Law confined the Defendant to a plea, consisting of a single matter of defence; but stances frequently occur in which there exists two or distinct grounds of defence to one and the same and, it is obvious that the Common Law rule must times have operated unjustly against him, inasmuch as misapprehension on his part or on that of his Counsel egard to the law, or the facts of the case, or as to the tual state of the proofs, might sometimes induce him choose an unavailing defence in preference to another ch would have been successful, and thus he may have n subjected to a recovery, then the right of the con- versy both in law and in fact was on his side. These siderations no doubt occasioned the enactment of the tute of 4th Anne Chap. 16, which provides that it shall lawful for any Defendant in any action or suit, with ave of the Court, to plead as many several matters ereto as he shall think necessary for his defence. Under

this statute the Defendant may plead as many different pleas (each being in itself single) as he may think proper. When several pleas in bar are pleaded in virtue of this statute to one and the same thing, each of them is treated and operates as if it were pleaded alone. It being an established rule, that one of them cannot, in the language of Chief Justice Wells, "be taken in to help or destroy another," but that every plea must stand or fall by itself; no one of them, therefore, can have the effect of dispensing with the proof of what is denied by another.

Hence, if the Defendant pleads first the general issue, and then pleads specially matter in avoidance, which impliedly confesses the declaration (as if he pleads first *non est factum* and adds a special plea of usury, duress, infancy, payment, &c., or pleads all these in successive special pleas, or pleads not guilty, and then special matter of justification or discharge); the matter of avoidance thus pleaded, though inconsistent with the general issue, does not supercede the necessity of the Plaintiff's proving his declaration, for a contrary rule would defeat the very object of the statute, which manifestly is to enable the Defendant not only to plead, but on the trial to rely upon as many different defences as he may choose to put upon the record.

Gould, Pleadings 402, Sec. 25, and cases therein cited.

We find authorities which seem to settle a different rule from the above. In 15 Mass., in case of Jackson *v.* Stetson, it is said by Justice Jackson, who delivered the opinion of the Court, that "when the Defendant in an action for slander pleads the general issue, and also in justification that the words spoken were true, the Plaintiff need not prove the speaking of the words upon the trial of the general issue." And again the Court held in 1st Pickering, in case of Alderman *v.* French, page 1, to the same doctrine, with this distinction: In the case of Jackson *v.* Stetson, 15 Mass., the Court laid down the rule most strongly that any special plea, although pleaded with the general issue, which confesses any fact hereto-

enied by the general issue, thus relieved the Plain-
om proving such fact under the general issue; while
t Pickering, the opinion being delivered by the same
is in these words: "It is important in the first
:o ascertain precisely the point in question; and this
more necessary as the opinion expressed on the former
n seems to have been much misunderstood. It is
question whether any special plea in confession and
ice amounts to an admission of the point traversed
general issue. Our practice as to pleading double,
in general with that of our Common Law Courts
United States and in England; and it could not be
ly believed that we intended in this summary manner
r at once the whole practice in this particular. The
n is confined to the case where the Defendant
and explicitly declares and alleges a certain fact,
terwards in the same cause calls on the Plaintiff to
hat fact. It applies not to pleas and averments,
are to common intent inconsistent, but such as are
and in words contradictory to each other." These
ses seem to be the only authorities directly in point
hold to this rule, and after a careful examination of
ne we must confess we have entirely failed to be
ed that either the reasoning or conclusions of the
are correct, while on the other side we find author-
reason for a different conclusion. In case of Cilly
ness, 2d N. H. R. 89, Justice Woodbury said when
g of the rule in Jackson v. Stetson: "It was con-
immemorial practice as well as authority." Again
Devrux R. 280, Chief Justice Marshall said in regard
same case: "I believe it stands alone, and that no
decision has been made in any state of the Union."
also said by Lord Tenderden, when discussing the
nestion, "that it would be contrary to all the prac-
my experience, and I believe in the experience of
entleman at the bar to hold that the statements in a
plea may be given in evidence under the general
Permit the Court here to say that we do not regard

the Mass. cases as entitled to the same consideration as we otherwise would but for this, that the Legislature of Mass. to avoid the effect of the case in 15 Mass., passed an act expressly authorizing such special pleas to be pleaded with the general issue; but notwithstanding this act the Courts do not regard it, but still adhere to their former opinion.

It is contended that under the statute of this Territory requiring pleadings to be under oath, these two different pleas could not be pleaded at the same time for the reason that one is repugnant to and inconsistent with the other, and therefore could not both be true. In this case the plea of not guilty is the plea of the general issue, and the Court can see no inconsistency in the plea of the general issue and the plea of justification, for if the Defendant succeeds in proving the justification, he most certainly is not guilty as complained of. In the opinion of the Court, if the Defendant desires to prove the truth of the words charged, it is not only necessary but eminently proper that he should plead both the general issue and justification as under the general issue he could prove many things that could not be proved under the plea of justification. For instance, he could under the general issue introduce evidence of general bad character of the Plaintiff (for if the justification should fail the quantum of damages would still remain). Also he could prove that the words were spoken on a justifiable occasion; that he was insane when the words were spoken; that the words were spoken in the heat of passion, or that he offered at the time and place an explanation of the words used, all in mitigation of damages.

4 Scam. 43. 2 Starkie Ev. 216 and 270, and cases there cited. 6 Blackf. 150 and 55. 2 Cowen 811. 4 Mich. 409. 10 Iowa 557. 5 Ind. 426. 3 Ind. 518. 8 Blackf. 462. 7 Ind. 440. 4 Iowa 453. 17 Ills. 71. 18 Md. 177.

Under the plea of the general issue he could not give in evidence the truth of the matter, or any part of it, even in mitigation of damages, but must justify specially.

ıit. Pl. 494. 13 Johnson 475. 14 Ills. 459. 4
520. 3 Ind. 115.

erefore appears to the Court that the Defendant in
ıses should not only be permitted to plead the general
ıut the plea of justification at one and the same time,
; thereby endangering any of his rights, for although
ht not fully justify under his plea, still the words
have been spoken under circumstances which if shown
:he general issue would greatly mitigate the damages.
l satisfied that this is the only correct rule, and it
o have been adopted and adhered to ever since the
of Anne by all Courts both in England and in the
States, except in Mass., and where the rules of
g have been regulated by some local statute. In the
of such statute in this Territory the Court feels
to adhere to the well established rules of pleading
United States Courts. Therefore, in the case at bar,
ıt hold that the Court below erred in holding the
justification to admit the publication of the libel
ɜ utterances of the slander complained of. In the
the authorities and the reasons herein stated, the
nt of the Court below must be reversed and the
'emanded. But as the error for which the cause
ı reversed seems to have been more the fault of the
han of the parties, we feel it to be but justice that
rty should pay his own costs in this Court.

judgment is therefore reversed, each party paying
costs in this Court, and remanded for a rehearing
ɔnsistent with this opinion.

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parte WILLIAM ROMANES ON *Habeas Corpus*.

may be arrested on complaint made, and upon proper
:nce may be held for a crime committed in another State or
.tory, a sufficient length of time to communicate with the
utive of such State or Territory, *before demand* made by
Executive.

APPLICATION of Petitioner, who was under arrest, for his discharge. The facts are stated in the opinion of the Court.

TITUS, C. J., delivered the opinion:

William Romanes was charged, on the 6th of September last, before the Judge of the Third Judicial District of the Territory of Utah, with the willful, deliberate and unprovoked murder of two unoffending men in Dakota. The testimony, which was strongly *prima facie*, was laid before the Governor of Utah, and by him submitted to the Governor of Dakota. The prisoner was committed to custody here to await the action of the latter Executive, and upon these facts and proceedings the accused presents his petition, denying the legality of his restraint and asking for his discharge.

Upon this question, it may be submitted as a law of nature, and therefore of universal obligation, that men, whether individually or in mass, are not bound to associate with murderers; and that nations and States, as well as those charged with the police powers of Territories, such as those of the United States, may expel or repel them from their borders.

The first murderer was regarded by himself, and it seems by others, as an outcast whom any man might slay. Gen. IV. 14.

And nations and States may remove or expel murderers, as well as other criminals from their territories. Kent's Coms. Vol. 1, passim; Vattel Book 2, Ch. 8, Sec. 100; New York *v.* Miln, 11 Peters 102; Holmes *v.* Jennison, 14 Peters 540; Ogden *v.* Gibbons, 9 Wheaton 199; License Cases, 5 Howard 504; Passenger Cases, 7 Howard 283.

The power to prevent, to punish, to repel and to remove crime and criminals, arises, it is submitted, from the universal law of self preservation and self protection, and it may in all cases be exercised in some effective way by those who wield the police forces of the community. And those who ask us to deny this power to Utah, and

:her Territories of the United States, must confront
›regoing principles and precedents, as well as many
equally authoritative.

it is hardly possible to resist the conclusion that all
es of the United States, relating to the arrest and
ry of fugitives from justice as well as other criminals,
to this case.

Act of Congress, Sept. 24, 1789, sec. 33, First Stat-
t Large, p. 9, provides that: "For any crime or
e against the United States, the offender may by any
e or Judge of the United States, or by any Justice
Peace or Magistrate of any of the United States,
he may be found, agreeably to the usual mode of
s against offenders in such State, and at the expense
United States, be arrested and imprisoned, or bailed
case may be, for trial before such Court of the
States, as by that act has cognizance of the
."

the same act directs the removal of offenders thus
d in other districts, into the districts where they are
:ried.

Act of Congress, Feb. 12. 1793, Sec. 1, First Stat.
ge, p. 302, regarding fugitives from justice, provides,
"Whenever the Executive of any State of the
or of either of the Territories northwest or south
Ohio, shall demand any person as a fugitive from
of the Executive authority of any State or Terri-
› which such person shall have fled, and shall moreover
e the copy of an indictment found, or affidavit made
a Magistrate of any State or Territory as aforesaid,
g the person so demanded with having committed
felony, or other crime, he shall be arrested and
and notice of the arrest be given to the Executive
ty making such demand."

a Magistrate, on proper evidence, has power to order
est of a fugitive from justice *before demand;* and to
him until a requisition can be made upon the
ve of the State, to which he has fled. Comm. *v.*

Deacon, 10 S. and R. 135; Dow's Case, 6 Harris 39; Phila. R. 234; Hyer's Case, Phila. Quar. Sess.; 3 Zabar. 311; The State *v.* Buzine, 4 Harrington 572; Clark's Case, 9 Wendell 221; Goodhue's Case, 1 City Hall Rec. 153; Gardner's Case, 2 John's 477; Comm. *v.* Wilson, Phila. Rec. 80.

The affidavit, when that form of evidence accompanies the requisition, must be sufficient to justify the commitment of the accused to answer the charge. 6 Penn. L. J. 414, 418. And it must allege that the party is a fugitive from justice. *Ex parte* Smith 3, McLean 131, 132; Fetter's Case, 3 Zabr. 311; Hayward's Case, 1 Sandf. S. C. 701; Legant *v.* Michael, 2 Carter 396.

By these constructions of the act last cited, the allegation of the *flight* of the accused is required to be made only in the affidavit of the power demanding his arrest and delivery, and nowhere else.

The skulking haste, the shifting evasions, and the shrinking alarm, though frequent consequences, are no part of the crime, and they need not elsewhere appear in any of its manifestations or averments. And the statement of the *flight* is requred there only to conform to the mere letter of the statute.

If a man commits a crime, in a State or Territory not his own, and then deliberately, openly and defiantly, by the ordinary mode of travel, return to his *usual* home in some other State or Territory, he cannot be said, in any actual specific sense, to be a fugitive from justice. *Constructively*, however, any one who commits a crime is a fugitive from justice from the moment he does so, until the hand of justice shall sieze or her mandate shall incarcerate him; and this implied conformity is all that the law really requires. If any of the characteristics of the fugitive were an indispensable part of the crime, or necessary to its punishment, then the monster who *could* perpetrate a crime, however atrocious, and *feel* none of the pangs of guilt, but even *act* as if he were entirely innocent, would escape by his own insensibility and hardihood.

he application of these statutes to the Territories of the ted States, is not only fit and proper, but it relieves a e necessity, which without such application must exist ur Territorial laws and intercourse.

e are not, however, left to conjecture the application ıe laws above cited to the Territory of Utah; for its nic law provides: "Sec. 17. That the Constitution Laws of the United States are (thereby) extended over declared *to be in force* in said Territory of Utah, so s the same or any provision of them shall be applica- Congress has thus positively extended the Constitu- and Laws of the United States, and the statutes above , which are obviously applicable among them, over the tory of Utah. And it has not given them to this tory as mere abstractions, awaiting legislative applica- but it has declared that they shall *be in force;* that ey shall be applicable and applied in all proper cases, me power then and still existing in the Territory of , able and authorized to administer them, so far as or any provision of them are applicable at all. That , it is submitted, can be no other than that of those ed with the administration of its police regulations. g these are the District Judges, who, both by the ɔ of their functions and the letter of the law, are servators of the peace."

ally it may be added, the poor murderer has none of ghts of personal liberty left him. They fall with his . And his offence not being bailable, the only right the law recognizes as his, is that of legal trial, which ns him to imprisonment as enduring as his life, or to a ture grave by the death penalty and the scaffold.

case presented appears, hence, to be entirely proper ı action of the authorities here, and the law of its dis- n clear.

offence with which the prisoner William Romanes ged not being bailable, he ought to remain in custody nt time to hear from the Executive of Dakota.

And his application is therefore denied, and his petition dismissed.

R. N. BASKIN AND S. DEWOLFE, *Respondents, v.* W. S. GODBE *et al., Appellants.*

WHEN SURETY DISCHARGED.—When the payee of a note gives the principal an extension of time for the payment thereof, for a valuable consideration without the consent of the surety, the latter is thereby discharged from further liability.

PLEADING IN ANSWER.—An allegation in the answer "that Defendant is informed and believes that the time of payment of said note was extended," &c., is not a sufficient allegation of the fact of extension.

NOTE EVIDENCE OF PRINCIPAL ONLY.—A promissory note is evidence of the principal amount only, and the interest thereon must be proven at the time of judgment.

JUDGMENT ON A NOTE HOW TAKEN.—Judgment on a promissory note must be entered for the aggregate amount of principal and interest due at the time of rendition of the judgment, otherwise the same will be invalid.

APPEAL from the District Court of the Third Judicial District.

The facts are stated in the opinion of the Court.

Marshall & Carter for Appellants.

Baskin & De Wolfe for Respondents.

HOGE, Justice, delivered the opinion of the Court.

This was a suit on a promissory note against Howard Livingstone, Josiah Riley and W. S. Godbe, for $2,500 with interest, after maturity, at the rate of five per cent. per month, payable to John W. Kerr & Co., and by them assigned to the Respondents.

W. S. Godbe, the only Defendant below who was served with process, filed his separate answer, setting up as a defence to the action that he was surety on said note, and that John W. Kerr & Co., were so informed at the time of receiving the same, and accepted it with all

sequences. He further says that after the ma-
d note, John W. Kerr, one of the payees of
tended the time of payment to Howard Liv-
o was the principal, for a fixed period and for
on to the said Kerr, paid by him and alleging
ı of time given to be without the consent of
t.

swer a general demurrer was filed by Respon-
ıg that the answer does not disclose a suffi-
of defence. The demurrer was sustained by the
, and the following judgment was entered for
:

on it was ordered and adjudged by the Court
Plaintiffs have and recover of and from the said
ıe sum of $2,500, with interest thereon, at the
per cent. per month till paid, from April 13th,
er with costs of suit, taxed at $15, and that
ue therefor."

judgment Godbe appeals, and assigns as error
the Court below in sustaining the demurrer.
l known rule of law that a demurrer confesses
rs that are well pleaded. The allegation that
surety being sufficiently certain, the demurrer
t fact.

rment of extension of time to the principal in
sufficiently alleged, there can be no doubt that
a good defence to an action if pleaded by a

e has been given to the principal in a note for
l, and a good or valuable consideration without
of the surety, by every known principle of law,
discharged. Bangs v. Strong, 7 Hill 250.
McGraw, 25 Ills. 103.

ne seems to be well settled that the exten-
and the giving of a further day of payment
or, by a binding and valid agreement with the
principal debtor, and without the assent of
ischarges the latter from liability on the con-

tract. Davis v. The People, 2 Gill 638. Warner v. Crain, 20 Ills. 151. Montigue v. Mitchell, 28 Ills. 485.

The only question remains, is the allegation of the extension of time sufficiently pleaded and certain? It is claimed that under our statute, Section 7, of the Judiciary Act, abolishes all technical forms of actions and pleadings. Section 8 of the same act requires every pleading to disclose a substantial cause of action or defense, and if it does not it is therefore demurrable.

There is in the opinion of the Court no sufficient allegation in the answer that the time of payment of the note sued on was extended to Howard Livingstone, who was the principal.

The answer is as follows: "For a further answer he says he is informed and believes that the time of payment of said note was extended, &c." This is not such an averment as could be traversed by the Plaintiffs, there being nothing in this allegation upon which they could take issue. The Appellant might have been so informed and believed it to be true, that the time of payment had been extended.

The answer is defective in the above particulars, it being necessary that the extension of time of payment should be positively averred in the answer.

The Court below did not err in sustaining the demurrer, and if there was a valid judgment in this case we would affirm the same. A judgment to be valid must be for a fixed and definite amount. The record shows that the interest on the note was not computed from the time of its maturity on the 13th day of April, 1866, to the date of rendering the judgment, leaving it open in this particular for some other party to make such computation and collect whatever such person might say that amount was.

In the absence of any statute on the subject the note is only evidence of the amount of principal due. The interest due at the time of rendition of the judgment should be proven by other testimony, unless the parties agree to the amount, and then judgment should be for the

amount of principal and interest due to that
note by operation of law becomes merged in the
and the contract of the parties is then at an
Court has no power to extend the contract
judgment. Without hearing the testimony the
d not render such judgment as the Court below
e rendered, as under the statute, Sec. 8, page
ht have done.
manded to the District Court, with privilege to
s to amend their pleadings on payment of the
is Court by Appellant.

NINGHAM, *Appellant*, *v.* ROBINSON & THATCHER, *Respondents.*

SUIT PENDING A BAR.—The fact that another suit is
g between the same parties, for the same cause of action
urt of competent jurisdiction, although in another Terri-
ill operate as a Bar to the prosecution of the action in this
ry.

from the District Court of the Third Judicial

10th day of August, 1866, the Plaintiff Cunning-
menced an action in the Probate Court of Salt
nty, to recover from the Defendants the sum of
sand dollars for work and labor, in transporting
m Salt Lake City to Virginia City, M. T. At
of the commencement of said suit, there was pend-
he District Court of Montana, held at Virginia
action wherein Thatcher & Robinson had brought
st said Cunningham for damages for the unskill-
negligent transportation of the goods mentioned in
laint in this action.
s suit for damages in Montana, the Plaintiff herein,
nam, had filed answer, claiming as a set-off the
$698, being the amount of freight due Cunning-

ham; and the said suit being still undetermined, the Defendants pleaded the pendency of the action in Montana in bar to further proceedings in this action.

Plaintiff demurred to the answer. Demurrer sustained, and on the trial judgment was rendered for Cunningham in the sum of $698. The District Court, on appeal, reversed the judgment of the Probate Court, and Plaintiff appeals.

No point is raised in the record as to the right of appeal from the Probate to the District Court, nor is the want of jurisdiction in the Probate Court referred to by either party.

PER CURIAM:—

An inspection of the transcript of the record and proceedings in the case of Robinson & Thatcher v. Cunningham, in the District Court of Montana, shows clearly that the suit in Montana was pending at the time this suit was commenced in Utah; and that it was between the same parties; and that the same cause of action alleged in the Plaintiff's complaint here was involved in the pleadings in the Court of Montana, and was adjudicated upon in that Court.

It is difficult to see what pretext the Probate Court could find for rendering judgment for the Plaintiff. He had litigated his cause of action with the Defendants in a Court of competent jurisdiction, and there had been rendered against him and in favor of the Defendants a judgment for $1,600 and costs.

The proceedings in the Probate Court were marked by a total disregard of all judicial comity, which must exist in all well regulated communities and Governments, without which there can be no safety to the citizens of any State or District.

The Constitution and Laws of the United States relative to the effect which shall be given in our States to judicial proceedings in another, were wholly disregarded. It would seem that no ordinary obliquity of the human mind could have produed such result.

nent of the District Court, reversing that of Court, must be affirmed, and it is so ordered.

KERS, *Respondent*, v. J. SIMCOX, JETER TON AND R. H. McBRIDE, *Appellants*.

E POSSESSION OF A PRISONER, at the time of his nnot be appropriated by officers who have him in id the same, although taken from him at the time of is still his property and subject to his order.

rom the Third Judicial District, Salt Lake

eys appear by the record.

J., delivered the opinion of the Court:

from the record in this case that on the 31st J. Simcox, one of the Defendants, was taken Clinton, another of them, and a Magistrate of Lake City, on a charge of stealing several horses, h he had sold to G. B. Rickers, the Plaintiff, rule for the sum of $160, and that these two subsequently taken from the said Plaintiff by as stolen property.

r appears, that on or before the examination Magistrate, the officers had taken from the pris- m of $120, and placed it in the Magistrate's that on the examination the accused admitted part of the money he had received from the part payment for the horses sold to him, and ; it might be returned.

ill further appears that on or about the time of ition, the Plaintiff demanded this sum of $120 from Jeter Clinton, and that the latter refused t, with the evasion that "it was to go to the ay expenses."

Upon these facts a rule was taken in the District Court, of the Third Judicial District of Utah, upon Simcox, Clinton, and R. H. McBride, the third Defendant, who claims to be a Sheriff's officer from Millard County, and to whom it is alleged the said sum of $120 was paid, to show cause why it should not be paid to the Plaintiff, G. B. Rickers.

Depositions were taken in the case, submitted upon argument to the District Court, and upon these that Court on the 11th of July last, rendered judgment ordering the said Jeter Clinton to pay the said sum of $120 to the Plaintiff, and on appeal brings the case to this Court for revision.

The proofs are positive and unquestioned that the said sum of $120 was in the hands of the Magistrate at the time of the examination, and that the accused then requested it to be paid to the Plaintiff, G. B. Rickers, as his, or rightfully his due, and that the Plaintiff himself then demanded this money as his own.

J. N. Sackett, a disinterested witness, proves this, and he is almost entirely corroborated by William Hyde, a policeman on duty at the time.

From all that appears in the case the Plaintiff was rightfully entitled to the said sum of $120, the accused, Simcox, was competent to dispose of it, and actually did direct its payment to the Plaintiff as belonging or due to him, and Jeter Clinton, one of the Defendants then having its possession or control, actually prevented this, the only honest use that could be made of it.

The reasons assigned by this "Conservator" of the peace, as he calls himself, for disallowing this money to be paid to the Plaintiff, are neither sufficient in law nor creditable to himself. It was not pretended that this money was stolen, or that it belonged to any one but the prisoner or to the Plaintiff. If it was the money of the latter, it ought to have been returned to him as his own. If it was the money of the prisoner, as the debtor of the Plaintiff, he was empowered to direct the payment; and

ı, corroborated as it was by every circumstance
ought to have been followed.
ment of the District Court is therefore affirmed,
equiring Jeter Clinton to pay the said sum of
B. Rickers is reiterated, and this Court retains
fore it to direct its execution.

ARD SAVAGE, *Respondent*, v. JOSEPH STONE, *Appellant*.

ı SALE UNDER A POWER CONTAINED IN MORTGAGE.—A sold
in premises, for which B promised *verbally* to pay $3,000.
re this sum B executed and delivered to A a mortgage on
mises, containing a power to sell at public auction. The
s were sold by A, and $700 realized thereby.
ı action for the balance of $2,300, due on the original ver-
tract, that the sale did not extinguish the debt, and is no
ın action on the verbal contract.
HER, That the contract was not merged in the mortgage,
sted independently of it, and parol evidence was admis-
prove the terms thereof.

, from the District Court of Carson County (now
a).

cts are stated in the opinion of the Court.

Y, C. J., delivered the following opinion.

ı an action to recover $2,300, balance alleged to be
ı a verbal contract for the sale of a certain mining
Plea general issue, and also setting up special mat-
ay of defense, and among other things that the
ıt, Stone, in consideration of the sale of said
ground to him, made, executed and delivered to
ıtiff a mortgage upon said mining ground.
ıstrument is then set out in the answer. It con-
e following provision:
ı conveyance is intended as a mortgage to secure

the payment of three thousand dollars, within forty-five days from the date of this indenture, without intent from the said party of the first part to said party of the second part, and these presents shall be void if said payment be made. But in case default shall be made in said payment as above provided, then the party of the second part is hereby empowered to sell the above described premises, or any part thereof, at public auction, in thirty days after due and proper notice, and out of the money arising from said sale to retain the said sum of three thousand dollars, with the costs and charges of making said sale, and the overplus, if any there be, shall be paid by the said party making the said sale, on demand of the party of the first part, or his assigns."

Defendant Stone then denies that said mortgage had been sued upon, denies all indebtedness, denies that there was any promise to pay said sum of three thousand dollars, other than that secured and provided for in the mortgage. Judgment was rendered for Savage for twenty-three hundred dollars, and Stone brings the case to this Court upon error, and relies upon the ruling of the Court as contained in a bill of exceptions, for a reversal of the judgment.

By the bill of exceptions it appears that the cause came on for trial before the Court on the complaint and answer, and that it was admitted that a sale had taken place under the power contained in the mortgage, and seven hundred dollars realized. Plaintiff then called a witness, who testified that Defendant agreed to pay three thousand dollars for the claim mentioned in the complaint, and went into possession on these terms. This testimony was objected to because it was *oral*, and referred to a contract or transaction contained in the mortgage, and because there was evidence of indebtedness (if any there was) in the mortgage, which objection was overruled and the witness allowed to testify.

Two questions are presented by this bill of exceptions for the decision of this Court:

First—Had the Plaintiff a right to resort to his action

Defendant for the balance of $3,000, after pro-
sell the mortgaged property? and,
Could parol evidence be introduced in support
ginal indebtedness or contract which existed
parol, or was such contract merged in the mort-

rst question is one of great importance, and the
pon it somewhat conflicting, we regret that we
led to establish a rule without the aid of a
book, and with the assistance of but few adjudi-
. We are free to confess in deciding this ques-
e governed by the authorities from New York,
se are not contradicted by any books before us,
ully yield any previous opinion we may have
l upon this subject. In the well considered case
r v. Hartford, 4 Wend. 381, the Court says the
a foreclosure of a mortgage given to secure a
has been fully considered by Mr. Justin Story,
v. White, 2 Gallison 152, who comes to the con-
nat in all the cases there is no difference of
mong the learned jurists whose decisions had
idered, that at law a foreclosure of the mortgage
to an action on the attendant bond.
case of the Globe Ins. Co. v. Lansing, 5 Cowen
question was whether a foreclosure of a mortgage
le under it operated as an extinguishment of the
it was there held that it was an extinguishment
r than to the amount produced by such sale.
case of Lansing v. Goelet, 9 Cowen 346, 403, the
was presented on demurrer whether a foreclosure
nortgaged premises without a sale operated as a
on of the debt, and it was held it did not, with-
verment that the mortgaged premises were of suf-
alue to pay the debt. There seems to be this dis-
in the law, that if the mortgagee prefers a simple
re of the mortgaged premises, he should account for
the mortgager to the amount of the debt; but if he
mortgaged premises, and they produce less than the

amount of the debt, the balance may be recovered on the bond, and if more than the debt is produced from the sale, the balance belongs to the mortgager. See also Jackson *v.* Hull, 10 John, 481. Dunkley *v.* Van Beuren, 3 John Chy. R. 331, in which the Chancellor expressly says that after foreclosure suit may be brought on the bond for the deficiency. And in the case of Jones *v.* Cindy, 5 Ib. 77, the court decides that the mortgagee has two remedies, one *in rem* and the other *in personam*, and that both may be pursued at the same time.

From these authorities it follows that the Plaintiff below did not exhaust his remedy by the sale of the mortgaged premises, and that he had a right to sue for the balance remaining due after deducting the sum realized by the sale.

But it is said that the Court erred in allowing the witness to testify in relation to the verbal contract, as the contract was merged in the mortgage. We do not think so. The mortgage did not extinguish the contract, nor was it merged. The contract existed independently of the mortgage, and was just as valid and binding in parol as if it had been in writing.

The mortgage was dependent upon the contract, not the contract upon the mortgage. One was an obligation to pay, the other mere security for payment. According to the decision in 6 John Chy. R., the mortgagee could institute suit upon both at the same time, one at law, the other in chancery; one *in personam*, the other *in rem*. But this could not be the case, if the contract merged in the mortgage.

The mortgage in the case before us recites the terms of the contract, recognizing its binding force and validity, and expressly states that it is given to secure the payment of three thousand dollars, in forty-five days from that date. What three thousand dollars? we might ask. Certainly none other than the three thousand dollars about which the witness testified Stone was to pay Savage for the mining claim. Since parol testimony cannot be introduced to vary a written instrument, neither can it be

. to prove the antecedent conversations between
ɜ in making a contract, when it is in evidence
ɔontract was reduced to writing. But this case does
ithin either of these well established rules of law.
act was not reduced to writing, the mortgage being
ty *for* the *contract*, and not the contract itself,
Court decided correctly in allowing the witness to
ence of the parol contract.
ent affirmed.

e names of the Attorneys for the respective parties do not
: in the record.—*Reporter.*

MATTER OF CATHERINE WISEMAN, PRAYING
A WRIT OF *Habeas Corpus* AND DISCHARGE FROM
RISONMENT UNDER SENTENCE BY JETER CLINTON,
OF THE ALDERMEN OF SALT LAKE.

rson Elected as Alderman in the City of Salt Lake, solely
ch, is not and cannot be a Justice of the Peace by the simple
f qualifying as such.
dings before a Justice of the Peace must contain all the
rial qualities of a Common Law Pleading, and an "Informa-
," or complaint, must show affirmatively that a crime has
committed.
Record of a Justice of the Peace, where the official charac-
or judicial power of such Justice is called in question, must
matively show the Jurisdiction of the Court.

facts are stated in the opinion.

ge Earll and *Governor Johnson* for petitioner.

ge Snow for the prosecution.

briefs on file.

WLEY, J.

ɜ question of fact and law involved in this case is:
st—Did the Court below, or the Alderman who sen-
d the petitioner to prison, have jurisdiction?

Second—Are the proceedings upon their face sufficient in substance, in the nature of the case, adjudicated by the Alderman?

If the Alderman has no judicial power, that ends the matter, and the prisoner must be discharged. If the Alderman has jurisdiction, yet if there is no crime shown to have been committed, or, if the process under which the prisoner is held is void of legal force, for want of materiality in the specific charge of the crime intended to be embraced in the pleadings, then she must be discharged. When I called Judge Snow's attention to these points, I hoped he would discuss them fully. The authorities presented by Judge Snow are recognized as good law upon the several points upon which they treat.

As to the question of the jurisdiction of Jeter Clinton, elected as an Alderman, of the case, it must be decided under the Territorial Statute, construed under the Organic Act.

By Section Nine of the Organic Act, Justices of the Peace Courts constitute a part of the Judicial system of Utah Territory.

By Section Seven of the Organic Act, all Townships, Districts and County Officers, not otherwise provided for, must be appointed or elected, in such manner as shall be provided by the Governor and Legislative Assembly.

In pursuance of this delegated authority, the Governor and Legislative Assembly, by Section One, Chapter Three, of the Statute, have provided, "That each precinct" in this Territory "shall elect one Justice of the Peace."

A Precinct in this Territory answers to a Township. The office of Justice of the Peace, in this Territory, by the rightful legislation of the Governor and Legislative Assembly, is made a Township or Precinct office, and is to be filled by the qualified voters of such Township or Precinct, by an election by them. No other electors except those in the Precinct have a right to vote for a Justice of the Peace; for all others are by the law ex-

participating therein. The right to vote for
ction of a Justice of the Peace are vested in the
ers of each Precinct in the Territory.
rmen of this city are elected as Aldermen by
l voters of and within the city, which embraces
ts. And they are elected as Aldermen. To be
serve as Aldermen, it is not necessary for them
s Justices of the Peace. If an Alderman, who
olely as such, by qualifying as a Justice of the
ereby clothed with the jurisdictional powers of
the Peace, then it would be incumbent on the
to show that he was so elected and had so
This Court, in the matter of inquiry now before
presume, without legal evidence, that Jeter Clin-
cted as Alderman, or that he has qualified as a
he Peace; and there is no evidence of this kind
g to show this, before the Court. A Justice of
ven, in every case when his official character or
vers are called in question, must in all his pro-
ow his jurisdiction. Not so with a Court of
risdiction, with full common law and chancery

o doubt that it would be competent for the
any given precinct, within the city limits, to
the Aldermen residing there a Justice of the
that in such case he would be qualified to
ffice of Justice of the Peace as well as Alder-
n the law, under the Organic Act, I must con-
d the Supreme Court in the case of Englebrecht
ter Clinton, that an Alderman, elected solely as
t and can not be a Justice of the Peace by the
of qualifying as such.
As to the question whether the proceedings
ton, as Alderman and *ex officio* Justice of the
sufficient in substance and form, I will say,
c. 5, Chap. 3, of the Territorial Statute, "all
ctions for the commission of public offences,
nmenced before a Justice of the Peace, by in-

formation duly subscribed and sworn to and filed with the Justice."

By Section 512 of the Code, it is provided that, "Actions in Justices of the Peace Courts shall be commenced by filing a copy of the account," &c., or a concise statement in writing, &c., and the issuance of summons thereon," &c. By Section 515, it is provided that, "When the summons is accompanied by an order of arrest," &c., "it shall be returnable immediately." By Section 518 of the Code, it is also provided that, "In an action for a fine or penalty," etc., the action must be commenced "in a fiduciary capacity." This "information," "or concise statement in writing, of the cause of action," are in the place of the ordinary pleading at common law, and must contain all the material qualities of a common law pleading; or in other words, it must show affirmatively that a crime has been committed, when, where and by whom committed; and if it is for the recovery of a penalty for a violation of a City or Municipal ordinance, it must set forth the ordinance, and claim the specific penalty therein fixed. This is needful, as a protection to persons charged with crime, that he or she shall not be liable or made liable more than once for the same offence.

This action was for a penalty commenced in the name of Salt Lake City, and without any pleading required by law. By Section 116, of Chapter 22, of the Statute, it is provided that, "All criminal prosecutions shall be commenced and carried on in the name of The People of the United States in the Territory of Utah." There is no pretence that this requirement has been complied with; and it must be commenced "in a fiduciary capacity." None of these statutory requirements, or rules of pleading were observed, nor was there an "information," "or concise statement in writing of the cause of action" in either substance or form.

By Section 507 of the Code, it is also provided that all "Justice's Courts shall be held in their respective precincts." This requirement is not shown to have been

observed. Under this statute a Justice of the Peace can not hold his Court out of his Precinct. To what Precinct Alderman Clinton belongs does not appear, nor whether he held his Court in his Precinct or not. Therefore, even if Jeter Clinton was a Justice of the Peace, the proceedings of this case before him are found to be wholly insufficient in both form and substance, and to be without authority of law.

As to whether or not the Governor and Legislative Assembly can delegate the legislative powers reposed in them by the Congress of the United States, under the Organic Act, is not material to decide the question nvolved in the case now before me; and, inasmuch as this uestion is of great moment, I shall not express any opin-n upon it at this time, nor until a thorough investiga-on of it. There is a consideration, however, that has not en attended to by counsel in their arguments. The ganic Act provides that "all Acts passed by the Gov-ıor and Legislative Assembly shall be submitted to the ngress of the United States, and if disapproved by Con-ss, shall be null and of no effect." If the Governor Legislative Assembly can avoid this duty by farming their legislative powers, to Municipal Corporations of · own creation, they then can thereby dispose of the e legislation of the Territory, and take from Congress ɔwer to review or disapprove of the legislation thus ed. But as we have before said, this is too grave a on for a summary opinion, I will therefore merely call tention of counsel to it.

leciding and in disposing of the question before me, only to repeat the decision of the Engelbrecht case, n Alderman of Salt Lake City is not a Justice of ıce, by virtue of his election as an Alderman. There vidence showing that Jeter Clinton is an Alderman, he has qualified as a Justice of the Peace. The must be, and accordingly is discharged from her ment. But if a proper complaint is made, and ɔwn by the prosecution, that she has been guilty

of a crime known to the law, I will hold the prisoner to answer to the charge before the District Court.

NOTE.—No. 2. See 16 Cal. 374. 18 Ib. 599. 6 Cal. 66. Ib. 162. 20 Cal. 280.

No. 3. 15 Cal. 296. 16 Cal. 392. 17 Ib. 297. 23 Cal. 403. 7 Cal. 64. 12 Cal. 283.

Judicial notice of who are officers—See 44 Cal. 213. 15 Cal. 53. 32 Cal. 106.

IN THE MATTER OF NOUNNAN & ORR, PARTNERS, &c., BANKRUPTS.

1. If, after certain of their creditors have filed a petition in bankruptcy against them, the alleged bankrupts file their own petition in bankruptcy, and all the creditors, including the first petitioners, come in and prove their claims under the last petition, the first is thereby waived, and, on motion, it should be dismissed.
2. If, after the commencement of proceedings in bankruptcy, and before adjudication, the bankrupts, with the assent of the creditors, employ an expert who renders services which inure largely to the benefit of the creditors, the claim of such expert for compensation out of the assets should not only be allowed, but should be preferred.
3. The Court is, however, not necessarily bound by the agreement between the bankrupts and the expert as to the amount of such compensation.

Original proceedings in bankruptcy in the Supreme Court at a special term, January 6th, 1871.

Certain motions herein having been argued before Associate Justices Hawley and Strickland, and they having disagreed on these conclusions, the matter came up for re-argument before the full bench, on the day above mentioned.

It was shown to the Court that David P. Kimball and Heber P. Kimball filed their petition April 23d, 1869 and their amended petition May 11th, 1869, praying that Joseph F. Nounnan & Co. (the above named Nounnan and Orr) be declared bankrupts, &c.; that afterwards, before adjudication, by agreement with the Kimballs, and by the acquiescence of the other creditors, Jos. F.

n & Co. prosecuted a claim against the Union Pacific
l Company; that they employed, by agreement in
Stevenson, an engineer, to make certain surveys
asurements of portions of the U. P. Railroad involved
litigation; that Jos. F. Nounnan & Co. recovered
e said Railroad Company the sum of $95,000; that
Nounnan & Co. then filed their own petition in
tcy (June 9, 1870); *that the Kimballs and all other*
s—taking no further steps under the first two peti-
either of them—came in and proved their claims
he third or voluntary petition; that an assignee was
nder the last named petition; that Jos. F. Nounnan
aid over to the assignee, for the benefit of the cred-
e $95,000 recovered from the Railroad Company,
t that sum was nearly or quite all the assets of the
ts.

rgument came up on the following motions:

e part of Stevenson, that he be allowed the stipu-
ice for his services, and that his demand be pre-

e part of the Kimballs, that their petitions of April
May 11, 1869, be dismissed.

e part of Thos. F. Almy, a creditor, that he be
ed in the place and stead of the Kimballs as peti-
creditor, &c.; or that a hearing be had upon the
l second petition, &c.; or that these petitions be
l and a hearing had, &c.

part of the assignee, that Almy's claim be rejected,
round that Almy had received certain collateral
therefor, which he had sold.

irkpatrick for Stevenson.

Marshall for the Kimballs.

lmy in person.

Maxwell and *Mr. Robertson* for the Assignee.

N, C. J.

In very important particulars this case differs from any reported case, and the Court, in deciding the questions raised, must therefore make rather than follow precedents.

I have reached the following conclusions:

1. All the creditors having proved their claims, and other proceedings having been taken, under the third or voluntary petition, filed June 9, 1870, the creditors thereby waived the right now to insist upon going back and proceeding under the first two petitions, or either of them. The petition of Thos. J. Almy should therefore be denied.

2. The motion to dismiss the petitions of the Kimballs, filed April 23d and May 11th, 1869, should be granted.

3. The petition of the Assignee that Almy's claim be rejected, cannot be allowed. But that claim should be referred to the Registrar to examine into and report thereon.

4. The bankrupts and the creditors have had, or are to have, the full benefit of Stevenson's services, and he should be held to have substantially complied with the terms of his contract.

5. The nature of Stevenson's services, and the circumstances under which they were rendered, entitle him to be placed among the preferred creditors.

6. The Court is not necessarily bound by contract between Stevenson and Jos. F. Nounnan & Co., as to the amount of Stevenson's compensation,—other creditors are interested in that question. But, taking all the proofs into consideration, Stevenson should be allowed the amount stipulated in the written contract less the amount already paid; and his claim to such amount should be preferred.

STRICKLAND, J., concurred. HAWLEY, J., dissented.

: MATTER OF THE ALLEGED BANKRUPTCY OF FRANK ENYON AND WAKEFIELD FENTON, CO-PART-ERS, UNDER THE FIRM NAME OF KENYON & FENTON.

e Publishers and conductors of a Daily Newspaper and a Job nting Office connected therewith, in which are made Cards, l-Heads, Show-Bills, &c., are Manufacturers within the mean- ; of the Bankrupt Act.

e Promissory Notes of such Manufacturers are commercial per.

) question before the Court arises upon two separate rrers filed by said several alleged bankrupts to the on for Adjudication of Bankruptcy against them.

e petitioner among other things alleges that said firm ublishers of a daily paper in Salt Lake City, in said tory, known as the "Salt Lake *Daily Review*," and also conducted a book and job printing office con- d therewith, in which are manufactured cards, notes, eads, blank books, posters, show-bills, and other es, etc. That said firm within six months, to-wit: he the 26th of December, 1871, in said Territory, g manufacturers, have suspended and have not resumed ent of their commercial paper within a period of teen days, which paper is therein set forth; and that g in contemplation of insolvency, said Kenyon executed ortgage or transferred all his right, title and inter- in the business, material, effects and assets of the *Daily Review* and said job office to the said Fenton, the intent to delay the operation of said bankrupt and that being in contemplation of insolvency, and hin six calendar months, to-wit: on the 17th day of vember, 1871, and at sundry other times since then, le payments of money to sundry persons therein named, h the intent to give a preference to their creditors; and t within six calendar months, to-wit: on the 2d day of vember, 1871, the said firm being manufacturers, sus- nded, and have not resumed payment of their com-

mercial paper within a period of fourteen days, therein describing the same and showing it to be negotiable paper.

The said demurrers substantially charge, that said petition is not sufficient in law, and in this:

1st. It does not aver that the alleged bankrupts are manufacturers within the meaning of the Bankrupt Act.

2d. It does not aver that the notes mentioned in said petition were the commercial paper of the said bankrupts, nor that they were made in the course of their trade as manufacturers within the meaning of said Act.

3d. There is not a sufficient allegation that said mortgage, and the said payments made by said bankrupts, were made with the intent to prefer any of their creditors.

4th. That there is no allegation that said mortgage and payments were made in contemplation of bankruptcy, etc.

5th. That there are not sufficient facts alleged to entitle the petitioner to the relief prayed for under the said Act.

Chas. G. Loeber, Solicitor for Kenyon.

D. Cooper, Solicitor for Fenton.

James L. High, Petitioner, *pro se.*

McKEAN, C. J., delivered the following opinion:

The Respondents must be regarded as manufacturers, and the promissory notes set forth in the petition as their commercial paper. The petition contains all necessary averments, and, therefore, the demurrers should be overruled.

HAWLEY, J., delivered the following opinion:

To understand the questions raised by said demurrers, it becomes necessary to enquire into the nature and extent of the character of a manufacturer and trader within the meaning of the Bankrupt Act.

The character of a trader embraces a wide field of

eration. It is of no consequence in what one may
ıde, the only question is, does he buy and sell articles
ıich are subject to trade and commerce? *In Re* Cowles,
B. R., 42.

Selling horses or other stock, or the products of a farmer,
es not constitute him a trader within the meaning of the
t. But if a farmer buys horses or other stock, or pro-
cts of a farm, to sell again, and this constitutes a part
his business, he then becomes a trader, and subjects
nself to this provision of the Bankrupt Act. *In re*
andler, 4 B. R. 66.

The term manufacturer, under the Bankrupt Act, has
egal meaning, and this legal meaning must be governed
legal rules. It is true, that every one who manufactures,
not to be embraced within the legal phrase. A farmer
not to be considered a manufacturer in the commercial
se, when he confines his business to the manufacture of
milk of his cows into butter and cheese, nor when he
ıverts the products of his farm into beef and pork. But
does not follow, that when he makes it a part of his
iness to buy milk and manufacture the same into butter
l cheese, or to purchase the products of other farms and
er stock than those of his own, and manufactures the
ıe into beef and pork, that he is not a manufacturer
hin the meaning of the act.

When the manufacturing becomes the principal part of
n a farmer's business, which requires him to buy articles
products, and to manufacture them for sale, he thereby
omes a manufacturer and trader within the meaning of
act.

buyer of leather, who makes it his business, or a part
his business, to manufacture the same into boots and
es, or harness, and sells the same, though he be a nursery
ı or a gardener or a farmer, is a manufacturer and a
ler within the meaning of the act. If other construc-
than this should be given to the act, the spirit
the letter of the same could be destroyed by assump-
s the most frivolous as well as those the most false.

If it should be admitted that the publishers of a weekly or daily paper were not manufacturers within the meaning of the act, yet if they should buy paper, ink and other material, and make the same into cards or bill-heads, or blanks and blank books, and conduct a business of this kind, as in this case it is averred the bankrupts have done, they are manufacturers and traders within the meaning of the act; for these articles so manufactured are not necessary parts of the business of publishing a newspaper.

The petitioner avers, that said alleged bankrupts are publishers of said newspaper and manufacturers of books, cards, bill-heads, etc. Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother Judges have expressed the opinion it would be, and I am inclined to the same conviction. A newspaper publication is as much the result of manufacture as that of books or cards or bill-heads. To make a distinction between them, when in fact there is no distinction, would seem to be an utter disregard of the objects as well as the legal intendment of the law; for they buy, manufacture and sell.

The second cause of demurrer, to-wit: that there is no allegation that said notes set forth were the commercial paper of the said firm, certainly has no foundation; for the averment of the petitioner is explicit that said firm within six calendar months, to wit: on the 2d day of November, 1871, being manufacturers as aforesaid, suspended and have not resumed payment of their commercial paper within a period of fourteen days.

This allegation is in the language prescribed by the 39th section, and fully sets forth the making and suspension and non-resumption of their commercial paper for a period of fourteen days. What other or further averment is necessary is not comprehended, and we must therefore hold this averment sufficient.

The third cause of demurrer, in part, is, that the said Kenyon mortgaged his said interest in the property named, to his co-partner, Fenton, who is made a party

ıdant in the proceedings of bankruptcy, with the intent refer his said partner, seems to be well taken; for a ıfer of one partner to another, of a firm, is not such a ıfer that puts the property out of the firm in the strict). The removal of the property by mortgage out of the ls of one into the possession and ownership of the other ıer, does not remove the same in legal contemplation . liability to the firm's creditors.

ıt the other clause of this specification, that said pay- ts made by said firm within six calendar months, with ıt to prefer creditors, is a sufficient charge under the therefore, this cause of demurrer being good only in , and not obnoxious to the petition in another material t, it cannot be sustained.

he fact that said payments were made to the employees aid firm, in their said business, while other employees, the petitioner, were not paid, does not relieve against act, or cause, for proceedings in bankruptcy against n. They have no right to prefer one of their employees nst the rights of other creditors, whether employees or rwise. The law prefers an employee to the amount of but this preference must be secured, if at all, by and ugh the proceedings of bankruptcy, and not outside of n, or independent of, and in spite of the act.

'henever a person or a firm find they are unable to pay or their debts in full, or his or their commercial paper ıaturity, it is his or their duty to apply to the Court in form of law, and under the Bankrupt Act, to distribute ›r their assets among his or their creditors equally, with- other preference than the said act provides.

ut counsel insist, that because the petitioner has embraced ain elements of Sec. 35, with those of Sec. 39 of the act, efore his petition in these respects is obnoxious to the urrer. The petitioner manifestly has a right so to These two sections must, as they uniformly have ı, be construed by the Courts together; for, in effect, 35 so provides, as follows: "And if any person, being lvent, or in contemplation of insolvency or bankruptcy,

within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent or acting in contemplation of insolvency, and that such payment, sale, assignment," etc., "is made to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this act," etc. The 39th section provides, "that any person residing," etc., "being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, or give any warrant to confess judgment, or procure, or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorser, bail, sureties or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act, or being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy," etc.

From the recital of these parts of the said two sections, it is manifest that they must be construed together, particularly in proceedings of involuntary bankruptcy. To decide otherwise would be a violation of the letter as well as the spirit of the Act.

The fourth cause of demurrer assigned that there is no sufficient allegation that the said payments were made in contemplation of insolvency, with intent to give preference, etc., cannot be sustained; for the averments in the petition are, that the said firm, within the period of six calendar months, within said Territory, to-wit: on the 17th day of November, 1871, being in contemplation of insolv-

y with intent to give preference, did make payments to dry persons (naming them) and at sundry other times rein named, within said Territory, and also averring t they were manufacturers, etc. A more specific com- nce with the provisions of the Act could not be made ı is made by the petitioner.

'he fifth cause of demurrer is a general one and goes he whole petition; it, therefore, follows from what has ıdy been said, that it cannot be sustained.

he assertion of counsel, that said notes in said petition forth were given by said firm as publishers of said ' paper, and not as manufacturers as aforesaid, is not e out by the allegation and averments in said petition ained. The petitioner avers that said firm were manu- ırers of books, blank books, cards, bill-heads, etc., as as publishers of said paper, and also avers that said made said notes and delivered them, etc., that is, put them in circulation as commercial paper. Thereby ıame became their commercial paper under the Act ınder the law merchant, and cannot be restricted in haracter by the appliance of a technical construction as counsel have sought to give it. Whether it was ıd by said firm as the publishers of said daily paper, manufacturers of books, blank books, cards, bill- , etc., it matters not; for the same being negotiable ut into circulation either as publishers as aforesaid or nufacturers as aforesaid, it becomes their commercial within the meaning of the Bankrupt Act, as well as the law merchant. A more restricted construction be an utter disregard of the spirit and letter of the ıd do violence to the best interests of the business ınity: *In re* Chandler, 4 B. R. C. C.; *In re* Nico- , 3 B. R. 55; *In re* Hollis, 3 do. 82.

term commercial paper, within the meaning of ınkrupt Act, includes negotiable notes, bills of ex- , negotiable bank checks, certificates of deposit used ımercial transactions known as law merchant. In nse Congress used the term in the Act, and not in

the restricted sense of counsel in the argument of this case. By usage and by statute, negotiable paper is to be regulated by custom and the law merchant. If a "banker, broker, merchant, trader, manufacturer or miner," allows his paper to go to protest and suspends payment for fourteen days, or if he has fraudulently stopped payment, in either case he has committed an act of bankruptcy. A fraudulent stoppage of payment is an act of bankruptcy, and his creditors may proceed against him at once, without waiting fourteen days. But when there is only stoppage or suspension of payment, without fraud, then the same must continue without resumption, fourteen days, before the act of bankruptcy is complete.

This provision in the 39th section, is so clear, that it seems strange that counsel should insist upon a different construction. *In re* Jersey City Window Glass Company, 1 B. R. 113; *In re* Ballard & Parsons, 2 B. R. 84; *In re* Towenstein, 2 B. R. 99; Doane *v.* Compton, 2 B. R. 182; Davis *et al.* Armstrong, 3 B. R 7; Heinsheimer *v.* Shea, 3 B. R. 46; *In re* Hollis, 3 B. R. 82.

Paper not given in the ordinary course of the business of a banker, merchant, manufacturer, trader or miner, it has been held, is not commercial paper within the meaning of the act. *In re* Lowenstein, 2 B. R. 99; *In re* McDermott Pat. Bolt Manufacturing Company, 3 B. R. 33. But the case of Chandler, 4 B. R. 66, holds the contrary doctrine.

It is sufficient, however, if the debtor's commercial paper was incurred in his character of banker, merchant, trader, manufacturer, or miner. It does not matter whether the same was given for a loan of money, for goods, or to his or their employees, or otherwise, nor whether the maker, acceptor, or indorser, as principal, debtor, or otherwise, is liable thereon, if it appear in the petition that it is the debtors' commercial paper of the class enumerated in Section 39 of the act. In the case at bar it so appears with sufficient averments. We must therefore, overrule the demurrers and grant leave to the

rupts to reply to the allegations contained in the ion.

RICKLAND, J., delivered the following opinion:

e petition appears to be sufficient upon its face, and paper is negotiable paper. Then the only question ining is: are these parties within the purview of the are they manufacturers? If so, the paper as a matter urse is their commercial paper. I believe them to be facturers. The demurrers are not well taken.

S. GODBE, *Respondent*, *v.* BRIGHAM YOUNG, 'RUSTEE-IN-TRUST OF THE CHURCH OF JESUS CHRIST F LATTER-DAY SAINTS, *Appellants*.

(See same case in 15 Wallace, 562.)

the interposition of an untenable objection only, to the introction of evidence, all other objections are waived.
e question whether the Plaintiff, after the Defendant has rested, y again introduce evidence in chief, or shall be confined to utting evidence, is entirely in the discretion of the Court.
o objection is made within a reasonable time to an account ed, assent thereto may be presumed.
account stated carries interest from the day of its liquidation.
ctions of contract, interest is allowed as a legal right. In y other cases it may be allowed, in the discretion of the jury.
ere interest is allowable, and the contract does not fix the centage, it is regulated by the Statute, if there be a Statute.
ere be no Statute, a reasonable rate of interest should be wed by the jury by way of damages.

al from the Third District Court.

Plaintiff claimed judgment against the Defendant, on owing alleged state of facts, to wit: That in the of 1865, the Plaintiff, at the request of the Defendvanced to the latter, "to be used in the constructhe Deseret Irrigation and Canal Co.," goods of the

value of $10,020.27; that on the 12th day of February, 1866, an account was stated by the Plaintiff to the Defendant for the said sum, to which the Defendant made no objection; that on the 30th day of May, 1868, the Defendant paid the Plaintiff thereon the sum of $5,000. The Plaintiff claimed judgment for the balance, with interest on said stated account at the rate of 10 per cent. per annum, from February 12th, 1866, to May 30th, 1868, and interest on the balance then remaining due, at 10 per cent per annum from said 30th day of May, 1868, until paid, (such interest being by way of damages).

The Defendant, in his answer, denies that there was ever any account stated between the parties hereto; and denies that there was found to be due the Plaintiff from the Defendant, as said Trustee, the sum charged in the complaint, or any other sum.

The complaint and answer are verified. The cause was tried in the Third District Court, at the July Term, 1870, before Mr. Justice Strickland and a jury.

The jury rendered a verdict in the following language:

We, the undersigned jurors, hereby find for the Plaintiff in the sum as claimed by him, viz: The amount of $10,020.27, with interest from the 12th day of February, 1869, up to the date of payment of the $5,000, acknowledged May 30, 1868, and interest on the remaining balance up to date, at the rate of 10 per cent. per annum—total amount, $8,382.76"

The Defendant appeals. Other facts appear in the opinion of the Court.

Marshall & Carter, for Respondent.

Snow & Hoge, for Appellant.

McKEAN, C. J. delivered the following opinion:

1. The testimony of Rodford, and the written correspondence of the parties to the record, introduced in evidence, authorized the jury to find, as they did find, that Brigham Young, and the "Deseret Irrigation and Canal

pany," and the "Trustee-in-Trust of the Church of
ı Christ of Latter-day Saints," were one and the same;
the same evidence authorized the jury to find, as they
ind, that the Plaintiff's account against the "Deseret
ıtion and Canal Company," was properly rendered to
Defendant, through the Defendant's proper agent, on
.2th day of February, 1866, and that the stated bal-
was then found to be due to the Plaintiff from the
ıdant. (Terry v. Sickles, 13 Cal. 427; Powell v. Noye,
ırb. 184; Lockwood v. Thorne, 11 New York, 170).
After the parties had rested, the plaintiff called one
ırong as a witness, who testified that Lawrence had
him that Kimball & Lawrence once had an account
t the "Deseret Irrigation and Canal Company," which
Trustee-in-Trust had settled by giving credit on tith-
This was hearsay testimony, and was improper. But
efendant's counsel objected, for the reason that the
ce was not in rebuttal, and was therefore illegal."
ıbjection was not tenable, and every other was waived
terposing it. (Jackson v. Hobby, 20 Johns., 357;
ın v. Wells, 17 Wend., 136; Potter v. Dayo, 19
, 361; Elwood v. Deifendorf, 5 Barb., 398; Merritt
man, 6 Barb., 330; Ballows v. Sackett, 15 Barb.,
mith v. Hill, 22 Barb., 656; Newton v. Harris, 2
345).
ther, after the Defendant had rested, to allow the
ff again to introduce evidence in chief, or to con-
m to rebutting testimony, was entirely in the dis-
of the Court. (People v. Mather, 4 Wend., 229;
v. Voca, 15 Wend., 193; Morris v. Wadsworth, 17
103; Ford v. Niles, 1 Hill, 300; Jackson v. Tall-
4 Cow., 450; Bedell v. Powell, 13 Barb., 183; Peck-
Lary, 6 Duar., 495; Anthony v. Smith, 4 Bosw.,
ailroad Co. v. Stimpson, 14 Pet., 888; Lewis v.
20 New York, 58; and 13 Abb. Pr., 1.
ıe letters introduced in evidence by the Plaintiff
e evidence had rested, were part of the *res geste*,
ether they tended to make out the Plaintiff's case

or to rebut the Defendant's, they were equally admissible. (Haley v. Jarvis, 7 Bosw., 461; Rouse v. Whithed, 25 New York, 170; Livermore v. St. John, 4 Rob. N. Y. 12.)

It has even been held, though it is not necessary to go to that length here, that "where one party produces the letter of another, purporting to be in reply to a previous letter from himself, he is bound to call for and put in the letter to which it was an answer, as part of his own evidence." (Watson v. Moore, 1 C. & Kir., 626; Roe v. Day, 7 Car. & Payne, 705; 1 Greenleaf on Ev., Secs. 108 and 201, and notes.)

4. The Court was correct in charging the jury that "if the Defendant did not object within a reasonable time to an account presented to him, his assent may be presumed, and will support an action upon an account stated; and also that, "If when an account is rendered no objection is made to it, it is to be considered liquidated from the time it is rendered." (Walden v. Sherburne, 15 Johns., 409; Hall v. Morrison, 3 Bosw., 520; Case v. Hotchkiss, 3 Abb. N. S. 381; Hutchinson v. Bank, 48 Barb., 302; Crane v. Hardman, 4 E. D. Smith, 448; Bainbridge v. Wilcocks, Baldw., 536—3d Circ. Pa.)

5. Prior to the 14th day of February, 1868, there was no Territorial Statute on the subject of Interest, in Utah. At that time it was enacted, "That it shall not be lawful to take more than 10 per cent. interest per annum, when the amount of interest has not been specified or agreed upon." (Laws of Utah, 1868, chap. 13, p. 15.) But on the 19th day of February, 1869, this act was repealed and the following enacted, to-wit: "That it shall be lawful to take ten per cent. interest per annum, when the amount of interest has not been specified or agreed. (Laws of Utah, 1869, chap. 19; p, 17).

The subject of interest is an important branch of jurisprudence, and one that has engaged the best talents of legislators and jurists. At common law, interest was not only not recoverable, but the taking of it was severely

ished. In modern times, however, both in England and
erica, in the former country principally by statutes, in
latter principally by usage and adjudications, this rule
been greatly qualified. As a general rule, the statutes
ed in both countries in regard to interest, are merely
ibitory of interest being taken above a certain rate;
are negative and not affirmative; they do not declare
what cases interest may be taken, nor do they require
o be paid in any case. (2 Parsons on Notes and Bills,
to 393, and note p.) "The payment of interest not
ig required, either at common law or by statute, it
ows that whenever the courts allow interest as such, as
dental to the debt, they do so on the ground of the
eement of the parties, either express or implied." (Ibid,
. Sedgwick on Damages, 55 Ed., 435.). "The courts of
United States, more than those of England, make the
wance more nearly to depend upon the equity of
case, and not requiring either an express or implied
mise to sustain the claim." (Sedgwick on Damages,
Ed., 438; Wood v. Robins, 11 Mass., 504; Pope v.
rett, 1 Mason 117.) "The American cases look upon
interest as the necessary incident, the natural growth
the money and therefore incline to give it with the
ncipal; while the English treat it as something distinct
l independent, and only to be had by virtue of some
itive agreement." (Sedgwick on Damages, 5th Ed.,
3; Boyd v. Gilchrist, 15 Ala., 849; Stevenson v. Max-
ll, 1 Sandf. Ch. R., 273.)

In the case at bar the jury found that the account was
nidated on the 12th day of February, 1866. The ac-
int therefore carried interest from that date; at what
e, however, and how computed, and whether it carried
erest before that date, will be hereafter considered.
arsons' Mercantile Law, 252; Klock v. Robinson, 22
end., 157; Crosby v. Otis, 32 Maine, 256; Hicks v.
omas, Dudley, Geo., 318; Vermont &c. R. R. Co. v.
rmont Central R. R. Co., 34 Vt., 1.

"The old common law rule, which requires a demand

to be liquidated, or its amount ascertained, before interest can be allowed, has been so far modified, that if the amount is capable of being ascertained, it carries interest." (20 N. Y., 469; Graham v. Chrystal, 1 Abb Pr. N. S. 121; 2 Keyes, 21; McMahon v. The N. Y. & Erie R. R. Co., 20 N. Y., 463; Spencer v. Pierce, 5 R. I., 63.) There is, however, no necessity for relying upon this doctrine in this case. The account was found to be liquidated.

When interest, as such, should be allowed by courts as matter of law, and when it may be allowed as damages by juries in their discretion, are questions that have been much discussed by courts and commentators. We are satisfied, however, that in regard to the first of these questions, the rule most firmly founded on record, and reason, and best supported by authority, is, "that in actions of contract interest is no longer in the discretion of the jury, but a matter of right, and as essential to legal indemnity as the principal sum or ascertained value to which it is an incident." (Sedgwick on Damages, 5 Ed., 432, note 2; Dana v. Fiddler, 12 New York, 40, 50; Reid v. The Rens. Glass Factory, 5 Cow., 587; Van Rens. v. Jones, 2 Barb. 643; Meech v. Smith, 7 Wend., 315; Reab v. McAlister, 8 Wend., 109; Hill v. Allen, 13 Ill., 592; Lush v. Druse, 4 Wend., 313; Van Rens. v. Roberts, 5 Den. 470; Van Rens. v. Jewett, 2 Coms., 135.)

We are equally well satisfied "that interest may be allowed in the discretion of the jury, but not by the Court as matter of law, in cases of trover, trespass, or for non-delivery of goods by carriers," when the carriers are in fault. (Sedgwick on Damages, 5th Ed., 441, 433, and 429; Van Rens. v. Jones, 2 Barb., 670; Beals v. Guernsey, 8 Johns., 446; Bissell v. Hopkins, 4 Cow., 53; Richmond v. Bronson, 5 Den., 55; Van Rens. v. Jewett, 2 Coms., 135; Gilpins v. Consequa, Pet. C. Ct., 85; 3 Wash. C. Ct., 184; The People v. Gasharia, 9 Johns., 71; Shingerland v. Swart, 13 Johns., 255; Hyde v. Stone, 7 Wend., 354.)

6. The court also charged the jury, "That if they

nd for the plaintiff they would find $5,020.27, with
erest on $10,020.27 from the day the account was ren-
ed until the day of the payment of the $5,000, and from
t date to the day of trial, on the amount then remain-
due. This was right. Indeed, no exception was taken
this portion of the charge. It became the law of the
e, and no objection can now be urged to it.

But, on the argument it seemed to be conceded by
nsel, that if any interest was allowable, it was ten per
t. per annum from and after the 19th day of February,
6, the date of the statute in regard to interest. It is
y clear that where interest is allowable, and the contract
s not fix the per centage, it is regulated by the statute,
there be a statute. The Court did not name any per
tage, and the charge did not conflict with the principle
stated. (Sedgwick on Damages, 5th Ed., p. 257; Lewis
Lee, 15 Ind., 499; Hayman v. Sanders, 12 Cal., 107; Provo
Lathrop, 1 Scam., 305; Van Rens. v. Jones, 2 Barb., 667;
se v. Field, 13 Tex., 623.) This action is on contract,
l the Court properly charged the jury, as matter of law,
t if they found for the plaintiff, they would allow him
erest from the day of the liquidation of the account,
n though there was no statute upon the subject at that
e. (See authorities cited under the 5th point.) But
Court, with equal propriety, left the percentage to the
cretion of the jury. In Davis v. Greely (1 Cal. 432) the
urt say, "Interest is generally regulated by statute, but
the absence of any statute, a reasonable rate may be
owed by way of damages."

But, might not the Court have held even a stronger doc-
ne, and instructed the jury that if they found for the
intiff, then, as matter of law, the Plaintiff was en-
ed to interest from the day the debt was contracted,
hout regard to its subsequent liquidation? It has been
d that "an unliquidated account for money paid or
t, carries interest. Whenever it is said, therefore, that
interest is reasonable upon an unliquidated account,
account other than for money lent or advanced or

had and received, must be understood." (Siotard v. Graves, 3 Cal., 226; Reid v. Rens. Glass Factory, 3 Cow., 427, and 5 Id., 597; Trotter v. Grant, 2 Wend., 413.) It has also been held "that upon money advanced by one person for the use of another, interest is recoverable from the time of the advance, in the absence of any express agreement upon the subject." (Gillett v. Van Rensselaer, 15 New York, 397.)

If the goods advanced were taken in lieu of "a loan" to the Deseret Irrigation and Canal Company, as some of the evidence would seem to indicate, might they not have been regarded as money? And if so, interest might have been charged for about nine months additional. But there is no need to pass upon this question.

7. Having found for the Plaintiff on the merits of the action, the jury, in their discretion, fixed the interest at ten per cent. per annum before the statute, the same as they allowed after the statute. The rule which they adopted for casting interest was correct. (Connecticut v. Jackson, 1 Johns. Ch. R. 17; Dean v. Williams, 17 Mass., 417; Story v. Livingston, 13 Pet., 359; Dunlap v. Alexander, 1 Cranch. Ct., 498.) But they seem to have erred in the process of computing it, and to have allowed the Plaintiff several hundred dollars less than he was entitled to according to the facts found by the jury. Of this the Defendant has no reason to complain. "The Supreme Court may render such judgment as the court below should have rendered." (Laws of Utah, p. 67, sec. 8.) Instead, however, of adding to the judgment the interest which the jury omitted, we are of the opinion, all things considered, that the judgment of the court below as it stands, should be affirmed.

STRICKLAND, J., concurred.

HAWLEY, J., dissented, solely on the ground that the jury did not allow the Plaintiff as much interest as he was entitled to. In other respects he concurred.

.. & E. H. PERRY, *Respondents, v.* JOHN TAYLOR *et al., Appellants.*

(Opinion Rendered October 26th, 1871.)

STEREST.—An agreement to pay interest on a note which pro-ides for "interest at the rate of two per cent. per month from ate," does not extend beyond the time the said note becomes ue and payable by its terms.

Then there is a Statute providing a specific rate of interest, such ote is the measure of damages, otherwise the damage is to be tablished by proof.

AMAGE AS INTEREST.—Upon stated and liquidated accounts, for oney had and received, and upon notes overdue, where there no Statute for Interest, damages may be recovered in lieu of terest, upon proper proof.

ULE AS TO INTEREST WHEN THERE HAVE BEEN PARTIAL PAY-NTS.—The payment is to first apply to the discharge of the erest due, and if the payment exceeds the interest, the surplus es towards discharging the principal; if the payment be less an the interest, the surplus of the interest due must not be en to augment the principal, but interest continues on the mer principal until the period when the payments taken ether exceed the Interest due, and then the surplus is to be plied towards discharging the principal, etc.

EAL from the Third Judicial District. The facts in the Opinion.

finer for Appellant.

V. Baskin for Respondent.

LEY, J., delivered the Opinion of the Court.

was an action in assumpsit, brought upon a prom-note, in the Third Judicial District Court, by the dent, against Chauncey W. West, John Taylor, and heeler, as joint and several makers of said note, reads as follows:

0.70. Great Salt Lake City, Aug. 10th, 1867. months after date, we, or either of us, promise to A. & E. H. Perry, or order, the sum of nine hun-nd twenty dollars and seventy cents, for value , without defalcation or discount, with interest at of two (2) per cent. per month from date.

CHAUNCEY W. WEST,
JOHN TAYLOR,
LEVI WHEELER."

The Respondents commenced their said action in the court below, in the name of C. A. & E. H. Perry, plaintiffs, as though they were co-partners, without averring a co-partnership. Neither of their christian names appears upon the record. As objectionable as this is, and as obnoxious as it was to a demurrer, no advantage was taken of it by the Defendants in the court below, nor has there been any interposed by Appellants in this court; this fault may therefore be considered as waived.

By the return of summons it appears that John Taylor only was served with process, and that he failed to file his answer or to make any objection whatever until the day of trial and judgment. From the bill of exceptions it appears that the case was brought on for trial on the 6th day of October, 1869, when his default was taken. The case was then called for trial, and without any formal waiver of a jury on the part of Taylor, it was tried by the Court; but on the argument in this court, it was stipulated by and between the parties, that there was in fact a waiver of a jury, and the record was accordingly so amended. It appears from the Record that there was, on the first day of April, 1869, paid on said note, the sum of $300, and on the 15th of May following, the sum of $162.50. It appears from the bill of exceptions, that, on the introduction of said note as evidence in the court below, the said Defendants in error insisted that the measure of damage for the non-payment of said note when due, and from that time until the day of the judgment, was the interest upon the same, at the rate of two per cent. per month; to which the Appellant objected; which objection was over-ruled, and exception was taken thereto; and thereupon James M. Carter was sworn, under the ruling of the Court, to compute the interest upon said note, up to that time, at the said rate of two per cent. per month; and that upon such computation, there was found due upon the note the sum of $911.70; and thereupon the Respondent asked for a judgment in that amount for principal and interest, as damages; to which the Appellant objected, and insisted that the same was too

which objection was overruled, and the Appellant
ception thereto; and thereupon the said Court ren-
udgment against the said Appellant and in favor of
d Respondents for damages in the said sum of
, and costs, to which judgment the said Appellant
xceptions for that cause, and assigns the same as

ıer the record nor the bill of exceptions shows any
e to prove what the actual damage was to Respond-
hich they sustained by the law of custom, by reason
detention of the money due upon the note after its
y; nor was there any evidence to prove what the
was actually worth from and after said time.
ems to have been taken for granted by Respondents
id note became due and payable, the measure of
for the detention of money due upon it, was two
t. per month, the same as specified in the note, for
not only up to the time it became due and payable
erms, but after that time, as aforesaid. But such
he law.
agreement to pay interest, which is contained in the
: two per cent. per month, did not extend beyond
ıe the same became due and payable by its terms;
re being no other agreement for interest, to deter-
ıe damage as interest, after the note became due;
re being no affirmative law fixing the rate of inter-
ı and after the same became due, such damage by
interest or otherwise, should have been left to be
ned by proof. The Statute (since repealed) ap-
Feb. 14, 1869, which provides "that it shall not be
o take more than ten per cent. interest per annum,
ıe amount of interest has not been specified or agreed
is entirely negative in its character. It does not
necessary in this case to construe said statute, or
de whether or not, during its life, it actually fixed
ount of damage by way of interest at ten per cent.
ıum. If such is its proper construction, and that
cent. was not simply the maximum rate under it, it

would not help this case, for this rule was not followed by the Court; but rather the measure of interest named in the note after, as well as up to the time it became due, to-wit: at the rate of two per cent. per month. This was manifestly wrong, for the said Statute fixed the maximum rate not to exceed that of ten per cent. This view of the law was fully sustained by the Supreme Court of the United States in the case of Brewster *v.* Wakefield 22 Howard U. S. 125; see also Macomber *v.* Dunham, 8 Wend. 550; United States Bank *v.* Chapin, 7 Wend 471; and Ludwick *v.* Huntsinger, 5 Watt and Serg. 51–60.

As a rule, where there is a Statute providing a specific rate of interest, such rate is the measure of damage. But in the absence of such a Statute, the measure of damage by way of interest or otherwise, is determined by proof and the discretion of the jury under the evidence.

At common law, it was formerly held, that in the absence of a special agreement for the payment of a specific rate of interest, none could be recovered, either as such, or as damage in lieu of interest;—See the case of Reid *v.* Rensselaer Glass Factory, 3d Cowen, R. 419, in which Justices Savage and Sutherland present the law and the law of England and this country in able opinions. But this rule, as will be seen in said case, has been relaxed in England, and it is now held both in England and this country, that upon stated and liquidated accounts, for money had and received, or loaned, and upon notes past due, where there is no Statute for interest, damages may be recovered for the detention in lieu of interest, in the discretion of the jury, under proper proof. But where there is a Statute which determines the rate of interest per annum, such is the measure of damages, in such or similar cases, on the ground that the law consider such damage by way of interest, incident to the debt, and implies a promise on the debtor to pay it from the day it becomes due, if not then paid. This implied promise is supported by common justice between man and man, which rests upon every man to render to another a fair equivalent for the use or detention

at which is justly due to his fellow man. See Selleck
:ench, 1 Conn., N. S. 32, 35; Read v. Rensselaer
Factory, 5 Cowen, R. 587; Van Rensselaer v. Jones,
rbour Supreme Court Reports, 651; Parsons on Notes
Bills, 391, 395, note p; 396 note q; 397 note s and v;
ick on damages, 375 to 390 inclusive, and notes.

e Appellant does not object to the payment of the
two per cent. per month during the time of his agree-
so to do, or up to the time the said note became due
ayable to-wit: up to the 10th day of August, 1868,
: twelve months. Nor does he object to the payment
mages as interest, from and after the note became due
resaid, at the rate of ten per cent. per annum. But
otests against the payment of two per cent. per month.
and after the note became due, to the day the said
ient was rendered. And in this we think he was and
irely right.

l for the purpose of disposing of the question as to
:oper mode of casting interest, where there are partial
nts, as in this case, we will further say, that the rule
sting interest, as laid down by the books, and which
ends itself upon principles of justice, is as follows:
payment is to first apply to the discharge of the in-
due. If the payment exceeds the interest, the sur-
oes towards discharging the principal, and the subse-
interest is to be computed on the balance of principal
ing due. If the payment be less than the interest,
rplus of interest due must not be taken to augment
incipal; but interest continues on the former princi-
til the period when the payments, taken together,
the interest due, and then the surplus is to be
l towards discharging the principal, and interest is to
iputed on the balance of the principal as aforesaid."
Connecticut v. Jackson, 1 John., ch. 17; Penrose v.
1 Dallas Penn., 404; Tracy v. Wickoff, 1 Dallas
133.

ment reversed, revised and rendered pursuant to the
i herein rendered.

WILLIAM S. GODBE, *Petitioner*, v. THE CITY OF SALT LAKE, *Respondent*.

(See Shepherd v. Second Dist. Court post.)

1. A statute which is relied upon as conferring original jurisdiction upon this Court, should be very clear, and should admit of no other reasonable construction.
2. The Supreme Law of the Territory of Utah consists of the Constitution and the Laws of the United States, made in pursuance thereof, and all treaties made under the authority of the United States. This, of course, includes the Organic Act of the Territory.
3. If the Legislative Assembly pass an Act inconsistent with the Organic Act, it is null and void, unless Congress affirmatively approves it. Then it would become part of the Constitution of the Territory, provided it be not in conflict with the Federal Constitution.
4. This Court has no original jurisdiction, save in the one case of writs of *habeas corpus*, and in that case its jurisdiction is concurrent, and not exclusive.
5. The jurisdiction of the Supreme Court of Utah is mainly appellate, and that of the District Courts mainly original.

This is a suit in equity, brought originally in this court. In his bill the Plaintiff alleges that he is a druggist by occupation, and carries on the business of a wholesale and retail druggist in the City of Salt Lake; and the Defendant is a corporation; that by virtue of an ordinance of said Defendant, passed October 27th, A. D. 1866, entitled, "An Ordinance relating to License for the Manufacture and Sale of Spirituous, Vinous and Fermented Liquors," the said City of Salt Lake assumes the authority to impose upon the Plaintiff, in addition to his license as a druggist aforesaid, a license for retail sale of liquors of two hundred dollars per month, payable quarterly in advance, said license including quantities not exceeding three gallons; and a further license of one hundred dollars per month as a wholesale liquor dealers' license, payable quarterly in advance; that the sale of spirituous and vinous liquors is a part of his business as a druggist, the same being kept and sold by all druggists as a medicine; that the City of Salt Lake is

;ed in the business of wholesale and retail liquor
·s, and has large quantities of spirituous and vinous
·s which it offers for sale at its liquor store, in said
that on the 11th day of July, A. D. 1870, the De-
nt complained of the Plaintiff before one Jeter Clinton,
man of said city, charging this Plaintiff with selling
int of spirituous liquors to one David Ray, for the
›f fifty cents, without first obtaining a license so to do,
ontrary to the ordinance aforesaid; that in pursuance
d complaint, this Plaintiff was arrested, and a fine of
hundred dollars, with costs, was imposed by said
n, Alderman, and a judgment therefor was entered
t this Plaintiff by said Alderman; that on the 25th
›f July, A. D. 1870, this Plaintiff filed in
court his petition, alleging, among other things,
he said proceedings were without warrant or authority
, and contrary to the course of the common law, and
g that a writ of *certiorari* issue to the said Jeter
n, Alderman; that the said writ did so issue; that
23d day of July, A. D. 1870, a complaint was filed
the said Clinton, Alderman, setting forth that this
ff had sold four gallons of whisky contrary to said
nce, whereby an action had accrued to the said city;
ıe said city is about to file other and numerous com-
against this Plaintiff for similar alleged violations of
leged city ordinance, greatly to the annoyance and
n of the Plaintiff; that in the complaint filed on the
y of July, A. D. 1870, and others filed and about to
d by the said city against the Plaintiff, the same
matter is embraced, and the same issue presented,
n the writ of *certiorari* herein before mentioned,

That the said license is imposed without warrant
thority of law.

That the said license is unreasonable.

That the said ordinance, so far as it relates to this
matter, is wholly null and void.

That the said Jeter Clinton, Alderman, has no

jurisdiction of the subject matter, and no authority to enter judgment against the Plaintiff, nor to hear and determine said cause.

5th. That the Plaintiff, by virtue of his license as a wholesale and retail druggist, has the right to dispose of spirituous and vinous liquors as drugs and medicines.

The plaintiff further alleges that said Jeter Clinton, Alderman, has no jurisdiction of the subject matter of said complaints, and that under the laws of this Territory, he, the Plaintiff, is wholly without redress by appeal, for this, that there is no provision for appeal from said Alderman's Court; that the said ordinance by virtue whereof said licenses are levied, and said fine imposed, is wholly null and void, for this,

That the said ordinance is unauthorized by the Act creating said city of Salt Lake, and the Act amendatory thereof.

That the said licenses so imposed as aforesaid, are imposed without any by-law, ordinance, or valid regulation of said corporation to justify the same.

That the said licenses are unreasonable, and, if enforced, destructive of the business of the Plaintiff.

That the said licenses are unequal and partial, in this that they impose a license fee irrespective of the amount or character of the business transacted.

That the said licenses are in restraint of trade and not uniform, in this, that they operate as a protective tariff to the liquor business of the Defendant, and impose upon a portion of those vending liquors the obligation to pay license therefor.

The Plaintiff further proceeds and says, that inasmuch as he cannot have relief in the premises by the plain, direct and ordinary course of law, and inasmuch as the said actions, doings and pretenses of the said Defendant are contrary to equity and good conscience, and without authority of law, and tend to the manifest injury and oppression of the Plaintiff, he prays that an injunction issue from this court against the Defendant, against the

yor, the Aldermen, the City Council of said City, and inst the said attorneys, Snow & Hoge, and all other ers and employes of said city, enjoining them and each them from further prosecuting said actions, and a all further prosecution of this petitioner by reason of alleged violations of said City Ordinances; and that said Jeter Clinton, Alderman be enjoined from further eeding upon said complaint against the Plaintiff.

n the order of Mr. Justice Hawley, the writs of *certi* and injunction prayed for, were issued, the first on 25th, the other on the 26th day of July, A. D. 1870.

ie answer of the Defendant puts in issue the material ations of the bill of complaint, and denies the original diction of this court.

rshall & Carter for the Plaintiff.

ow & Hoge and *Hempstead,* for the Defendant.

KEAN, C. J., delivered the Opinion of the Court.

e Defendant objects that this is not one of the class ses in which an injunction may issue to prevent a plicity of suits, and cites Daniels' Chancery Pleadings Practice, 3 vol., 1721; Story's Equity Pleading, 553; 's Eq. Juris, 2 vol., sec. 893-8; Adams' Eq., 439,

Without pausing to consider this point, let us proit once to the question of the original jurisdiction of ourt.

he case of Kerr *v.* Wooley, decided by this Court Chief Justice Titus and Associate Justices Drake and rdy sat on this Bench, it was held that this court eneral original jurisdiction. In the later case of nce *v.* Wardell, decided by this court when Chief Wilson sat here with my present Associates, the loctrine was held, Mr. Justice Hawley delivering the n of the Court, the Chief Justice concurring and Mr. Strickland dissenting.

n great respect for my learned associate who deliv-

ered the opinion of the majority of the court in that case, I regard this question as one of such grave importance, one so far reaching in its consequences, that, in my opinion, the doctrine of *stare decicis* should not prevent a re-examination of the subject. What, then, is the jurisdiction of the Supreme Court of this Territory? It certainly has appellate; has it also original jurisdiction? If it has, is such original jurisdiction general or limited? Whatever jurisdiction it has is conferred by the act of Congress entitled, "An Act to establish a Territorial Government for Utah." (9 Statutes at Large, chap 51, sec. 9. See Laws of Utah, p. 25). And upon section 9 of this act must we concentrate our attention. In order to better understand this section, as a whole and in its several parts, let us analyze it and arrange *seriatim* all its provisions that touch even remotely the question of the jurisdiction of the courts:

1. "The judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace."

2. "The Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually."

3. "The said Territory shall be divided into three Judicial Districts, and a District Court shall be held in each of said Districts by one of the Justices of the Supreme Court, at such time and place as may be prescribed by law."

4. "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of Justices of the Peace, shall be as limited by law."

5. Provided, that Justices of the Peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars."

6. "And the said Supreme and District Courts respectively shall possess chancery as well as common law jurisdiction."

'Writs of error, bills of exception, and appeals, be allowed in all cases from the final decisions of said ct Courts to the Supreme Court, under such regula- as may be prescribed by law."

'But in no case removed to the Supreme Court shall by jury be allowed in said Court."

'Writs of error and appeals from the final decision d Supreme Court shall be allowed, and may be taken Supreme Court of the United States, in the same er and under the same regulations as from the Circuit s of the United States, where the value of the prop- r the amount in controversy, etc., shall exceed one and dollars."

writ of error or appeal shall also be allowed to the me Court of the United States, from the decisions of aid Supreme Court created by this act, or of a Judge f, upon any writ of *habeas corpus* involving the ques- f personal freedom."

"And each of the said District Courts shall have and se the same jurisdiction in all cases arising under Constitution and Laws of the United States as is l in the Circuit and District Courts of the United ."

nd the said Supreme and District Courts of the said ory, and the respective Judges thereof, shall and may writs of *habeas corpus* in all cases in which the same ranted by the Judges of the United States in the ct of Columbia."

"And the first six days of every term of said court much thereof as shall be necessary, shall be appro- d to the trial of causes arising under the said Consti- and Laws" (of the United States.)

nd writs of error and appeal, in all such cases, shall ade to the Supreme Court of said Territory, the same other cases."

us now consider the provisions in their order.

The provision that "the judicial power of said Ter- shall be vested in" certain courts, naming them,

has no bearing upon the question of the jurisdiction of any of those courts. We need, therefore, spend no time upon it.

II. The Supreme Court "shall hold a term at the seat of government of said Territory annually." Now, if this court has general original jurisdiction, it follows that all actions that would otherwise have to be brought in the District Courts, may be brought in this Court; and from all parts of this vast Territory, extending more than five hundred miles from north to south, and more than five hundred miles from east to west, in one of the most mountainous regions of the world, jurors, witnesses and defendants, must be compelled to come to Salt Lake City, in the northern part of the Territory, to attend court. Nothing need be said of the inconvenience and expensiveness of such a requirement. Nor is this all. This court may be so overwhelmed with litigation that its annual term may become a perennial term, preventing the Judges from repairing to their respective Districts, and thus, in effect, abolishing the District Court. Did Congress intend this? Does the law require or permit this? If so, let it be done. But that law should be very clear, and should admit of no other reasonable construction, which is relied upon as authority for such a practice.

III. Congress provided for three Judicial Districts in this Territory; directed that one of the Justices of the Supreme Court should hold a District Court in each district, and made it possible for him to hold as many terms, and at as many places, in his district, as should be necessary. It would not have been easy for Congress more clearly to have shown its intention to bring the "original" administration of justice as nearly as practicable home to the very doors of the people.

IV. "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of Justices of the Peace, shall be as limited by law." The Organic Act provides four courts,

; them in their order, from the highest to the
The provision just quoted also names four courts
ir order, from the highest to the lowest, viz:
pellate; 2, Original; 3, Probate; and 4, Justices
Peace. A court mainly original, although in a
sense appellate, is called a court of original juris-
; and a court mainly appellate, although in a minor
›riginal, is called a court of appellate jurisdiction.
clear from the provision last quoted, that the
ıtion of the highest court in this Territory is
appellate, and that of the next highest mainly
l.

provision that the jurisdiction of the said four
"shall be as limited by law," can refer to none
ramount law, whether then existing, or then or
fore or thereafter enacted. The supreme law of the
ry of Utah is the Constitution and the laws of the
States made in pursuance thereof, and all treaties
ınder the authority of the United States. This, of
includes the Organic Act of the Territory. (See
ution, Art. 6, sub. 2.) If the Legislative Assembly
pass an act inconsistent with the Organic Act, it
›e null and void, unless Congress were to affirma-
pprove it. Then it would become paramount and
the Constitution of the Territory, provided it were
conflict with the Federal Constitution.

he provision in regard to the jurisdiction of Jus-
the Peace, has no bearing upon the question under
ation.

'And the said Supreme and District Courts respect-
hall possess chancery as well as common law
tion."

ıed counsel, in commenting on this provision, seem
ently to have assumed that the word "respectively"
ıymous with the word "originally." A moment's
n, even without reference to a lexicon, will convince
their error. Let it be observed, also, that the
jurisdiction," is not preceded or qualified by the

adjective "original." No one will deny that Congress might so have amended this provision to make it read: "And the said Supreme and District Courts 'originally' shall possess chancery as well as common law jurisdiction;" or, so as to make it read: "And the said Supreme and District Courts respectively shall possess chancery as well as common law 'original' jurisdiction;" but then, Congress did not so amend it, and this court has no power to so amend it. It is well known to learned counsel that the Supreme Court of the United States, and the Circuit and District Courts of the United States within the organized States, "respectively possess chancery as well as common law jurisdiction;" and it is equally as well known that the jurisdiction of the Supreme Court of the United States is appellate and not original. The provision under consideration, simply and only, gives to the Supreme and District Courts of this Territory respectively chancery as well as common law jurisdiction. When we ask which has original and which appellate jurisdiction, we must look elsewhere for an answer.

VII. No one denies that this is an appellate court, but the question is, is it also a court of original jurisdiction?

VIII. "But in no case removed to the Supreme Court shall trial by jury be allowed in said court." Here again learned counsel assume the right to amend the Organic Act and add to this provision so as to make it read: "In no case removed to the Supreme Court shall trial by jury be allowed in said court; but in all cases originally commenced in the Supreme Court, trial by jury shall be allowed." It is sufficient to say that Congress enacted no such provision. It is well known to every lawyer that no case removed or appealed to the Supreme Court of the United States is ever tried by a jury. But what lawyer would therefore bring an original action in that court and demand a trial by jury? If the Supreme Court of the Territory is to have a jury, why should no conceivable case removed to this court be allowed to be tried by jury? As if to make it clear that this court

s not to hear trials before juries, and was to be only appellate court, Congress prohibited trial by jury in cases removed into this appellate court even though y should be jury causes. Let us not bend or break law by the forced inference, that because a case, removed appealed to this appellate court cannot be tried by y, therefore if the same case or any other case were ginally brought in this court we must take jurisdiction it, and grant a trial by jury. Let us remember the xim: "*Sensus verborum est anima legis.*" "The mean- of the words is the spirit of the law;" and the other xim: "*A verbis legis non est recedendum.*" "The words the law are not to be departed from;" and still that er maxim: "*Si a jure discedas vagus eris, et erunt omnia ibus incerta.*" "If you depart from the law you will ıder without any guide, and every thing will be in a e of uncertainty to everybody."

X. The provisions of the Organic Act in regard to writs rror and appeals from the final decisions of this court, he Supreme Court of the United States, do not affect question under consideration.

. The remark last above is also applicable to the pro- ons touching writs of error on appeal from the de- ons of this court, or of any Judge hereof, upon any of *habeas corpus* involving the question of personal dom.

I. "And each of the said District Courts shall have exercise the same jurisdiction in all cases arising under Constitution and Laws of the United States, as is vested he Circuit and District Courts of the United States." ıt, then, is the jurisdiction vested in these last-named ts?

he Supreme Court of the United States has original ıdiction in two classes of cases—1, those affecting ambas- rs, other public ministers and consuls; 2, those in which ate shall be a party. (Constitution, Art. 3, Sec. 2.) ll other cases arising under the Constitution and Laws he United States, within the States, the Circuit and

District Courts of the United States have not only original but exclusive jurisdiction. This being the case the District Courts of this Territory clearly have not only original, but exclusive original jurisdiction in all cases arising under the Constitution and Laws of the United States within the Territory.

Can it be possible that it was the intention of Congress to compel all cases arising under the Constitution and Laws of the United States, all cases of the highest dignity, to be originally tried in the District Courts, and then to allow all petty cases, all cases above the jurisdiction of a Justice of the Peace, to be originally tried in the Supreme Court of the Territory? If such was the intention of Congress, most assuredly it should be somewhere expressed in such clear and unequivocal language as to put it beyond the possibility of a doubt.

XII. "And the said Supreme and District Courts of the said Territory, and the respective Judges thereof, shall and may grant writs of *habeas corpus* in all cases in which the same are granted by the Judges of the United States in the District of Columbia."

This language is clear and unmistakable. Had Congress said that the said courts, and the respective Judges thereof, shall have jurisdiction in all cases of *habeas corpus*, it might still have left open the question as to which should have original, and which appellate jurisdiction. But the language is, "shall and may grant writs of *habeas corpus*." This language most explicitly gives to this court original, though not exclusive jurisdiction in one class of cases; and this is the only provision in the Organic Act which does explicitly give to this court any original jurisdiction. All other explicit provisions of the Organic Act, touching the jurisdiction of this court, make it an appellate court. To borrow the language of the Supreme Court of the United States in Marbury v. Madison, (1 Cranch, 175,) "Where an instrument organizing fundamentally a judicial system, divides it into one Supreme, and so many inferior courts," etc., "then enumerates its powers, and proceeds so

Distribute them as to define the jurisdiction of the
ie Court by declaring the cases in which it shall take
jurisdiction, and that in others it shall take appellate
tion; the plain import of the words seems to be,
one class of cases its jurisdiction is original and not
:e; in the other it is appellate and not original."
at great man Chief Justice Marshall, near seventy
go, been considering the case now at this bar, he
hardly have employed language more appropriate
iat just quoted.

. "And the first six days of every term of said
or so much thereof as shall be necessary, shall be
:iated to the trial of causes arising under the said
ution and Laws" (of the United States). The word
" in this provision has no bearing upon the question
consideration, for it applies with equal propriety to
ment before Judges and to an investigation before a
(See Law Dictionary.)

. "And writs of error and appeal, in all such cases,
e made to the Supreme Court of said Territory, the
s in other cases." This clause of the Organic Act
onfirmation to the position taken under the eleventh
bove considered, to-wit: That the District Courts
xclusive original jurisdiction in all cases arising under
nstitution and Laws of the United States. Assuredly
yer would risk his reputation by taking the position,
cause may be originally tried in this court and then
d to this court! There is abundant authority for
that the District Courts shall originally try the cases
highest dignity, but where is the authority for say-
at the Supreme Court shall or may originally try
erior case?

clearly of the opinion that the Organic Act confers
inal jurisdiction upon this court, save in the one
writs of *habeas corpus*. If there is any law confer-
on this court general original jurisdiction, it must
ted for elsewhere than in the Organic Act.

learned counsel have referred to section 1 of chap-

ter IV., of the Laws of Utah (p. 34). It reads thus: "Be it enacted by the Governor and Legislative Assembly of the Territory of Utah, That all the courts of this Territory shall have law and equity jurisdiction in civil cases, and the mode of procedure shall be uniform in said courts." If in any particular this provision conflicts with the Organic Act, in such particular it is null and void, unless it has been affirmatively approved by Congress. So far as the Legislative Assembly sought by this provision to affect the Supreme and District Courts, it substantially, but very unnecessarily, reaffirmed that provision of the Organic Act which has been considered under the sixth point above. The Assembly did not undertake to say, and has no right to say, which of these courts shall have original and which shall have appellate jurisdiction.

A careful and analytical examination of all the law upon the subject, must lead, it seems to me, irresistibly to the conclusion that this court has not general original jurisdiction, and that it cannot entertain the questions arising in the case at bar, until it shall be called to pass upon them in its appellate capacity.

The petition for an Injunction is over-ruled, and the restraining order granted by Justice Hawley is dissolved.

STRICKLAND, J., concurred.

HAWLEY, J., dissented.

REPORTS OF CASES

DETERMINED IN

E SUPREME COURT

AT

THE OCTOBER TERM, 1873.

HON. JAMES B. McKEAN, CHIEF JUSTICE.
HON. P. H. EMERSON, ASSOCIATE JUSTICE.
HON. J. S. BOREMAN, ASSOCIATE JUSTICE.

---

rte BENJAMIN L. DUNCAN; *Ex Parte* JOHN D. T. McALLISTER.

ES.—A Territorial Marshal is neither a Federal, nor a District, a Township Officer.

THE LEGISLATURE RELATING TO MARSHALS.—The Act of the islature of Utah entitled "An Act in Relation to Attorneys Marshals," approved March 3d, 1852, in so far as it conflicts h the Organic Act of Congress, is null and void.

ORIAL MARSHAL, HOW ELECTED.—Under Section 7 of the anic Act of Utah, a Territorial Marshal must be nominated, by and with the advice and consent of the Legislative Coun- appointed by the Governor of the Territory; and the Legisla- , in Joint Assembly, has no power to elect such officer.

ES, PART VALID, PART VOID.—A Statute may be valid in t, and void in part.

SION OF GOVERNOR—PRIMA FACIE EVIDENCE.—One holding commission from the Governor, as Territorial Marshal, will ecognized as a *de facto* officer, over one holding a certificate election merely, from the Joint Assembly of the Legislature.

(Original Proceedings in the Supreme Court.)

The Court being in adjourned session in the month of May, 1874, Duncan appeared in court, and by his counsel claimed to be recognized by the Court as Territorial Marshal for the Territory. McAllister also appeared by his counsel and claimed to be recognized as Territorial Marshal. The evidence presented, and the grounds relied upon by each, are stated and considered in the opinion of the Court.

J. R. McBride and *R. N. Baskin* for Duncan.

J. G. Sutherland and *Z. Snow* for McAllister.

MCKEAN, C. J., delivered the Opinion of the Court.

BOREMAN, J., concurred. EMERSON, J., dissented.

On the argument on behalf of the respective claimants, the Journal of the Legislative Assembly of Utah was introduced, showing that on the 14th day of February, 1874, the Council was in session, and that among other proceedings, "communications were received from His Excellency, the Governor, nominating * * * Benjamin L. Duncan to the office of Territorial Marshal."

A commission, of which the following is a copy, was also introduced:

THE UNITED STATES OF AMERICA,
TERRITORY OF UTAH.

"*To all who shall see these Presents, Greeting:*

"Know ye, that whereas Benjamin L. Duncan was, on the third day of March, A. D. 1874, duly appointed Territorial Marshal in and for the Territory of Utah, and he having duly qualified as such, as appears by proper evidence on file in the office of the Secretary of the Territory: Therefore I, George L. Woods, Governor of said Territory, do hereby commission him Territorial Marshal, as above indicated, and authorize and empower him to discharge the duties of said office according to law, and to enjoy the rights and emoluments thereto legally appertaining, until

session of the Legislative Assembly, and until his shall be elected and qualified to office.

"In testimony whereof I have hereunto set my hand and caused the Great Seal of said Territory to be affixed.

at Salt Lake City, this third day of March, A. D. and of the Independence of the United States, nety-eighth.

"GEO. L. WOODS,
Governor.

E A. BLACK,
etary of Utah Territory."

e part of McAllister, the Journal of the Legislative r was introduced, showing that on the 16th day uary, A. D. 1874, the Committee on Elections of se of Representatives reported to the House "the and kind of officers to be elected by the joint the Legislative Assembly," among others, "One al Marshal;" and added, "Your committee would mmend that the Assembly hold a joint session as possible, consistent with other legislative business, purpose of making said elections." Also showing the House of Representatives, on the 19th of the nth, Mr. S. A. Mann moved "that the Council ited to meet the House in joint session tomorrow, n., for the purpose of electing the officers made by law by the joint vote of the Legislative Assem- onded and carried." Also showing that in the on the same day, "A communication was received House, asking the Council to meet in joint ses- orrow, at 2 p. m. On motion of Councilor Har- the Council agreed thereto." Also showing the record:

Session. Representatives' Hall, Salt Lake City, 20, 1874.

rding to previous agreement, the Assembly went session.

"The President of the Council presiding.

"The roll of the Council was called by the Chief Clerk of the Council. Quorum present.

"The roll of the House was called by the Chief Clerk of the House. Quorum present.

"The President declared the joint session open and ready to proceed to business. * * * * *

"On motion of Councilor Harrington, John D. T. McAllister was elected Territorial Marshal."

Documents, of which the following are copies, were read on the argument:

"REPRESENTATIVES' HALL,
SALT LAKE CITY, Feb. 21, 1874.

"*Hon. J. D. T. McAllister:*

"DEAR SIR:—We have the honor to inform you that at a joint session of the Legislative Assembly, held at the Representatives' Hall, on the twentieth instant, you were elected Territorial Marshal for the Territory of Utah, for the term prescribed by law.

"Respectfully yours,
L. JOHN NUTTALL,
Chief Clerk of the Council.

"ROBT. L. CAMPBELL,
Chief Clerk of the House of Representatives."

"TERRITORIAL AUDITORS' OFFICE,
SALT LAKE CITY, Feb. 26th, 1874.

"I hereby certify that John D. T. McAllister, who was on the twentieth day of February, A. D. 1874, elected by the joint vote of the Legislative Assembly of the Territory of Utah to the office of Territorial Marshal for the Territory of Utah, hath this day presented his bonds, with security, and taken and subscribed the oath of office. Which bond has been approved and filed in my office, as required by law.

[L. S.] WILLIAM CLAYTON,
Auditor of Public Accounts for U. T."

The contest between Duncan and McAllister for the Ter-

ial Marshalship does not come before us on appeal, nor in the nature of a *quo warranto*. Each petitioner asks to be recognized as the Marshal *de facto*, leaving the tion as to who is Marshal *de jure* to be contested in her way. But the manner in which the question is ɔnted to us, will compel us in some regards to consider legal rights of the petitioners, though we intend now ecide only which of them shall be treated as the *de* ı officer of the court.

as the Supreme Court of the United States decided the tions involved in this contest? If it has, then its decis- must put a speedy end to this controversy.

he cases of Clinton *v.* Engelbrecht and Snow *v.* the ted States *ex rel.* Hempstead, have been cited as con- ing; and it must be conceded, on all hands, that if the tions now before us have been decided in that court, it in one or the other, or in both of those cases. What ı the questions involved in those cases? In Clinton *v.* elbrecht, the United States Marshal summoned the jury ɔh tried the case—a case arising under the local laws of Territory. The court decided that the jury should have ı summoned by the Territorial Marshal, and not by the ted States Marshal. In Snow *v.* the U. S. *ex rel.* Hemp- d, the United States Attorney claimed that it was his ıt and duty and not the right and duty of the Terri- al Attorney General, to prosecute, in the Federal courts, offenders against the local criminal laws of the Terri- . The court decided that such offenders should be ɜecuted by the Territorial Attorney General, and not by United States Attorney.

hose questions being decided, are set at rest. But the ıreme Court of the United States would be the last court ɜlaim that it could decide, in those cases, or in any case, uestion not involved in the record. No court has more ırly than that court laid down the doctrine, that an ıion expressed upon a question not before the court is ɜher binding upon inferior courts nor upon the court ɜch expressed it.

The question, how must the Territorial Marshal of Utah be appointed, or elected, or chosen? has never been presented to the Supreme Court of the United States, and therefore that court has not had it in its power to decide it. It has never been decided, neither in that court nor in this. If either court has ever employed language which even remotely seems to decide this question, it has been in some case not involving the question, and therefore the language was clearly *obiter*.

The learned counsel for the respective petitioners referred to many text books and reported cases; but in some respects the case at bar is unlike any in the books. It is a case of new impression. Let us inquire, then, not in the light of authority, for there is none, but in the light of reason brought to bear upon the statute, how must the Territorial Marshal be appointed, or elected, or chosen?

The Organic Act of this Territory provides for the election, by the people, of the members of the Legislative Assembly; and that the Governor, Secretary, Chief Justice and Associate Justices, U. S. Attorney and U. S. Marshal, shall be nominated, and by and with the advice and consent of the Senate, appointed by the President of the United States. And section 7 of the Organic Act provides thus: "And be it further enacted: That all Township, District and County officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and Legislative Assembly of the Territory." These provisions, it will be borne in mind, apply to Federal officers, members of the Legislative Assembly, and Township, District and County officers. It is most manifest that none of these provisions control the question under consideration. A Territorial Marshal is not a Federal officer; he is not a member of the Legislative Assembly; he is not a Township, District, or County officer. These provisions of the Organic Act throw no direct light upon the inquiry, how must the Territorial Marshal be appointed, elected or chosen? But section 7 of that act contains this further provision: "The

›r shall nominate, by and with the advice and con-
the Legislative Council, appoint all officers not
otherwise provided for."
there be any question that if there is anything in
;anic Act, authorizing the creation of and designating
nner of filling the office of Territorial Marshal, it is
vision last quoted. If such an officer can exist at
st he not of necessity be created like "all officers
ein otherwise provided for?" The Supreme Court
United States has recognized the right of the Gov-
nd Legislative Assembly to create the office, but it
decided how that office must be filled.
what legislation has there been creating or touching
icer? When Brigham Young was Governor of this
:y, an act was passed and approved containing this
n, to-wit: "Be it enacted by the Governor and
ive Assembly of the Territory of Utah: That a
shall be elected by a joint vote of both Houses of
;islative Assembly, whose term of office shall be one
(afterwards extended to four years), "unless removed
Legislative Assembly, or until his successor is elected
alified." (See sec. 1, chap. ix., p. 38, Laws of

thought by some whose opinions are entitled to a
›spect, that the office sought to be created by this
ıd the manner of filling it, are inseparable; that
can stand without the other; that if the one is
›wn it must drag down the other with it. Let us
r this view of the case.
, must be presumed to have been the intention of
gislative Assembly in enacting this law? Was it to
ıodate and benefit the public? Or was it to create
for the benefit of some favorite? We must judi-
resume that the legislators intended to serve their
ıents rather than some one man; that the office and
officer was the thing considered. If the office and
:umbent are inseparable, then the office did not
ll the incumbent was chosen, and were the incum-

bent to die the office would die with him. There would be no vacancy to fill for the reason that there would be no office; and there could be no Territorial Marshal until the office were created by legislation, and filled by proper designation. And what would be the consequences of such a state of affairs? The United States Marshal could not act in local cases, either civil or criminal; the rights of parties could not be enforced, and criminals could not be brought to justice. Unless we are irresistibly impelled to it we ought not to reach a conclusion that might lead to such consequences.

It seems to have been the intention of the Legislative Assembly to do two things—

1. To create the office of Territorial Marshal.
2. To fill that office by a joint vote of both Houses.

The Supreme Court of the United States recognizes the right of the Assembly to create the office and the Organic Act provides how it shall be filled. If any part of the Utah Statute conflicts with the Organic Act, of course the former must, in such part, be null and void. The doctrine that a statute may be valid in part and void in part, is elementary.

If the Territorial Marshal is a "township," "district," or "county" officer, then the manner of electing him provided by the Utah Statute may be valid. (Organic Act. sec. 7.) A constable chosen for a town, or precinct, or small political division or district, is a Township or District officer. An officer chosen or appointed for a limited division of a county, or of the Territory, such as a representative district, or council district, or judicial district, is a district officer. The Utah Statute provides—"Sec. 2. Said Marshal shall have power to appoint one or more Deputy Marshals in each judicial district of the Territory." A Sheriff is a County officer. The Territorial Marshal is not a Federal Officer; he is therefore not to be nominated, and, by and with the advice and consent of the Senate, appointed by the President of the United States. The bailiwick of the Marshal is co-extensive with

rritory; he is therefore not a Township, District
nty officer, and therefore he cannot be appointed or
in such a manner as shall be provided by the Gov-
ınd Legislative Assembly, unless they shall provide
ıe manner that has been provided by Congress. The
rial Marshal, not belonging to any one of the classes
ally named, must be included amongst "all officers
rein otherwise provided for;" and therefore he must
ıinated, and by and with the advice and consent of
gislative Council, appointed by the Governor. (Or-
Act, Sec. 7.) The Utah statute, in so far as it con-
ith this provision of the Organic Act, is null and
What may have been the motive of the Legislative
ly in passing, or of Governor Young in approving,
ovision; whether the Governor desired to be relieved
responsibility of nominating the officer, or whether
intended to take the power to nominate away from
cessors in office, it is unnecessary to inquire. It is
ıt to say, that they could neither repeal nor override
ortant provision of the Organic Act.

her the joint session of the two Houses of the Leg-
Assembly was called and conducted, and the election
Allister effected, according to parliamentary law or
a matter of no moment. According to the Supreme
of the United States, the Assembly had a right to
the office of Territorial Marshal; according to the
Act the Governor of the Territory had a right, nay,
his duty, to nominate, and, by and with the advice
nsent of the Legislative Council, to appoint the
ent of that office. The Governor did so nominate
ı; the Council did not reject the nominee; the Gov-
lid not withdraw his name; and, after the adjourn-
f the Council, the Governor appointed him by issuing
a commission. "The Governor shall commission all
who shall be appointed to office under the laws of
l Territory, and shall take care that the laws be
lly executed." (Organic Act, Sec. 2.)

questions are left for consideration when this con-

troversy shall come before us in a proceeding on *quo warranto,* if such a case shall arise.

We intend now to go no further than to inquire and decide which of these petitioners has the better *prima facie* case, and which ought therefore to be recognized as the Territorial Marshal *de facto.*

It is the opinion of the court that Benjamin L. Duncan ought to be, and he is hereby recognized as *de facto* the Territorial Marshal of this Territory.

Emerson, Justice, dissented, but there seems to be no written opinion.

WILLIAM H. SMITH, *Respondent, v.* HENRY J. FAUST AND JOHN S. HOUTZ, *Appellants.*

MOTION FOR JUDGMENT ON PLEADINGS, HOW WAIVED.—After Plaintiff submits his case to the jury, and a verdict is rendered, the Court will not disturb the same, although he was entitled to a judgment on the pleadings.

JUDGMENT ON THE PLEADINGS.—When the answer fails to put in issue the allegations of the complaint, the Plaintiff, on motion, is entitled to recover upon the pleadings, without offering any testimony.

Appeal from the District Court of the Third Judicial District.

The facts appear in the Opinion of the Court.

Baskin & DeWolfe for Appellants.

Fitch & Mann for Respondent.

EMERSON, J., delivered the opinion, the other Judges concurring.

The complaint is in two counts, and is duly verified. The first count is for the work and labor of the Plaintiff in person, for which he claims there is a balance due him from the Defendants of $482.35.

The second count is for a balance due from the De-

ıts to one John J. Smith, for work and labor, and has been duly assigned to the Plaintiff, and upon he claims there was due the sum of $162.25. A bill ticulars was attached to and filed with the complaint.)efendants' answer reads as follows, viz: "In answer complaint of the Plaintiff herein, said Defendants each and every allegation of the same, in manner and as herein alleged."

cause was tried by a jury, who found a verdict in of the plaintiff for $343.50.

objection was taken to the form of the answer before Upon the trial the Defendants offered certain evidence, he counsel for the Plaintiff objected to any evidence received on the part of the Defendant, for the reason he answer did not deny the allegations of the com- . The objection was overruled and the evidence ted.

ntiff's counsel also, before the case was finally given jury, moved the court "for judgment for Plaint- cording to the prayer of the complaint." This motion enied and the verdict of the jury taken. To both of)ove rulings, exceptions were taken by the Plaintiff's el, who, upon the hearing of the case in this court, sly waived all benefit he might be entitled to, if any was committed in said rulings. The record shows after the verdict of the jury was rendered, the Plaint- ounsel moved the court for judgment, according to ayer of the complaint, *non obstante veredicto.*

the record does not show that any proceedings what- vere had upon this motion; besides, it was embraced l covered by the waiver above mentioned.

erward the Defendants moved for a new trial, and ed the following reasons therefor, viz:

st—"The insufficiency of the evidence to justify the t of the jury rendered therein, and said verdict was t law."

ond—"For errors in law occurring at time of trial, s, overruling the motion of Defendant's counsel for

a nonsuit, after the evidence on the part of the Plaintiff was submitted."

The motion for a new trial was denied, and the Defendants took their appeal to this court.

When a complaint is verified, the statute requires a specific denial to each allegation of the complaint; and every material allegation not specifically controverted by the answer, shall, for the purpose of the action, be taken as true. In this case there was no attempt at such an answer as is required by the statute.

The Plaintiff was entitled to recover upon the pleadings, without offering any testimony.

But inasmuch as he did offer testimony, and submitted his case to a jury, we do not think it advisable to disturb the verdict.

The Court did right in denying the motion for a new trial.

The Record discloses no error of which the Defendants can take advantage.

The judgment is affirmed.

DAVID B. McGEE, *Respondent*, *v.* P. EDWARD CONNOR, (sued with John M. Murphy), *Appellant*.

PARTY INDORSING NEGOTIABLE PAPER, WHEN SURETY OR MAKER.—One who, not a party to negotiable paper, places his name, without more, on the back of the same, before an indorsement by the payee, renders himself, in the absence of proof, liable as surety or maker.

PLEADING IN A SUIT ON PROMISSORY NOTE.—In a suit on such note, an allegation of "Notice of Non-payment" is immaterial, and an answer setting up want of notice, and denying the allegation of notice, raises no material issue, and Plaintiff in motion is entitled to recover upon the pleadings.

AS TO WHO IS AN INDORSER, A QUESTION OF LAW.—In a complaint against one who signed his name on the back of a note before delivery to the payee, an allegation that such party so signing "had notice of the non-payment thereof," does not make such party an indorser merely.

Appeal from the Third District Court.

facts are stated in the Opinion of the Court.

stead & Kirkpatrick for Appellant.

rd & Hagan for Respondents, made the following

he Defendant Connor, as it is alleged in the com-
and not denied in the answer, having written his
pon the back of the note at the time of its execu-
d in connection with Murphy, the maker of the note,
d it to the payee, is regarded in law as a maker.
not, therefore, entitled to notice. (Red & Big. Lead.
n Bills and Prom. Notes, 155; 22 Howard, 341.)
, however, Connor is considered as a mere guar-
he was not discharged from liability by failure to give
unless he alleged actual loss from such failure. (2
, 137-139; 39 Cal., 494; Chitty on Bills, 365.)
he allegation that Defendant "indorsed said note,"
in connection with the other averments of the com-
does not change the *status* of defendant. (Bouvier
ic., "Indorse.")

EAN, C. J., delivered the Opinion of the Court.

Respondent brought his action in the Third District
and complained of the defendants as follows: "The
named Plaintiff complains of the above-named De-
ts, and for cause of action alleges, that heretofore,
on the 22d day of October, 1872, at Salt Lake City,
aintiff and Bernard D. Sloan were co-partners, under
m name of D. G. Magee & Co.; that at the date and
last aforesaid, the Defendant, John M. Murphy, made
tain promissory note to the said D. B. Magee & Co.,
ds and figures following, to-wit:

30.00.

Salt Lake City, October 22d, 1872.

y (60) days after date, for value received, I promise
to the order of D. B. Magee & Co., one thousand

and eighty dollars, negotiable and payable at the Banking House of Wells, Fargo & Co., in lawful money of the U. S., without defalcation or discount, without interest.

JOHN M. MURPHY."

That at the time of making said note, and before its delivery, the Defendant, Patrick Edward Connor, for value received, indorsed the same by writing on the back of said note his signature in words following, to-wit: "P. Edw. Connor;" and that the said note, so indorsed, was then and there delivered by the said Defendants to the said D. R. Magee & Co.; that afterwards, and before the said note became due, the partnership heretofore existing as aforesaid, between the Plaintiff and the said Bernard D. Sloan, was dissolved; that after said dissolution, to-wit: on the 29th day of November, 1872, the said Bernard D. Sloan, for a good and valuable consideration paid to him by the Plaintiff, assigned and transferred all his interest in said note to the Plaintiff, who then became, and still is, the owner and holder thereof; that on the 24th day of December, 1872, the said note was presented for payment at the said Banking House of Wells, Fargo & Co., in Salt Lake City, and payment of the same was demanded, but was not paid; that notice thereof was given to the said Defendant, Patrick Edward Connor; that the Defendants have not paid the said note, nor any portion thereof.

Wherefore the Plaintiff demands judgment against the Defendants for the sum of ten hundred and eighty dollars, with interest thereon at the rate of ten (10) per cent. per annum, from the 24th day of December, 1872, and his costs of action." The complaint was verified.

To this complaint the Defendant, Connor, simply answered, "That notice of dishonor of said promissory note in said complaint mentioned, was not given to this Defendant."

On the 18th day of August, 1873, the Plaintiff's Attorney caused to be served on the Defendant Connor's attorney, a notice that at the opening of the District Court on the 28th day of August, or as soon thereafter as

counsel could be heard, he would move the Court for judgment for the Plaintiff against the Defendant Connor for the full amount claimed in the complaint, the motion to be based on the pleadings on file in said action.

That motion was argued by the respective counsel on the 10th day of September, 1873, and judgment was rendered thereon for the Plaintiff against the Defendant Connor, for the sum of $1,157.10, with $20 costs and disbursements.

The Defendant Connor appeals from that judgment to this Court, and assigns as error, that the Court below erred in granting the said motion.

As to whether a person who places his name on the back of a promissory note, as did the Defendant Connor, thereby renders himself liable as maker, guarantor, or indorser, is a question upon which there is a wide conflict of authority in different States. This question is learnedly commented upon in Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes, pp. 110 to 156 inclusive. In a note on page 155, those authors say:

"It may be stated, as the result of the foregoing cases and citations, that in the following States, one who, not a party to negotiable paper, places his name, without more, on the back of the same, before an indorsement by the payee renders himself, in the absence of proof, liable as maker or surety: Massachusetts, Vermont, Maine, New Hampshire, Michigan, Louisiana, Missouri, South Carolina, Texas; also in Rhode Island, Georgia, Ohio and Minnesota, if the party signed before delivery to and to secure the payee. In the following as indorser: New York, Mississippi, Pennsylvania, Tennessee, Iowa, Wisconsin, California, Indiana. In New York this liability cannot be changed by parol proof. In the following as guarantor: Illinois, Connecticut, Ohio; also in Virginia, if the paper is not negotiable. In New York and Louisiana, if the paper is negotiable, such person becomes maker or guarantor."

The case now at bar is, it seems, the first that has come before this court involving the questions now presented for

our consideration. There is here no statute controlling these questions, and we must look to the Supreme Court of the United States for their authoritative decision. The case of Rey *et al.* v. Simpson (22 How., 341) has been cited by the counsel for the respective parties, and each claims it to be decisive of the case in favor of the client. Let us examine it.

That action was brought in a District Court of the Territory of Minnesota, upon a promissory note, of which the following is a copy:

$3,517.07½.

St. Paul, June 14, 1885.

Six months after date, I promise to pay to the order of James W. Simpson, three thousand five hundred and seventeen dollars, and 07½-100, value received.

(Signed) ALEX. REY."

Marshall & Co. (William R. Marshall and Joseph M. Marshall) indorsed their firm name on the back of this note before it was delivered to Simpson, who afterwards brought his action thereon against Ray and the Marshalls. In his complaint, in which Marshall & Co. were called "endorsers," Simpson alleges "that, after making and signing the note, the Defendant Rey then and there delivered the note to the other Defendants, and that they then and there, by their partnership name, indorsed the same, by writing the name of the firm on the back of the note, and then and there re-delivered the same to the first-named Defendant, who afterwards, and before the maturity of the note, delivered it so endorsed to the Plaintiff. He also alleges that the two Defendants, Marshall, so indorsed the note for the purpose of guarantying the payment of the same, and of becoming sureties and security to him, as the payee thereof, for the amount therein specified; and that he, relying upon their indorsement, took the notes and paid the full consideration therefor to the first-named Defendant."

son recovered judgment against all the Defendants, Courts of the Territory, and the Marshalls carried e to the Supreme Court of the United States, which after setting forth the substance of the complaint, d above, adds:

ner matters, such as due presentment, non-payment, otest, are also alleged in the complaint, which it is ssary to notice at the present time, as the questions to rmined arise out of the allegations previously men- and described."

rdly needed this last paragraph to convince one that e of protest could not relate back six months and the original contract of the parties. That contract d Marshall & Co. liable; as makers of the note. vere therefore not entitled to notice of protest, and n need not have given it.

Court held that, under the Minnesota Practice it oper to allege in the complaint "that Marshall & indorsed the note for the purpose of guarantying yment of the same, and of becoming sureties and y to the payee thereof." The Court might also have at it would have been permissible for the Defendants, ll & Co., to allege in their answer, that they indorsed te only as indorsers, and not as makers or guaran- It certainly was permissible for either party to plead, onsequently, to prove such allegations. In affirming lgment of the Minnesota courts, the Supreme Court ized the doctrine that "one who, not a party to ble paper, places his name, without more, on the f the same, before an indorsement by the payee, himself, in the absence of proof, liable as maker or " It is clear that while it was permissible for Simp- allege the purpose for which Marshall & Co. indorsed te, still, if he had only set forth the time and man- their indorsing it, and had said nothing of the e, his complaint would still have contained a good of action, and the law of the case would have been ne, unless Marshall & Co. had pleaded and proved a

purpose, an understanding, inconsistent with the legal presumption that they were makers of the note.

The Civil Practice Act of Utah (sec. 39, subdiv. 2,) requires that "the complaint shall contain—A statement of the facts constituting the cause of action in ordinary and concise language."

Now, according to the facts set forth in the complaint in the case at bar, the manner of making or indorsing the note in question by the Defendant, Connor, was without any understanding or purpose other than what the law presumed; although it was competent for either party, in his pleading to have alleged that it was intended that Connor should be held liable only as an indorser. But neither party has made any material allegation inconsistent with the legal presumption that Connor put his name on the note as a maker. To allege that Connor, sixty days after the making of the note, had notice of its dishonor, was as immaterial as it would have been to have alleged that Murphy had like notice. In the case of either, the notice, and consequently the allegation, was alike unnecessary. Such unnecessary notice of protest was also given in Rey *et al. v.* Simpson; and it went for nothing in the decision of the case. In the complaint in that case, Marshall & Co. were called "indorsers;" but they were held to be makers.

The Civil Practice Act contains the following provisions:

"Sec. 65. Every material allegation of the complaint when it is verified, not specially controverted by the answer, shall, for the purpose of the action, be taken as true."

"Sec. 66. A material allegation in a pleading is one essential to the claim, or defense, and which could not be stricken from the pleading without leaving it insufficient."

There is but one allegation in the complaint that could be stricken out without leaving it insufficient, and that is the allegation that notice of presentation and non-payment of the note was given to Connor. All the other allegations being material, and none of them being controverted by the answer, must be taken as true. The

Plaintiff was therefore entitled to judgment in the court below, and that judgment should be affirmed here. Ordered accordingly.

Boreman, J., concurred. Emerson, J., dissented, and delivered the following Opinion:

I have not been able to concur in the Opinion of the Chief Justice in this case.

We must assume that the complaint states all the circumstances connected with the giving of the note, and the Defendant not having denied any of these allegations, we must, under the statute, and for the purpose of this action, consider them as true. In other words, there was no express understanding or agreement between the Plaintiff and the Defendant, Connor, at the time he put his name upon the back of the note, what his (Connor's) liability should be. There is no doubt but that the intention and agreement between the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. There is also no doubt but that a third person, or stranger to the note, who puts his name upon the back of it in blank at the time the note is made, may be held as an original promisor, guarantor, or endorser according to the nature of the transaction and the understanding of the parties, and the law of the place where the transaction takes place.

But in this case there was no agreement or understanding whatever, and there is no statute of the Territory upon the subject. By what rule then shall the contract of Defendant Connor be construed and his liability fixed. It seems to me that we must resort to the law merchant, a part of the common law of the land, a system that has grown up out of the necessities of business. By this law, where a stranger or third person writes his name on the back of a promissory note, made payable to the order of the payee, to whom it is afterwards delivered, there is nothing in such an indorsement to indicate that the person making

it means to be considered liable in any other character than that of a strictly commercial indorser. This note was, in legal effect, regular mercantile paper, upon which the Defendant, Connor, contracted the obligation of indorser within the law merchant, and by that obligation, and no other, he is bound.

If my view of the law is right, then the allegation in the complaint, that notice of the dishonor of the note was served upon the Defendant, Connor, is a material allegation, and it having been denied under oath in the answer, there is a material issue raised by the pleadings, and the Plaintiff was not entitled to a judgment upon them.

I am of the opinion that the judgment of the Court below should be reversed.

FIRST NATIONAL BANK OF UTAH, *Respondent*, v. M. KINNER, *Appellant*.

See Ante, People v. Green, 11.

PLEADING IN ACTION AGAINST A GUARANTOR.—Wherever the Statute of Frauds is recognized, it is not necessary that a complaint against a guarantor should set forth that the guaranty was in writing and signed, etc. (Brannan v. Ford, 46 Cal., 7; Miles v. Thorne, 35 Cal., 335.)

THE COMMON LAW.—No specific body of the Common Law was transplanted to the Territory of Utah by the fact of emigration. Neither has the Common Law been extended over the Territory by the Treaty of Guadalupe Hidalgo, and but one course has been left open, to-wit: for the whole body of the people to agree expressly or tacitly upon a common measure. The people of Utah have tacitly agreed upon maxims and principles of the Common Law, suited to their condition, and consistent with the Constitution and Laws of the United States, and these only wait the recognition of the Courts to become the Common Law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power.—EMERSON, Justice. (See ante People v. Green; also Norris v. Harris, 15 Cal. 226; 2 Cal. 99; also, Godbe v. S. L. City, ante 68.)

STATUTE OF FRAUDS.—The question as to whether any part of the Statute of Frauds in force in England, is in substance a part of the Territorial law, discussed by Emerson, Justice, but not decided by the Court.

WHEN THE STATUTE OF FRAUDS APPLIES.—In the case at bar the promise of the Defendant was for the payment of a still subsisting debt of another, and comes within the terms of the Statute of Frauds; but if the effect of the contract of Defendant had been to discharge the original debt and he became the sole debtor, and there was no debt of another to which his promise was collateral, then the contract was not within the purpose and spirit of the statute. (Crooks *v.* Tully, 50 Cal.; 88 Cal. 185; 84 id. 678.)

APPEAL from the Third District Court.

The facts are stated in the Opinion of the Court.

Marshall & Royle for Respondent.

Robertson & McBride for Appellant.

EMERSON, J., delivered the Opinion of the Court.

This case comes up on an appeal on the part of the Defendant, from a judgment of the Third District Court overruling the demurrer to the complaint.

As shown by the Record, the case is substantially as follows: On the 20th of March, 1872, Nounnan & Gilmer made their joint promissory note, by which, for value received, they promised to pay to the order of A. Godbe, cashier of the Plaintiff corporation, $1,500, on the first day of September, A. D. 1872, with interest at two per cent. per month.

This note was delivered to and discounted by the Bank, and on the 7th of May following, and before maturity, was taken up by Nounnan, one of the makers. On the succeeding 7th of June, and when nearly three months of the current time of the note remained unspent, Nounnan reproduced it to the Bank, and at his request re-discounted it. When it became due and payable, according to its tenor, Nounnan applied to the Bank for an extension until the 1st day of January, A. D. 1873. The extension was

agreed upon, but as a part of this arrangement, the Defendant was to guaranty the payment of the note at the expiration of the time agreed upon. The complaint states, that the Defendant, with full knowledge of such agreement, "and for a valuable consideration to him moving, as well as in further consideration of the said extension of time, did guarantee the payment of said note," in the following terms: "For value received I hereby guarantee the payment of the within note."

The complaint sets up the carrying out of the agreement on the part of the Bank, and the failure of payment. The suit is on the guaranty.

Defendant demurs, and the only matter of consequence arising on the demurrer, is the validity of the guaranty.

Upon the face of the complaint the written undertaking does not specify the time when the payment was to be made, and does not explain the consideration.

If the case was on trial, and verbal evidence should be offered that the agreement was for payment on the 1st day of January, A. D. 1873, there would be some ground for the objection, that it was proposed to vary the legal effect of the writing by parol, since, as the note was past due, the written guaranty would import an agreement to pay in a reasonable time, and not on the first day of January, A. D. 1873.

There is a peculiarity about this proceeding that impressed me from the very outset, and which was not removed at the close of the elaborate argument of counsel.

Taking it for granted that the Defendant intended to go upon the idea that the doctrine applicable, where the Statute of Frauds prevails, should be administered, I am unable to see how he can raise the question supposed to be aimed at, by resorting to a demurrer to the complaint. Wherever the Statute of Frauds is recognized, or in force, so far as I know, the Plaintiff is not required to set forth that the guaranty was in writing and signed, etc. It is considered as a matter of evidence, and the want of it as

matter of defence. If the Defendant demurs, he thereby confesses that the agreement was in writing, and he precludes Plaintiff from giving legal evidence. (Gould's Plead., chap. 4, sec. 45; 2 Saunders' Plead. and Ev., 546; Campbell v. Wilcox, 10 Wall. 421.)

Waiving this consideration, how ought the case be viewed?

The demurrer is understood as implying two general propositions. The first is that the essential portion of that branch of the Statute of Frauds which relates to guaranties, is in force in this Territory as common law. The second is, that by force of that law the Defendant's undertaking, as set forth, was not binding. The second proposition may be first considered. Supposing the principles of the statute to be law in this Territory, it is requisite to ascertain what they are, so far as they could be held to bear on this case. It may be assumed that the operation of the statute, admitting it to be recognized as Common Law, is to save anyone from being charged upon a promise to answer for the debt, default or miscarriage of another, unless the agreement to so answer is in writing, signed by the guarantor or by his authority.

This statement is intended to recognize the statute as most stringently framed and expounded. In some of the States, Michigan among the number, the consideration is not required to be expressed in the writing. In England and in the State of New York, it must be in it.

According to the exposition of the statute in some States, where it is most rigidly applied, it has been held that if the object of the guaranty is a benefit to the guarantors which he did not before possess, a benefit accruing immediately to himself, and the basis for his undertaking is a consideration going directly to him, the case is not within the statute. This doctrine is stated with great precision by Chief Justice Savage in Farley v. Cleveland, 4 Cowen 432; and same case in error 9 Cow. 939. Referring to those cases, which he says do not fall within the statute, and are within the third class of cases, as this branch of the Statute of Frauds was divided and classified by Chief Jus-

tice Kent in Leonard v. Vridenburg (8 John 29) he observes: "In all those cases founded on a new and original consideration of benefit to the Defendant or harm to the Plaintiff, moving to the party making the promise, either from the Plaintiff or original debtor the subsisting liability of the original debtor is no objection to a recovery." In the case just referred to (same case in error, 9 Cow. 639) the Reporter's note expresses the doctrine of the decision in very clear and concise language. It is as follows: "Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within the Statute of Frauds, although the original debt still subsists and remains entirely unaffected by the new agreement." (See Mallory v. Gillett, 21 N. Y. 412; Furbush v. Goodnow, 98 Mass. 296; Nelson v. Boynton, 3 Met. 396, where the doctrine is much considered.)

Inasmuch as upon a fair construction of this complaint, it must be held that it alleges a benefit to the Defendant and a new consideration going to him, as a basis for his promise, I was at first inclined to the opinion that the doctrine as above stated applied to the case made by the complaint. But upon a more careful study of the cases referred to, with a more extensive comparison with other decided cases, I am satisfied that, admitting the Statute of Frauds to be in force, the case made by the complaint would come within it.

In all the above cases, the Plaintiff surrendered, and the Defendant received a bond of security, charged with the Plaintiff's debt, and all come within the class of Williams v. Leper, 3 Bush. 188, which is the starting point in all this class of cases, and Castling v. Aubert, 2 East. 325, which followed it, and upon the same ground with them, were no doubt properly held not to fall within the statute. I have found no case were the parol promise of one to pay the subsisting debt of another, has been

sustained by the courts upon any other consideration than the receipt of some fund or security, either from the debtor or creditor, charged with the payment of the debt, so that in making the payment of the debt he was really fulfilling an obligation of his own.

It seems to me, that to carry the doctrine so far, as to apply it to the case made by the complaint, and to hold that it is not within the statute, would be virtually a repeal of the statute. (Denman, C. J., in Green v. Cresswell, 10 Ad. & Ellis 453.)

In regard to the promise to pay money, which goes in discharge of the subsisting debt of another, the true test, whether within the statute or not, is, that it is made and accepted by the creditor as an original undertaking, and not merely subsidiary to that of another. In the present case I regard the Defendant's promise as one for the payment of a pre-existing and still subsisting debt of another, and therefore within the terms of the statute.

If the effect of the promise or contract of the Defendant had been to discharge the original debt, and he became the sole debtor, and there was no doubt of another to which his promise was collateral, then the contract was not within the purpose and spirit of the statute, and it need not have been in writing. The complaint, as before said, alleges the contract to have been in writing, and the demurrer admits it. Even where the statute is most stringently applied, it is held that the words "value received" sufficiently explain the consideration going to the guarantor. (Douglas v. Howland, 24 Wend. 35; Miller v. Cook, 23 N. Y. 495.)

But however this may be, what opinion ought to be formed of the proposition, that this branch of the Statute of Frauds is in substance a part of the Territorial law?

In American Ins. Co. v. Canter, 1 Pet. 511, the Court, by Judge Marshall, say substantially, that the laws of Florida, as they were when the Territory was ceded, so far as not inconsistent with the Constitution and Laws of the United States, continued in force until altered by the newly created power of the State. (See, also, United States v.

Powers, 11 How. 570; Strathers v. Lucas, 12 Pet. 410, 436.) This appears to be the settled doctrine in regard to conquered and ceded Territory in the absence of special treaty stipulation. It applies to territory acquired from Mexico, since the treaty of Guadaloupe made no special provision on the subject. Utah was embraced in that acquisition. As in Florida, the pre-existing law was Spanish. So in Utah, it was Mexican, and in both cases the laws were derived mainly from the laws of Rome. In neither did the English Common Law, or the Statute of Frauds, prevail. Congress made no special change, and the Territorial Legislature, upon whom authority was conferred, have made no express enactment upon the subject.

This Territory was first settled in 1847, and from that time up to the acquisition and treaty in 1848, the settlers were comparatively few in number. There were no settled laws, usages and customs among them. They came here as American citizens, under the flag, and claiming the protection of the United States Government.

The particular class of persons forming the great, if not entire bulk of emigrants, claim to have furnished troops from among their own numbers to assist this Government in its war against Mexico.

At the time of the acquisition and treaty, they could not claim Mexican citizenship, and have never adopted its laws and customs.

Soon after the change of sovereignty by the treaty, emigrants in large numbers flocked in from the States and surrounding Territories, and for many years there has been an organized community.

When we turn to the communities from whence these emigrants proceeded, we find that they differed one from another, more or less, in regard to their laws and institutions. No two are alike. In the most, it is true, many common law principles and doctrines were in force. Still the body of the common law in each was peculiar to the particular State, and it was rather the common law of the State than English Common Law. In some, the English

statutes had been received as Common Law; in others, not.

These diversities make it impossible to assume that any specific body of the Common Law was transplanted to the Territory by the fact of immigration.

But one course was open, and that was for the whole body of the people to agree, expressly or tacitly, upon a common measure. It was to be expected that the emigrants would not be contented with the loose and alien institutions of an outlying Mexican department, and they have not been.

They have tacitly agreed upon maxims and principles of the Common Law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the Common Law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power.

The judgment of the court below is affirmed, and a remittitur ordered to issue forthwith to the Third District Court, the Defendant to have ten days after notice served upon him, or his attorney, of the filing of the remittitur in that court, to answer the complaint.

BOREMAN, J., concurred in the conclusion reached.

McKEAN, C. J., delivered the following Opinion:

I concur in the conclusion that the judgment of the Court below must be affirmed. Upon the question, how far, or what parts of the Common Law of England should be recognized in this Territory, I reserve my opinion, to be written out and filed hereafter.

Ex parte CHARLES H. DOUGLASS, ON *Habeas Corpus.*

INQUIRY ON WRITS OF HABEAS CORPUS.—A party will not be discharged upon the hearing on a writ of *habeas corpus*, when it appears that he is held upon a final process from a court of competent jurisdiction, and when the judgment of such court is regular upon its face and entered in the ordinary course of justice—irregularities, if any, must be corrected either in the court where they are alleged to have occurred, or by appeal.

POWER OF MUNICIPAL CORPORATIONS TO PUNISH UNDER ORDINANCES.—The City of Salt Lake, by its Council, passed an ordinance to punish parties who should be convicted of keeping any house for "gaming purposes;" the general Statutes of the Territory had also provided against such offence. Held, that the power to punish this offence is embraced among those granted to Salt Lake by its Charter.

Held further, that the City had power to punish the same, notwithstanding the offence was provided against by general law.

Held further, that the power to pass the Ordinance in question is not a special privilege within the meaning of section one of the Act of Congress entitled, "An Act amendatory of an Act to provide a temporary government for the Territory of Montana;" Approved May 26th, 1864. (4 Stat. at Large, 426.)

APPEAL from the District Court of the Third Judicial District.

The facts appear in the Opinion of the Court.

E. D. Hoge for the People.

J. R. McBride for Appellant.

BOREMAN, J., delivered the Opinion of the Court.

In September last, the Appellant, (Douglass,) was by Jeter Clinton, Justice of the Peace for Salt Lake City, fined one hundred dollars for the violation of an ordinance of said city, which prohibits the keeping of any house for gaming purposes. Failing to pay the fine, he was committed to prison, and thereupon sued out his writ of *habeas corpus* before the District Court of the Third Judicial District of the Territory. Having heard the case, the court remanded him to prison, from which judgment of the court in thus remanding him the Appellant comes by appeal to this court.

Two grounds of error are assigned for the reversal of the judgment of the District Court. The first ground is that the prosecution was in the name of the "People of the United States in the Territory of Utah," whereas it should have been in the name of the "City of Salt Lake." The record of the case does not disclose any such state of facts, nor does the stipulation of the attorneys. The commitment shows that the judgment was in the name of the "City of Salt Lake." Upon its face, then, the judgment is admitted to be correct. A portion of the argument of counsel was, however, based upon the assumption that the facts were as alleged by the Appellant. We will therefore go so far as to state that upon the hearing on a writ of *habeas corpus*, where the party asks a discharge from imprisonment on final process from a court of competent jurisdiction, and where the judgment is regular upon its face and entered in the ordinary course of justice, the party will not be discharged, but be compelled to seek a correction of the irregularities in the court where they are alleged to have occurred, and if he fail of redress in that way, to resort to his appeal.

But we are told, as a second ground of error, that the Police Court has no jurisdiction, "that the ordinance under which the sentence was inflicted is illegal and void." The power to create and punish this offence is embraced among the powers granted to Salt Lake City by its Charter, but, although this is true, it is claimed that the offence is provided against in the general statutes of the Territory, and that therefore the power of the city to punish the same by ordinance is nugatory and void. We are aware that some authors, supported by decisions, have sought to establish such a doctrine, but we cannot go that far. The same authority which gave the Charter created the general law. It cannot be that the Legislature intended to repeal the general statute by giving the corporation a like power in this respect. The city might fail to enforce the power given it, in which case there would be no power within the corporate limits for resort to punish such offences. It was evidently intended that both laws should stand together, if such

be possible, and we see no good reason for declining to have two such conservators of the peace instead of one. No harm has been done by it in this case. The Appellant does not claim that he has ever been tried or convicted for this offence under the general law, or that the penalty he is required to pay is any greater than under the Territorial statute. It is further asserted that the power to pass laws for the creation and punishment of criminal offences in general is a power delegated to the Governor and Legislature, and cannot be redelegated by them. If the old maxim that powers delegated can not be delegated again by the body to which they are given, is to be so rigidly interpreted it might be doubtful whether our Territorial government itself exists by authority. But we do not view the rule in that light, and that really it does not apply to the matter before us. The rule must be read and applied by the light of surrounding circumstances. The learned Cooley says: "We have elsewhere spoken of Municipal Corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as touching upon the maxim that legislative power is not to be delegated, since the maxim is to be understood in the light of immemorial practice in this country, and of England, which has always recognized the propriety of vesting in the Municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority." (Cooley's Con. Lim. 118.) This maxim has lived and grown up in the very midst of nations filled with cities and towns possessing these same powers as those specified in this case. For the Legislature to delegate the power to create a Municipal Corporation, might be an intrenching upon the maxim, but not so in delegating powers for local police regulations.

We are cited to the law of Congress which prohibits any Territorial legislative authority from granting any private charter or special privilege. (14 Stat. at Large,

526). We do not consider that law as at all applicable to this case. A municipal corporation is not a private corporation, neither is the authority to pass the ordinance in question a special privilege. If the Legislature should grant to the City of Salt Lake the exclusive privilege of having and owning a railroad in this Territory, that might be considered a special privilege, not a privilege generally granted to corporations. The one in question is not special to Salt Lake City—it is a common and usual privilege almost universally given to municipal corporations, and it cannot be that Congress intended to class as "special privileges" the common and usual powers given to such corporations to regulate the internal police affairs of the city in the ordinary way.

It is further contended that the right in the legislative authority to grant such powers to a municipal corporation, pre-supposes the right to empower the city government to punish by ordinance every variety of crime, even the greatest, thus by a summary proceeding depriving a citizen of his rights upon a mere information, without the intervention of a Grand Jury and a petit jury. We cannot perceive how this would be the case provided we keep in view the rights and privileges which we enjoy under the Common Law. No person could at Common Law, be convicted of a crime except upon the presentment or indictment of a Grand Jury, and upon the verdict of a jury of his peers. This was not the case, however, where the offense charged was a misdemeanor. The word crimes did not embrace misdemeanors, and a party upon a charge of misdemeanor could be proceeded against by simple information—without a Grand Jury—and though, in some cases, they might be proceeded upon by indictment, yet this was not a requisite. Felonies could not be proceeded on by information, but required both a Grand and Petit Jury. The case under consideration is not at Common Law a crime—a felony—but would be classed as a misdemeanor. We cannot therefore say that the legislative authority to give the city power to punish in such cases did not exist. We believe it did.

We therefore conclude that the judgment of the District Court, remanding the Appellant, be affirmed. Let the judgment be affirmed.

McKEAN, C. J., and EMERSON, J., concurred.

NOTE.—Upon subjects of similar character, see *Ex parte* Shrader, 33 Cal. 279; Johnson *v.* Simonton, 43 Cal. 242; Smith *v.* Keating, 38 Cal. 702; also 29 Cal. 272; 18 Cal. 678.

NOTE 2.—No point was made in the Supreme Court as to the right of appeal from the judgment of the District Court in *habeas corpus* cases.

ALICE CAST, *Respondent, v.* ERIC M. CAST, *Appellant.*

JURISDICTION IN DIVORCE CASES.—The jurisdiction of the District Courts in divorce cases does not depend on Territorial Statutes, but if such were the fact, the Legislature of the Territory has conferred jurisdiction on these courts by "An Act regulating the mode of procedure in civil cases in the Courts of the Territory of Utah," approved Dec. 30, 1852, and "An Act in relation to the Judiciary," approved Jan. 19, 1855.

CHANCERY JURISDICTION OF THE DISTRICT COURTS.—The District Courts have Jurisdiction in all suits for divorce, by virtue of their Common Law, and Chancery powers conferred by the Organic Act.

ID.—The statute in relation to divorces having given the right to a dissolution of the marriage contract, for the various causes mentioned, but failed to provide a competent tribunal to hear and determine suits of that character, the jurisdiction in such cases necessarily attaches to the District Courts of the Territory, as Superior Courts of General Jurisdiction.

ACT CONFERRING JURISDICTION UPON PROBATE COURTS, VOID.—The Territorial Legislature has no power, under the Organic Act, to confer jurisdiction on applications for divorce upon the Probate Courts; it therefore follows that the sections of "An Act in relation to Bills of Divorce," approved March 6, 1852, which purport to confer such jurisdiction, are void.

PROBATE COURTS INFERIOR TRIBUNALS.—The Probate Courts are inferior tribunals, and their jurisdiction cannot be inferred, it must be given by positive law.

EQUITY PROCEEDINGS.—The proceeding in divorce cases belongs properly to the equity side of the court.

ALIMONY, WHEN ALLOWED.—The right to alimony follows as a matter of course, if the Respondent is entitled to a decree of divorce.

APPEAL from the District Court of the Third Judicial District.

The facts appear in the Opinion of the Court.

Snow & Hoge for Appellant.

No authorities on file for Appellant.

Tilford & Hagan, and *W. W. Gee,* for Respondent.

1. The first, fourth and eighth sections of the Territorial Statute in relation to divorces are void and invalid, for the reason that they attempt to confer jurisdiction on the Probate Courts in applications for divorce. These sections of the Statute are in conflict with the Organic Act, and necessarily without force. (Moore v. Konsbly, Idaho R., 55–62; Landon v. Bartley, Idaho R., 223; Lockuane v. Martin, Kansas R., 67; Sec. 9, Organic Act.)

2. The Territorial Legislature having given a right to divorce, but neglected to designate a court of competent jurisdiction to hear and decide suits for a dissolution of the marriage contract, the jurisdiction in such cases devolves of necessity and right on the District Courts as tribunals of general jurisdiction. (Wightman v. Wightman, 4 John., C. R., 343; Perry v. Perry, 2 Paige 505.)

3. If it be conceded that the jurisdiction of the District Courts in divorce cases depends on Territorial legislation, Respondent claims that such jurisdiction has been conferred by the 2d sec. of "An Act in Relation to the Judiciary, approved Jan. 19, 1852." By that section, jurisdiction is conferred on the District Courts, "both in civil and criminal cases, and as well in Chancery as at Common Law."

BOREMAN, J., delivered the Opinion of the Court.

This is a suit for divorce from the bonds of matrimony and for alimony, which was instituted by the Respondent against her husband, in the Third District Court of the Territory, wherein a decree for divorce and alimony was entered, and thereupon the Defendant appealed to this court.

The only question raised and involved is as to the jurisdiction of the District Court to hear and determine the case. The objection to its taking cognizance thereof is based solely upon the ground that divorce is "neither the subject of common law nor equity jurisdiction" but is a "special proceeding and purely statutory." It is further claimed that the only statute which controls this matter is Territorial, and embraced in one enactment, entitled, "An Act in relation to Bills of Divorce," approved March 6th, 1852. By the terms of this law, divorce is committed to Probate Courts, and no allusion is made to the District Courts. These facts, it is claimed, exclude the subject for consideration in the District Courts.

If it be true that this jurisdiction depends entirely upon Territorial statute, it does not follow that it depends entirely upon the one particular statute referred to. Other statutes may cover the same subject matter, and in order to reach a correct conclusion as to the powers granted, and the intention of the Legislature, the examination should extend to all Territorial enactments bearing upon the point at issue.

The Legislature, nearly ten months after the divorce act, created the law entitled, "An Act regulating the mode of civil procedure in civil cases in the courts of the Territory of Utah," approved December 30th, 1852, which provides: "Section 1. That all the courts of this Territory shall have law and equity jurisdiction in civil cases," and the last section thereof repeals all conflicting statutes. These terms seem to confer a general jurisdiction and make no exceptions. The natural deduction is that no exceptions were intended, or had in view, but that the purpose was to embrace all civil suits in this general grant of jurisdiction. Mr. Justice Story conveys the same idea in the following broad language: "The remedies for the redress of wrongs and the enforcement of rights, are distinguished into two classes; first, those which are administered in Courts of Common Law; and secondly, those which are administered in Courts of Equity." (1 Story's Eq. Juris., par. 25.)

If divorce be a "remedy for the redress of wrong," or for the enforcement of a right, it belongs to one of these two classes—either of the class administered in Courts of Common Law or to the class administered in Courts of Equity. And if to either class, then this statute confers the jurisdiction upon the District Courts, and so much of the divorce act as seems to confine such cases to the Probate Courts, is by the repealing clause referred, expressly negative. This Civil Procedure Act was, subsequently, "so far as in conflict" with the code of 1870, repealed; but as there is no conflict so far as this question of jurisdiction is concerned, it remains unimpaired. In addition to this, the code of 1870 bears out the same general idea that the District Courts have jurisdiction in all civil cases.

Over two years after the above mentioned enactments of 1852, the Legislature manifested this same intention in still broader terms, in "An Act in relation to the judiciary," approved Jan. 19, 1855, in the first section of which we read that "the District Courts shall exercise original jurisdiction, both in civil and criminal cases," when it is not "otherwise provided by law." The reverse of this general grant of power must be provided in some law. The granting of a particular jurisdiction to the Probate Courts is not sufficient to negative this, nor does this enactment affect the jurisdiction of the Probate Courts, but the District Courts shall have the jurisdiction also, in that as in all other civil cases, unless some other law says they shall not have it. The divorce act itself does not so provide, and it has not been claimed that such a provision anywhere exists. By inference alone can the conclusion be drawn from the divorce act that the District Courts are to be excluded from jurisdiction in divorce. It will not do to say that inference is what is intended, or allowed, by the words "otherwise provided." These words require an express negative of the power. Divorce is a "civil" or a "criminal" suit, and of course no one claims it to be the latter. It is a civil suit, whether we call it a suit at law or in equity, or whether we call it a special proceeding and *sui generis*.

Let us now advert to the question of the power of the Legislature to pass the divorce act. This act specifies the causes for which divorce can be granted, and it likewise gives directions as to the manner of proceeding in such cases, and purports to confer the jurisdiction thereof upon the Probate Courts. The authority of the Legislature to specify the causes of divorce and to direct the manner of proceeding, is not questioned. But it is claimed that that act, so far as it confers the jurisdiction upon Probate Courts, is in conflict with the Organic Act, and therefore null and void.

The authority of the Legislature to confer such power upon the Probate Courts, is based upon that portion of the "Organic Act" which reads as follows: (Sec. 6.) "That the Legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act." The "subject" must not only be "rightful," but also "consistent" with the Organic Act.

The latter clause of this sixth section, respecting the admission of the laws to Congress and its disapproval, cannot be relied upon in this case. If an act of the Legislature be already void, the disapproval of Congress is not necessary. Such disapproval is only necessary to make void that which is otherwise valid. When the matter considered is a rightful subject of legislation; and consistent with the Constitution of the United States, and with the Organic Act, but yet is inexpedient and unwise, it would be necessary to invoke the disapproval of Congress to invalidate it. But any act of the Legislature which is not consistent with the Constitution of the United States, or which is not consistent with the provisions of the Organic Act, is null and void, and it seems impossible that Congress should have intended to require its disapproval of such acts, that it should have intended to require its disapproval to make void that which is already void. The case of Clinton v. Engelbrecht, "slightly understood," lays down no such doctrine.

By the Organic Act the "judicial power" of the Territory is divided into four distinct branches, and vested respectively in a Supreme Court, District Courts, Probate Courts and Justices of the Peace. The necessary deductions are that four kinds or qualities of jurisdiction were intended, and that these kinds or qualities were to be distributed in a manner usual to like courts in the States. If a jumbling of jurisdictions was to be allowed, the division of the judicial power was wholly unnecessary, and this commingling of jurisdictions is comparatively unknown under like Organic acts, except in Utah.

But our Organic Act does not stop with this simple division of the "judicial power" into four heads—it goes farther, and provides that the District Courts shall be vested with the same jurisdiction as is vested in the Circuit and District Courts of the United States, and in addition thereto provides that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of Justices of the Peace shall be as limited by law; provided that Justices of the Peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars; and the said Supreme and District Courts respectively shall possess Chancery as well as Common Law jurisdiction." (Sec. 9.) The jurisdiction here vested refers especially to cases arising under Territorial laws. If the Territorial law should give the right, and that was such as was recognized at Common Law or in Chancery, as such as required Common Law principles or equitable principles, to be invoked to grant the relief, the jurisdiction belonged to the District Court as original, and the Supreme Court as appellate, unless the prior words, "be as limited by law," were intended to give the Legislature the power to otherwise provide. Let us look at this matter. This fundamental act says that the jurisdiction of the courts—all Territorial courts—shall "be as limited by law," provided "the said Supreme and District Courts shall possess Chancery as well as Common Law

jurisdiction." The jurisdiction of the various courts may "be as limited by law," with the proviso, and so far as any attempt of the Legislature conflicts with the proviso, it is null and void. The proviso is as much a part of the statute and as binding upon the Legislature, as the express grant to which the proviso is attached. The Legislature may limit the jurisdiction, but in doing so must not come in conflict with the provisos mentioned, or other parts of the Organic Act. The Legislature may limit the jurisdictions of these courts, fix the respective boundaries of each court, and detail the general powers of the respective courts—this must all be done according to the authorities as given in the Organic Act. The Legislature cannot deprive any court of the jurisdiction granted to such court in the Organic Act. That jurisdiction is above the reach of legislative enactment. Dunphey *v.* Kleinsmith, 11 Wallace, 610. It is a rule which we conceive to be well settled in the United States, that no court can have any jurisdiction except such as is conferred by the power which created the court, or by a Legislature endowed with express authority to confer such jurisdiction. (Kent Com., p. 334, 336; United States *v.* Hudson, 7 Cranch, 32; Wharton's Crim. Law; par. 163.)

It is claimed that jurisdiction in divorce can only be taken by express enactment of the Legislature. Equally express must be the authority bestowed upon the Legislature. If the Legislature can claim such a power by irresistible implication of the fundamental law, then also with like irresistible implication can the District Courts claim such jurisdiction under Territorial statutes, aside from the Organic Act.

The Constitution of the United States created the Supreme Court of the United States and gave a general outline of its jurisdiction. In like manner our Organic Act created the District Courts and gave a general outline of their jurisdiction. It nowhere, except as is embraced in the name, gives any jurisdiction, in express language, to the Probate Courts. The delineation of power contained in the Constitution of the United States, as belonging to the Supreme Court, and the inferior courts to be thereafter

l, "is now regarded as nothing more in this respect
ı power vested in Congress to confer jurisdiction, in
cretion, within those limits. (Abbott's U. S. Court
ce, p. 185.)

Justice Baldwin, in delivering the opinion of the
me Court of the United States, in the case of Rhode
l v. Massachusetts (12 Peters, 457, 721), says: "It
necessarily left to the legislative power to organize the
eme Court, to define its powers consistently with the
itution, that constitution having "delineated only the
outlines of the judicial power, leaving the details to
ress." To use a later legal term of the United States
eme Court, the constitution only "chalked out" the
daries of the jurisdiction.

is just so in regard to our Territorial Courts. The
nic Act gave only the outlines of jurisdiction, leaving
he Legislature the organization of the courts and the
ils of jurisdiction, all, however, to be consistent with
outlines given, just as those of Congress were to be
istent with the constitution. And this and nothing
e is the plain meaning of those words, "as limited by
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'he outlines of the jurisdiction given to the District
rts are in the name and in the words, "Chancery as
l as Common Law jurisdiction." The outlines of juris-
tion given to the Probate Court are nothing save and
ept such as are embraced in the name itself. In filling
the details of jurisdiction to the District Courts, the
gislature is guided by the name and the words, "Chan-
y as well as Common Law jurisdiction." In filling out
duties of Jurisdiction to the Probate Courts, the Leg-
ature can alone be guided by the name; and to do so, the
gislature can confer no jurisdiction upon the Probate
urts except such as is usual to such courts. Had Con-
ess intended more, it would have been as easy to say so
this connection as it was in connection with the District
d Supreme Courts. Probate Courts are inferior Courts

and no jurisdiction can be inferred—it must be given by positive law. (Peacock v. Bell, 1 Sanders, 74.)

The District Courts are not inferior courts, within the meaning of the language as used in the books. (Hurd on *habeas corpus*, p. 348-9; Territorial Laws, ch. I., sec. 1, p. 29.) Much can be inferred in their favor.

If the Legislature could infer authority to empower the Probate Courts to grant divorces, it could in like manner and with equal reason, bestow such power upon Justices of the Peace. The Organic Act does not say, in direct language, that it shall not do so. But the very idea shows at once how unsound is the assumption of the Legislature to bestow such power upon the Probate Courts.

Whether as a fact it be true or not, it is presumed that the legislature is willing to act in harmony with national law and American ideas and principles and to do so it must notice the general character of the courts throughout the nation, and can not, without well grounded authority, attempt to commingle and mix up the jurisdictions of the Territorial tribunals created by the Organic Act, contrary to the well known and recognized powers of such courts in the States of the Union and contrary to the intention manifested in the Organic Act. As therefore the Legislature is not vested with any power to confer jurisdiction, in divorce, upon Probate Courts, it follows that the attempt to do so is nugatory and that the Divorce Act, in so far as it grants jurisdiction toP robate Courts, is void.

We now, at this stage of our examination, find that we have a statute which authorizes divorce and specifies the causes for which it may be granted. But no tribunal is designated in specific terms, to take such jurisdiction.

What course should be pursued? We have no Ecclesiastical Court, and none were ever known on American soil, even in colonial times. In the absence of such tribunals, it becomes the duty of the District Courts, they being courts of general jurisdiction, superior and not inferior courts, to step in and take such jurisdiction, that the law may not fall or fail for want of a proper tribunal.

the Legislature," says Mr. Bishop, "should establish
em of laws, not mentioning any court in which they
› be enforced, the tribunal best adapted to enforce
ought to take the jurisdiction." (1 Bishop on Mar-
and Divorce, par. 19, n. 1; Perry v. Perry, 2 Paige,
And such a court is generally a court of equity.
› v. Rose, 4 Eng. (Ark.) 207, 512; 1 Story's Eq. Juris.,
53.)

e District Courts, by the language of the Organic Act,
made courts of general common law and chancery jur-
:ion. But these broad terms do not, as it is claimed,
ace divorce, because that is "neither the subject of
non law nor chancery jurisdiction." We cannot be-
that Congress intended to form these courts upon
a cramped model. The very name is wholly Ameri-
not English, and imports something that is American.
the very language of the law, "Chancery as well as
ımon Law jurisdiction," pre-supposes the idea of an
ıdy existing common law jurisdiction conferred in the
ıe itself.

! we are to discard the broad and liberal sense in which
words Chancery and Common Law jurisdiction are sup-
ɜd to be used, we render these almost lifeless words, and
trict Courts must depend upon Territorial statutes for
ir jurisdiction. If we are to confine such jurisdiction to
narrow list of the cases usually cognizable in the Com-
n Law Courts and Chancery Courts, technically so called
England, then rights exist in this Territory that can be
erted in no existing court, and wrongs exist that no
own tribunal among us can remedy. A mechanic's lien
r is found upon our statute book, and no court designated
which such lien can be enforced, and such lien was un-
own to the English Common Law Courts and Courts of
ıancery. What tribunal can take the jurisdiction?

At the present term of this court two cases have been sub-
itted to us in regard to adverse mining claims, the cases
ising under the 7th section of the United States mining

law of 1872. The law says that the matter in dispute shall be submitted to a tribunal competent to take the jurisdiction, and no court is specified. What tribunal shall assume to dispose of the matter? The matter was wholly unknown to the Common Law and Chancery Courts of England, technically so-called. Are parties to be remediless? We cannot consent to such a view of the matter.

Mr. Justice Story, in speaking of equity, says: "It has an expansive power, to meet new emergencies; and the sole question, applicable to the point of jurisdiction, must from time to time be, whether such rights and wrongs do exist and whether the remedies therefor in other courts, and especially in courts of common law, are full and adequate to redress." This is the true character of a Court of Chancery. (1 Story's Eq. Juris., par. 53.) New subjects and new rights are continually arising, and even in England the expansive nature of the chancery jurisdiction is such that "the jurisdiction may be deemed in some sort a resulting jurisdiction in cases not submitted to the decision of other courts by the Crown or Parliament as the great fountain of justice." (1 Story's Eq. Juris., par. 43.) On the other hand we turn to the Common Law, and Common Law includes everything of jurisdiction that is not equitable, and in its broadest sense includes even equity itself and also admiralty. (United States v. Coolidge, 1 Gall., 489; 1 Abbott's U. S. Practice, par. 196; Story's Eq. Juris., par. 41, note 11); and likewise the Common Law (1 Bl. Com., par. 79.) In the United States courts, Common Law embraces "all those proceedings in which legal rights are to be ascertained and determined, whether they be the old, long settled proceedings of the Common Law or new legal remedies, different, it may be, from the old Common Law forms, but proceeding according to the general course of Common Law principles as contra-distinguished to those where equitable rights alone were recognized and equitable remedies administered, as well as in contradistinction to those where, as in admiralty, a mixture of public law,

me law and equity, is often found in one proceeding."
bott's U. S. Ct. Pr., p. 193; Parsons v. Bedford, 3
, 433, 446; Parish v. Ellis, 16 Peters, 451.)
Common Law which our fathers brought to this
ry from England, includes, not only the principles
nistered in what are technically termed the Courts of
non Law, but in all other tribunals. (1 Bishop on M.
, par. 39.)
e Ecclesiastical Law is a part of the Common Law (1
op on M. & D., pars. 56, 57, 68, 71, 75) and ecclesias-
jurisdiction is derived from the Common Law. (Bac.
title "Ecclesiastical Courts," letter "E.") And "the
imonial law of England is the Common Law of this
try," as we are told in the books. (1 Bishop, M. &
par. 31.) The Common Law is the groundwork of all
diction; and the Common Law Courts existed centuries
re Chancery Courts or Ecclesiastical Courts were known
England. Prior to the Norman conquest, the powers of
t has since been known as Common Law Courts, Chan-
Courts, and Ecclesiastical Courts, were all united in
court and embraced in one jurisdiction. Chancery jur-
ction was almost unknown and Ecclesiastical jurisdiction,
exempt from lay jurisdiction, had never been heard of.
courts then existing were presided over by laymen and
esiastics together, and belonged as much to the one as
the other. William the Conqueror ordered, by statute, a
aration between the lay and the ecclesiastical powers of
se courts, and established separate tribunals, and "for-
le tribunals of either class from assuming cognizance of
es belonging to the other." (Bouvier's Law Dict., title,
Ecclesiastical Courts;" 1 Bishop on M. & D., par. 50.)
The Common Law Courts, before the Conquest, before
ancery Courts had grown up, and before the ecclesiastical
bunals had been called into existence, exercised the same
risdiction in divorce that the ecclesiastical courts after-
rds did, and granted the same kind of divorce as was
terwards granted in the ecclesiastical courts. None of
ese tribunals, either those existing before or those coming

into being after the Conquest, were empowered to grant any divorce, except "*a mensa et thoro.*" And at the date of the organization of the Territory of Utah, the ecclesiastical courts of England had no power beyond that, and had no jurisdiction to grant a divorce *a vinculo matrimonia.* Such as is prayed for in the case before us, could not have been granted in the ecclesiastical courts. It is a suit for divorce from the bonds of matrimony. (1 Bishop, M. & D. par. 30.)

In America a divorce is commonly taken to mean an absolute severing of the bonds of matrimony, and not merely a separation from bed and board. And this absolute divorce is the kind referred to in our Territorial statute. No ecclesiastical courts ever took cognizance of such cases. Parliament alone, in England, could grant absolute divorces. (Story's Conflict of Laws, par. 202; 1 Bl. Com., 440-1; Story's Equity Juris., par. 1427, note.)

If we are to follow English, instead of American models, in fashioning our jurisdiction in divorce cases, we cannot go to the ecclesiastical courts, but must go direct to Parliament—direct to our Legislature. But Congress has set its seal of condemnation upon this policy. The Territory of Florida took this view of the matter, and accordingly assumed to grant divorces by its own enactments. Congress very promptly dissented fnom this view, and at once, in 1824, annulled all such Territorial enactments. From that day to the present time no Territorial Legislature, so far as my knowledge goes, has presumed to take upon itself such power, recognizing fully that Congress disapproved of the exercise of such power, when no express authority therefor had been given. But Parliament itself never granted divorces *a vinculo*, except for adultery. (Bon. Law Dic., title "Divorce.") Hence, even our Legislature could have no pretense for assuming such power, even aside from the disapproval of Congress, save and except for the cause of adultery.

Hence, if we are to go to England for precedent and authority in divorce jurisdiction, we can find none except Parliament, and that for one cause only. No tribunal of

justice there exercises such power. This it would seem, is enough to show that the language, "chancery as well as common law jurisdiction," does not refer merely to matters and cases taken cognizance of in these English courts, but refers more especially to the "bed-rock" principles which underlie all these courts, and to comprehend every right that needed enforcement and every wrong which required a remedy.

In most of the States of the Union, divorce is classed among suits at law and tried by jury, and in others it is considered a proceeding in chancery. And generally it has not been assumed by the courts, except upon statutory authority or for causes arising prior to marriage when there was no statute. In Bacon's Abridgement (title "Marriage") it is said that the ecclesiastical courts could not grant divorce *a vinculo* for any cause occurring subsequent to marriage. The inference might be drawn that they had jurisdiction when the cause arose prior to marriage. And suppose this to have been true. Then any causes of which a court of chancery should certainly not take cognizance, would be those which arose prior to marriage, for such were peculiarly under the care of the ecclesiastical courts and could not be assured elsewhere, except upon statutory authority. Yet we find that of all the causes for divorce, the chancery courts of this country are inclined to take these cases rather than any other. Chancellor Kent, in speaking in a court of chancery, of divorce says: "Whatever civil authority existed in the ecclesiastical courts, touching this point, exists in this court, or it exists nowhere, and all direct judicial power over the case is extinguished, but that is hardly to be presumed." The case before him was one founded upon a cause existing at the marriage, and the Court, without hesitation, assumed the jurisdiction as part of the inherent powers of a court of chancery. (Wightman v. Wightman, 4 Johnson's Chy. R., 343.)

And we understand it is admitted, in the case before us,

that courts of chancery can take jurisdiction of divorce cases for causes arising anterior to marriage. Which of all others are the cases they should not take cognizance of, if we are to follow the rigid rule which it is proposed by the Appellant that we should follow.

No American court could grant a divorce from the bonds of matrimony unless the statute give the causes for such divorce. And we think it will be found that, where such a divorce has been sought in an American court of chancery and refused, there was no statute in existence giving causes for divorce. In this Territory we have such statute, and it requires only the application of common law and equitable principles to carry them into effect. We have been referred to no decision where the grounds for divorce were given by statutes, and where no court specified to take the jurisdiction, and upon no reasoning have we a right to infer that a chancery court would, in such a case, allow the statute to lie dead and the wrong unremedied.

Chancellor Kent tells us that "all matrimonial and other causes of ecclesiastical cognizance belonged originally to the temporal courts, and after the spiritual courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals." (Wightman v. Wightman, 4 Johnson, Ch. R., 347.)

We have no ecclesiastical courts, and if we had, they could have no jurisdiction in the case before us. We have only two sides to any court in this country—a law side and a chancery side, and whether divorce falls to the one side or the other, it belongs to the District Court. The proceedings under the Territorial statute are more akin to the chancery than the common law side of court. A suit under this statute is virtually a suit in chancery. The very gist of the action is an appeal to the conscience of the Chancellor and not to the verdict of a jury. The proceedings are not after the character of the ecclesiastical courts, the relief is not such as could be granted in those courts and the grounds of relief were wholly unknown in

that court for such a divorce. Hence we can see no good reason for a court of chancery refusing to take such jurisdiction in such cases, especially as chancery can give a more complete relief than a direct proceeding at law. Chancery is a superior court and chancery jurisdiction is a superior court jurisdiction, and everything is supposed to be done within the jurisdiction of said court, unless the contrary especially appears. (2 Bac. Ab., p. 526.)

No analogy for a contrary view from what we have taken, can be drawn, as to chancery powers, from the fact that in England a new divorce court has been created, with the Probate Judge as judge ordinary thereof; for the Lord Chancellor himself stands at the head of that court, and is authorized to take that position in such court whenever he may deem it proper.

The supreme court of the United States have, in the late case, but upon a totally different subject, given some dicta, which, by some, is supposed to bear upon the question involved in this case. Upon a fair and candid examination, however, of such dicta, we do not think that such will be found to be the case.

In respect to alimony, there seems to be no difference of opinion, if the granting of the divorce be proper.

Upon the whole case, therefore, we conclude that in divorce, as in all other civil cases, the Territorial statutes have conferred jurisdiction upon the District Courts; that the attempt to confer such power upon the Probate Courts was wholly nugatory, and in conflict with the Organic Act, and that such grant of power to the District Courts by the Territorial statutes was wholly unnecessary, as under the Organic Act, such power was already vested in the District Courts as part of their general jurisdiction. Therefore the judgment of the Court below, both as to divorce and alimony, is affirmed.

MCKEAN, C. J.:

I concur in the conclusion, that the judgment of the

Court below must be affirmed, and reserve the right hereafter to file my opinion in writing.

EMERSON, J., dissented.

ALICE CAST, *Respondent*, *v.* ERIC M. CAST, *Appellant*.

ALIMONY IN THE SUPREME COURT.—On motion made in the Supreme Court, in a proper case, temporary alimony and counsel fees will be allowed.

MOTION for Alimony and Counsel Fees, in the Supreme Court, during the pending of an Appeal in the case of Cast *v.* Cast (Ante).

Tilford, Hagan & Gee, for the motion.

Snow & Hoge, Contra.

Per Curiam:

It appearing to the Court, upon good and sufficient admissions, and proofs therefor, that Respondent is fully entitled to a further relief herein for alimony and costs, *pendente lite*, and good cause appearing therefor, and the Court being fully advised herein, it is ordered and adjudged that the further and and additional sum of Six Hundred ($600) Dollars be and the same is hereby allowed and adjudged in favor of said Alice Cast, and against said Eric M. Cast, as such costs and alimony herein pending this action, to be paid by the said Eric M. Cast to the Clerk of the Third Judicial District Court, for the use and benefit of said Respondent, Alice Cast, of the Territory of Utah, as follows, to wit: Three Hundred Dollars to be paid within fifteen (15) days from this date, May 21st, 1874, and Three Hundred Dollars to be paid over to said Clerk, for said Respondent, within thirty

rom this date, May 21st, 1874, and in default of the ɔnt of the said amount or amounts, or either thereof, e said Eric M. Cast, as hereinbefore ordered, it is ɔd, ordered and adjudged, that the said Alice Cast due process of law against said Eric M. Cast, to fully ıte and enforce the judgment.

RY G. HUSSEY, *Appellant*, *v.* JOB SMITH, *Respondent*.

TTERS NOT OF RECORD, NOT CONSIDERED.—Extraneous matter filed with the Record, but not made a part thereof, will not be considered on Appeal.

"OCCUPANT," WHO IS?—An "Occupant," within the meaning "Town Site" Law of Congress (14 Stat. at Large, 541) is one who is a settler or resident of the town, and in the *bona fide*, actual possession of the Lot at the time the entry is made. One who has never been in the actual possession of a Lot, cannot be said to be an "Occupant" thereof.

APPEAL from the District Court of the Third Judicial District.

The facts appear in the Opinion of the Court.

Snow & Hoge for Appellant.

Rosborough & Merritt for Respondent.

BOREMAN, J., delivered the Opinion of the Court.

These are special proceedings, under the Act of Congress of March 2d, 1868, commonly called the "Town-site" Law (14 Stat. at Large, 541), and the Act of the Territorial Legislature passed in pursuance thereof; and to carry out the trust arising thereunder, approved February 17, 1863 (Laws of Utah, 1869, p. 4). Mary G. Hussey and Job Smith are separate and distinct claimants for the same parcel of ground in the City of Salt Lake. They separately

made their application to the Probate Judge, each asking for the Government title, and each contesting the right of the other thereto. Being adverse claimants, their cases necessarily are considered together. Upon the hearing of the cases, the Probate Court adjudged that the certificate of title issue to Job Smith; from which judgment of the Probate Court Mary G. Hussey appealed to the District Court of the Third Judicial District of the Territory. The District Court affirmed the judgment of the Probate Court, and from this judgment of the District Court, Mary G. Hussey appealed to this court.

The case was heard by the Court, sitting without a jury, which made a finding of the facts, and thereupon gave its conclusions of law, and judgment accordingly. From the beginning to the ending of this record, there does not appear to have been any exception taken to any ruling of the Court below, nor to the finding of facts, nor to the conclusions of law. No effort seems to have been made for a review of the case in the Court below. There was no motion to correct the findings, nor any motion for a new trial. We therefore must accept the findings of the Court below as the true and correct statement of the case.

There is a vast amount of extraneous matter filed with the record, but no steps having been taken to make the same any part of the Record, we cannot consider it. We have then only to consider whether the findings will support the judgment rendered thereon. In considering this question, let us first ascertain what the Act of Congress upon which the above case is founded says. It reads as follows: "Whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the agricultural pre-emption laws, it shall be lawful in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the Judge of the County Court for the County in which such town may be situated, to enter at the proper Land Office, and at the minimum price, the land so settled and occupied in trust for the several use and bene-

fit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated, &c., &c. (Act of March 2d, 1867, 14 Stat. at Large, 541.) In accordance with the Act of Congress, the legislative authority of this Territory has made the necessary "rules and regulations," and upon no part of these is any question raised in this case.

In pursuance of the Act of Congress and the Territorial Act thereunder, as the findings of the Court below show, on November, 1871, Daniel Wells, as mayor of the City of Salt Lake, entered the land in controversy, among other lands entered by him as a "town site."

The findings further show that, on the 11th day of December, 1871, both said Job Smith and said Mary G. Hussey filed their statements with the Probate Judge of the county, claiming the premises in dispute; and that Job Smith had gone into possession thereof in 1856, and has remained in actual possession thereof ever since, and is still so. They do not show that the Appellant (Mary G. Hussey) ever was in possession of said land or any part thereof, or that she ever was one of the occupants of the "town site," or that she was then or ever had been, or is now even a resident of the city of Salt Lake, or of the Territory.

The only instance in which her residence is referred to, is at the time she received a deed for this property from Wm. Jennings, on the 9th day of March, 1872, when she is declared to be a non-resident of this Territory, and a resident of the State of Ohio.

What then does "occupant" under the law mean? and which of the two parties was the "occupant" within the meaning of the law and the rightful claimant to the deed of title?

Shall we say that the party not in possession at any time

is the "occupant?" or shall we say that he who had the actual possession is to be considered rightfully the "occupant?"

Upon these questions we are not without authority. The "Townsite law," of 1844, is very similar to that of 1867 (now under consideration) so far as the question of occupancy goes. And the Supreme Court of Michigan, in the matter of Henry Selby and —— Spalding, appellants (6 Mich. 193), says that "the law of 1844 was, we think, very clearly designed to protect *bona fide* town settlers, and did not recognize any paramount individual claims over them."

The Secretary of the Interior (Jacob Thompson) in a letter to the Commissioner of the General Land Office, dated June 26, 1858, says that in the act of 1844, by the term "occupants" is meant those who are settlers or residents and that it only embraces citizens thereof—that is, of the town.

The Supreme Court of Iowa, in Hall *vs.* Doran (6 Iowa 433), assert a like doctine where the act is special, but with language similar to the general law, although they add that the party to be entitled to the land must have been the occupant at the time the County Judge is required to make the deed and to execute the trust.

This question has also been under consideration in the Supreme Court of the United States, and passed upon by that tribunal in a case taken from Colorado. That case (Cofield *vs.* McClelland and Davis, decided December term, 1872, but not yet reported) arose under the law of 1844 and a special law for the relief of the citizens of Denver, (13 Stat. at Large 94), but the language of that special act, as well as the law of 1844, is similar to that of the law now under consideration.

The Supreme Court of the United States declare therein that "occupation and possession" give the "right," but assert that the occupancy and possession must exist at the time of the entry of the lands by the Probate Judge.

The Iowa case referred to says that the occupancy must exist at the time the County Judge is required to make the

deed. The Colorado case (by the U. S. Supreme Court) says that this occupancy must be at the time of the entry of the land by the Probate Judge.

Yet all the cases referred to herein declare that the title must go to the actual occupant. The appellant, Mary G. Hussey, never was an occupant, either at the date of entry of the land, or at the time at which the deed was required to be made, or at any other time. She therefore has no right whatever to a deed for said premises.

The other party, Job Smith, having been in continued actual possession of said premises from 1856, he was, and is, an occupant within the full meaning of the law.

These points being decisive of this case, it is unnecessary to consider the other questions raised.

The matter of the right of appeal from the Probate Court is not in issue.

The Judgment of the District Court is affirmed.

McKean, Ch. J., and Emerson, J. concurred.

cases existed by any law in force, when the writ *certiorari* issued in this case, it was a right of appeal the Supreme Court, and not to the District Court.

But if it should be found that there was some law of tl Territory providing for appeals in general from the Proba Court, still I am of the opinion that the writ of *certiora* was the proper remedy in this case.

The Probate Court had no jurisdiction of the subje matter, and its exercise was a probable usurpation of powe The whole proceedings in that court were *coram non judic* It had no right to render judgment at all, or to grant a appeal, or to take or file an undertaking on appeal, or make any order in the case whatever.

By the 435 section of the Practice Act, the writ *certiorari* is made the proper remedy in such cases. Th raises the jurisdictional question, and none other. Tl right of the superior courts, under the Act, to review tl proceedings of inferior courts, upon *certiorari*, is limited the very nature of the writ, to cases where the jurisdictic of the lower court is impeached. In this our statue affirmatory of the common law. True, a jurisdiction question may be raised at any time, and in any stage of tl proceedings, as well in the appellate court as in the court first instance, and when any of the prerequisites to give juri diction are found to be wanting, the case will be dismisse But a dismissal of the case in the District Court is not tl relief which the Appellant either sought or was entitled t If he could by any possibility bring his case into the Di trict Court by an appeal from the Probate Court, all th the court can do, is to dismiss the appeal for want of ju isdiction in the lower court. In effect it would say the is nothing to appeal from.

The object of an appeal is to try a case *de novo*, upo its merits, and as an incident to the right to hear, try an determine in the court whose decision is appealed from.

The power of an inferior appellate court is not t reverse judgments and correct errors on an appeal, unles that power is expressly given in the language conferrin

the right of appeal. This action of the court should invoked by writ of *certiorari*. This is what the Appella sought to have done, and I think he had a right to it.

The sections of our Practice Act in relation to granti this writ, are a literal copy of those in the Nevada A and we adopt the language of the Supreme Court of th State in the construction to be given them.

"The argument, as I understand, goes to the extent th a *certiorari* is absolutely inhibited to a party aggrieved all proceedings or actions wherein a right of appeal is give * * * I do not, however, so understand the law. Su a construction would often defeat the ends of justice. T statute is remedial, designed to confine inferior tribun and officers within the prescribed limits of their powe and to correct, in a speedy and economical manner, a abuse of them that may prejudice others. It should rece such a fair and reasonable interpretation as will best sec their objects. The writ of *certiorari* is declared to 'proper in all cases where an inferior tribunal, exercisi judicial functions, has exceeded its jurisdiction, and th is no appeal or other plain, speedy and adequate remed Like the other remedy referred to in the statute, the app also must be adequate to the relief sought. Such a c struction does no violence to the language or spirit of t section. An appeal through the means of which erro though manifest, cannot be corrected, would be a usel ceremony. The law does not require vain things to done; it does not limit a suitor to a process that is fr less when it furnishes one that may prove available." (P *et al. v.* Armstrong, 1 Nev., 82.)

The judgment and order of the court below in dismiss the writ of *certiorari*, is reversed, and the cause reman to the Third District Court.

BOREMAN, J., concurred.

MCKEAN, C. J., dissented.

JAMES H. NOUNNAN, *Appellant, v.* LLOYD ASP
WALL *et al., Respondents.*

CHANGE OF VENUE —An Order of the Court transferring a c
from the Third to the First Judicial District, is an intermed
and not a final order.

NO APPEAL FROM ORDER CHANGING VENUE.—There is no ap
from an order changing the place of trial. (See 5 Cal., 461
Cal., 324.)

APPEAL from the District Court of the Third Judi
District.

Order changing place of trial.

The facts appear in the Opinion of the Court.

Hemingray, Robertson & McBride, Tilford & Hagan,
Appellant.

Baskin & De Wolfe for Respondent.

EMERSON, J., delivered the Opinion of the Court.

A motion on the part of the Respondent has been m
to dismiss this appeal, upon the ground that an order m
by the court below is not such a final order or decree
can be appealed from.

The bill was filed by the Appellant in the Third Dist
Court, for the purpose, as is expressed in the prayer
relief, of setting aside the certificate of entry and patent
the Miller mining claim, and that they may be declared of
effect or validity, so far as the same affect or apply to the
terest in said mining claim, claimed by the Appellant, a
that he might be adjudged and decreed to be the legal a
equitable owner of an undivided three hundred feet in a
to said mine, and that the Respondents be adjudged a
decreed to hold only the legal title of said mine in trust
the Appellant, to the extent of his interest therein; and t
the Respondents be adjudged and decreed to execute said tru
especially by conveying to the Appellant an undivided th
hundred feet in said mine, and that the Respondents

divested of all claim or title in and to said three hu dred feet, and that the Appellant be invested therewi and that he be decreed to have, hold and possess the sa free from all claims or interference from the Responder or either of them. There is also a prayer for an account for all ores taken from the mine, and a prayer for injunction.

There was a personal service of the subpœna issued in cause upon the Respondents, Baskin, and the Miller Min Company; the Respondent, Aspinwall, was not served. parties served with process appeared and answered proofs were taken, and the cause was regularly procee in, and came up for final hearing in the Third Dist Court, upon the pleadings and proofs. Upon the hear and when the arguments of counsel were nearly throu for the first time the attention of the Court was called the fact that the property in dispute was situated wi the First Judicial District. No motion was made upon subject, but counsel desired to finish their argument u the merits. This was permitted, and the case was fi submitted to the Court.

The Court afterwards, and on the 22d day of Decem A. D. 1873, made the following order in the cause: "N on this day, the Court having had this cause under sideration since the 21st day of November, A. D. 1 and it appearing unto the Court that this cause pro arose and is only triable in the First Judicial District C it is hereby ordered and adjudged that the same be t mitted, with all the papers, pleadings, proofs and re herein, to said court for final hearing and decree, to w order and judgment so transmitting this cause to said c complainant by his counsel excepts."

The course is in this court by an appeal from his o This is an intermediate and not a final order. It i way affects the merits of the case; it merely changes forum where the merits of the controversy are t adjudicated and determined. It is not such an ord can be appealed from, either under the practice in

Haydon & Gilchrist for Respondents.

BOREMAN, J., delivered the Opinion of the Court.

Lawrence and Mann sued Howard upon a board bill, whi had been assigned to them by Tilden & Lawrence. The lat were hotel keepers in Salt Lake City, and Plaintiffs were th successors in business.

The Defendant denies the account, and for further defen sets up that Plaintiffs are indebted to him in a sum exce ing said account, for baggage and clothing of his, detai by Plaintiffs, and converted to their own use.

In this country hotel keepers act in a double capaci being both innkeepers and boarding-house keepers. As i keepers, they entertain travelers and transient persons, th who come without bargain as to time and price, and away at pleasure, paying for only actual entertainment ceived. As boarding-house keepers they entertain reside and regular boarders and lodgers for definite lengths time and at specific prices previously agreed upon.

In the case before us, the Defendant was not a trav nor a transient guest, but one living at the hotel as a reg boarder by the month, at a price fixed by contract. Defendant was a resident of Salt Lake City, and his p of abode in that city was the hotel of Plaintiffs' assign The hotel was his home. He was in no sense a guest as to hold the Plaintiffs or their assignors, to their pec liability as innkeepers. They were liable only as board house keepers.

If the goods were taken whilst Defendant was sti boarder and lodger at the hotel, the Plaintiffs were liable, as ordinary diligence was used by the keepers of house to make safe all articles left in the rooms, by re ing the lodgers to deposit the keys in the hotel office. stead of obeying this rule, the Defendant frequently left key of his room in the door. He was thus guilty of only negligence shown to exist whilst he remained boarder. But it is not claimed that the goods were whilst he was a boarder and lodger, but after he was tu

Ex parte FREDERICK BRIGHT, ON PETITION HENRY A. MORROW, FOR WRIT OF *Habeas Corpus*

MILITARY UNDER CONTROL OF CIVIL GOVERNMENT.—In our co try the army derives its existence from and is under the absol control of the Civil Government.

MARTIAL AND MILITARY LAW DISTINGUISHED.—Martial and M tary Law are not the same. The former depends largely u the discretion of the chieftain who proclaims it. The latter is clearly defined as is any system of Statute, Common or C Law. The former may apply both to soldiers and citizens; latter applies only to the army.

MARTIAL AND CIVIL JURISDICTION DISTINCT.—The judgments courts martial, when acting within their jurisdiction, are as va as are those of the civil courts. Neither can overrule nor assu the jurisdiction of the other.

IN TIME OF WAR, OFFENCES OF SOLDIERS TRIED BY MILITA AUTHORITY.—In time of war, all offences committed by soldi are cognizable by courts martial or military commissions. If civil courts, in time of war, try and punish such offenders, it because they are permitted to do so as a matter of comity expediency.

WHEN SOLDIERS, TO BE TRIED BY CIVIL AUTHORITIES IN TIME PEACE.—In time of peace, a soldier of the National army can demanded by and surrendered to the civil authorities, to be t and punished by them, only when he is charged with an offe "such as is punishable by the known laws of the land;" that by the laws of the United States, or of a State or Territory.

SOLDIER TO BE DELIVERED TO THE MILITARY AUTHORITIES, WH —A city By-law or ordinance is not in this sense a "known of the land," but a soldier who, when off duty, violates it, be arrested in the act and restrained by the civil authorities, may not be tried and punished by them. It would be their d to deliver him, on demand, to the military authorities, and duty of the latter to enforce the law military against him.

SOLDIER, HOW TAKEN FROM THE CIVIL AUTHORITIES.—If civil authorities refuse so to deliver up the soldier, the mili authorities may take him by force; but if, instead of resortin force, the military authorities apply to a Federal Court or Ju the prisoner must be discharged from the custody of the authorities by the writ of *habeas corpus*.

PROVOST GUARD IN A CITY.—It is the right of the mili authorities to station a Provost guard in a city, to arrest soldier who shall violate any City Ordinance.

APPEAL from the Third District Court.

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which the person or persons so accused shall belo
are hereby required, upon application duly made by or
behalf of the party or parties injured, to use their utm
endeavors to deliver over such accused person or pers
to the civil magistrate, and likewise to be aiding a
assisting to the officers of justice in apprehending a
securing the person or persons so accused, in order to br
him or them to trial. If any commanding officer or offi
shall willfully neglect or shall refuse, upon the applicat
aforesaid, to deliver over such accused person or p
sons to the civil magistrate, or to be aiding and assist
to the officers of justice in apprehending such person
persons, the officer or officers so offending shall be ca
iered."

This is the only provision of law requiring a mili
commander to deliver over to the civil authorities, for t
and punishment, an officer or soldier who is charged w
crime. And it will be observed that this requires s
surrender only when the person demanded is charged w
an offence "such as is punishable by the known law
the land." If a soldier were to rob a mail bag in
postoffice here, then the word "land," in this stat
would mean the United States; if he were to commit h
way robbery here, then it would mean the Territor
Utah—the former being an offence against the Federal,
latter an offence against a Territorial law. "Known
of the land," are not the by-laws or ordinances of a
But they are, when Federal laws, those laws of which
Federal courts, in all parts of the Republic, are boun
take judicial notice. They are, when State or Territ
laws, those laws, whether written or unwritten, of w
the courts of the State or Territory are bound to
judicial notice. They are the statutes enacted by the
making power, and the unwritten laws of the land.
ordinance of Salt Lake City forbidding drunkenness
disorderly conduct is not such a law. It was not ena
by the law-making power of the land. It is ne
a Federal nor a Territorial law. Courts cannot take juc

discharge by *habeas corpus*, but have appealed from t judgment discharging him. If, instead of seeking a ci remedy, Col. Morrow had released the soldier by forc military law, which is as valid as any other human la and more summary than most remedies, would have ful justified him.

But is a soldier to escape trial and punishment for viol ting the ordinance of Salt Lake City, forbidding drunke ness and disorderly conduct? By no means. It is the du of the Commandant of Camp Douglas, whenever su offence is brought to his notice, to see that the law mi tary is enforced against him. The offence is only cogni able by a court martial, and the civil courts can no mo assume the jurisdiction of that court, than it can assu the jurisdiction of the civil courts.

We have therefore reached the following conclusio

1st. That a soldier of the National army can be demand by and surrendered to the civil authorities, to be tri and punished by them, only when he is charged with offence, in time of peace, "such as is punishable by t known laws of the land," that is, by the laws of t United States, or of a State or Territory.

2d. That a city by-law or ordinance is not in t sense a law of the land; but that a soldier who, when duty, violates the ordinance of Salt Lake City forbiddi drunkenness and disorderly conduct, may, in the abse of a Provost guard, be arrested in the act and restrain by the civil authorities, but may not be tried and punish by them.

3d. That in case of such arrest and restraint, it is t duty of the civil authorities to deliver over such sold to the military authorities, on the demand of the latt and the duty of the military authorities to enforce agai him the law military forbidding such offence.

4th. That if the civil authorities, after arresting su offender, refuse to deliver him over on such demand, proceed to try and punish him. the military authori may take him by force.

Thus Congress has not failed to carry out the p
given in the Constitution; but has carried it out f
and in ample manner, making a complete system of
and regulations, with appropriate tribunals to enforce t
for the government of the army. Thus there is a
plete military government formed, totally distinct from
civil government; and we are told by Chief Justice C
in *ex parte* Milligan (14 Wallace, 237), that the Cons
tion itself provides for a military government, as
tinct from the civil government, and the Court say in
case that every soldier is amenable to that jurisdic
which Congress has created for their government,
whilst serving as such, he surrendered his right to be
by the civil tribunals. (4 Wall. 123.) When a pe
enters the army, he passes from one jurisdiction to anot
as much so as if passing from one State to another.
cuts loose from the control of the civil authorities,
passes under the control of that equally constituti
authority, the military. He takes an oath that he will
those appointed over him in the service "according to
rules and articles for the government of the army." (
10.) In the language of Chief Justice Chase again, *ex p*
Milligan, in entering the army, a person yields up
civil safeguards of the Constitution." He even gives
his right to "trial by jury." And this has been so un
stood, and acted upon, as Chief Justice Chase says,
the very adoption of the Constitution to the present t
There is no doubt about the general rule that the mili
are subject to the civil power, but in this nation, u
our Constitution, the civil power referred to is that of
nation, and not that of the States, Territories or ci
The army is a part of the executive power of the nat
and in its sphere totally independent of the co-ordi
branches of government, except where otherwise, under
Constitution, it is by Congress provided. The civil co
can hear no appeals from the military courts, and can
no case interfere with military law. The courts of

cannot occupy a broader field than the power to whi it is attached; and there can be nothing unreasonable concluding that this incidental power is exclusively in t hands of Congress, just as the power to declare war a raise armies, is exclusive. We are told by the Supre Court of the United States, and by text writers, that t militia, when in actual service, are exclusively under t control of the general Government, and no State or Ter torial authority ever had or could have jurisdiction o such militia. After the power is once given to the gene Government, it cannot exist elsewhere, unless expres authorized in the Constitution, and the Constitution mal no such provision. It therefore does not exist. (Hous *v.* Moore, 5 Wheaton, 17 and 53; 2 Story on Const., s 1213.) But the militia in actual service, are only subj to the same rules that the regular United States tro are. (5 Wheaton, 19.)

Hence the jurisdiction of the general Government o the regular troops is alike exclusive. And neither the mili in actual service, nor the regular United States troops, subject to the jurisdiction of any tribunal such as Cong shall prescribe. Congress has prescribed that all the m tary shall be subject to the jurisdiction of courts mar or other military authority, and has not granted nor c sented that such jurisdiction shall exist elsewhere, except certain specified cases, which will be referred to hereinaf But the Supreme Court of the United States uses e more positive language, and in Tarbell's case (13 Wall 397), fully recognizes the exclusive doctrine referred when it says that "among the powers assigned to national Government, is the power to raise and sup armies; and the power to provide for the government regulation of the land and naval forces;" that "the ex tion of these powers falls within the line of its duties; its control over the subject is plenary and exclusive." Court further say that Congress "can provide the rules the government and regulation of the forces after they raised, define what shall constitute military offences

lar troops shall at "all times and in all places" be su
ject to these rules and regulations.

Article 32 declares that "every officer commanding
quarters, garrison, or on the march, shall keep good ord
and to the utmost of his power, redress all abuses or d
orders which may be committed by any officer or sold
under his command; if, upon complaint to him of offic
or soldiers beating or otherwise ill-treating any person,
disturbing fairs and markets, or of committing any ki
of riots, to the disquieting of the citizens of the Uni
States, he, the said commander, who shall refuse to o
to see justice done to the offender or offenders, and rep
ation made to the party or parties injured, as far as part
the offender's pay shall enable him or them, shall, u
proof thereof, be cashiered or otherwise punished as a g
eral court-martial shall direct." Under this article
"abuses" and "disorders" by soldiers "under his co
mand" are to be redressed by military authority. Had
been intended to refer to only such abuses as took place
camp, or in the ranks or whilst on duty, it would have
said. But no exceptions are made, and the other parts
the article plainly show that abuses anywhere committed
any one under the command, were embraced, for it spe
"of disturbing fairs or markets" and of "committing a
kinds of riot to the disquieting of the citizens of
United States." Such fairs are not in garrisons, nor
such markets, nor could such fairs or markets be disturl
by soldiers on the march, if such soldiers were "on duty

The 99th article of war provides that "all crimes
capital, and all disorders and neglects which officers a
soldiers may be guilty of to the prejudice of good or
and military discipline, though not mentioned in the fo
going Articles of War, are to be taken cognizance of by a g
eral or regimental court martial, according to the nature a
degree of the offence, and be punished at their discretio
Here is a general authority to the court martial to take c
nizance of all disorders committed by officers or soldiers to
prejudice of good order and military discipline, whether co

mitted when "off duty" or "on duty," it would be difficult to find any such disorder. If "on duty," the party is unfit to discharge the duties devolving upon him and, if "off duty," he is wholly unfit to obey a summons to return to duty. His drunkenness is then damaging to the service, and prejudicial to military discipline. And that offences committed both "off duty" and "on duty," are comprehended, has been the view taken of the subject by the military authorities themselves. (Benet's Military Law, pp. 266 and 577. See also "Digest of Opinions of Judge Advocates," title "Jurisdiction," Sec. 4 and 5.)

But it is further claimed that, under the 33d Article of War, the military are expressly commanded to deliver over offenders to the civil authorities. And this is true, and if drunkenness were one of the offences embraced in this Article, then it would be the duty of the military commander to deliver over the offender to the civil courts. But even then, under the section, no authority could be claimed by the civil authority to try, convict and punish such offenders without notice to the commanding officer, and without his consent. But this 33d Article does not refer to such offences as drunkenness. It refers wholly to the higher grades of offences. And then in regard to these higher offences, the civil courts have no authority to call for the delivery of the offenders, except the authority given in that Article. They cannot demand such delivery because any local authority is recognized as supreme over the military. They must look alone to the Article itself, referred to, for their right to try, convict and sentence the offender. This 33d Article requires that the party must be charged with some offence "punishable by the known laws of the land." And we think it beyond cavil that the "known laws of the land" are only such as courts will take judicial notice of. City ordinances are not such laws. (Horn *v.* People, 26 Mich., 228). The petitioner here, then, was not guilty of a violation of the "known laws of the land," and could not rightfully be tried in a civil court for the offence charged. He could not even be tried by a military court.

He waived his right to be tried by a civil court when entered the service, and he cannot at pleasure withd: that waiver, which the Constitution and National law s he had the right to make. He is bound by his first wai and the military authority is authorized to enforce it, civil courts are excluded from any control over him.

The rules for the government and regulation of the arm no where show that they are to be enforced only in tim war. And as this no where appears, we have no right infer it. And to conclude that they were only applic in time of war, would lead to the absurd conclusion t the regular armies of the United States in time of pe are not subject to any rules and regulations specially ap cable to them, but that the civil courts have exclusive absolute control over the same.

We see then, that the soldier owes obedience to his supe officers, and whoever prevents this obedience, deranges n tary law, and deprives the officer of the service of his c mand, and that completely destroys the efficiency and di pline of the army. The Constitution and laws expre except persons in the land and naval forces, from the o nary operations of civil tribunals. And this is a necess for otherwise the army could not be maintained. The of exclusiveness, in the general government, is not al applicable to the clauses of the 8th section of Article I the Constitution, which apply to the army, but it ap with more or less strictness to all of the clauses of section. Several of the powers granted to the general ernment, under that section, are declared to be ex sively in the general government, whether Congress fit to make the appropriate legislation or not. In the ot it is declared exclusive, to the extent that when Cong has acted and made the appropriate legislation, no loca State law repugnant thereto is valid, and all State and o local laws which, in their execution conflict or interfere the National law, are to that extent null and void.

In coming to the conclusion we have, that the disch

of the prisoner was proper, we desire to say, that civil authorities could arrest soldiers in the actual commission of offences, and in some instances, in attempting to commit an offence. But they cannot be retained. They must be set at liberty or delivered to the military immediately when the danger is passed. They cannot arraign soldiers in the Police Court; and such can be arrested only to prevent damage or further injury being done by them.

In the case before us, the Police Court had no jurisdiction to try the prisoner nor to punish him.

The judgment, therefore, of the Court below is affirmed.

EDWARD FREIL, *Appellant*, *v.* LYMAN S. WOOD, ADMINISTRATOR OF THE ESTATE OF LAMBSON, DECEASED, *Respondent.*

NO WIFE A WITNESS.—Section 379 of the Practice Act, excludes the wife from testifying for or against her husband, except when the action is between themselves, and when a witness is offered by a party to the suit, with the statement that "she is his plural, or second wife," such witness will be excluded, and the Court will not try the question of the validity of the marriage, or the relations of the parties.

CANNOT CHANGE POSITION IN SUPREME COURT.—A party will not be allowed to take a position in this Court different from that taken in the Court below; such practice is unjust to the Court below, and cannot be tolerated.

APPEAL from the District Court of the First Judicial District.

Suit on a promissory note made by Lambson during his lifetime. The Defendant was sued as Administrator of the estate of said Lambson, and filed answer, pleading payment of the same by said Lambson before his decease.

The other facts are stated in the opinion of the Court.

D. S. Dana, for Appellant.

J. B. Milner, for Respondent.

BOREMAN, J., delivered the Opinion of the Court.

The Plaintiff, on the trial below, in the First District Court, in order to maintain the issue upon his part, offered as a witness, one Margaret Ann Herbal, and stated at the time, "she is the plural wife, or second wife of the Plaintiff, the first wife being now living, and residing with the Plaintiff as his wife." Defendant thereupon objected to said party being sworn as witness, and the objection being by the Court sustained, and the person excluded as a witness, the case has been brought to this Court upon that simple point.

The Territorial statute excludes the wife from testifying for or against her husband except when the action is between themselves. The exclusion applies to the lawful wife, and not to an illegal one. But is this Court to decide upon the legality or illegality of the marriage between the Plaintiff and her who is offered as a witness? By no means. The party offering her as a witness, asserts that she is his wife, and the Defendant assents thereto—so far as the case goes—and asks her exclusion under the statute excluding a wife. But it is said that she is the "plural wife" or "second wife" of the Plaintiff, and that the first wife is still living with the Plaintiff as wife. The whole admission should be taken together, yet this does not change the case. Suppose she is the "plural wife" or "second wife," and that the first wife is still living with the Plaintiff as his wife, it does not follow that the Court is going to decide that the first marriage is valid and the second one void, especially when no such case is presented. Such a case would have presented itself to the Court below, had the Plaintiff's counsel then and there disclaimed that said woman was the Plaintiff's wife, but only a mistress; yet this he did not do, but stood by his statement that she was a wife. Shall the Court go into the question whether this woman was a wife

The Plaintiff sued the Defendant in the First Distri Court, on a promissory note made by Lambson during h life time. The defendant pleaded payment by Lambs before his decease. On the trial, before the Court witho a jury, there was evidence tending to show such paymen The Plaintiff then called as a witness one Margaret A Harbel for the purpose of proving that there had been such payment, and further to establish admissions and sta ments to the same end. The counsel for the plainti when producing the witness, stated, as the bill of exceptic shows, that "she is the plural wife or second wife of t Plaintiff—the first wife being now living and residing wi the Plaintiff as his wife." The Defendant's counsel object to the witness being sworn. The Court sustained the jection, and excluded the witness from the stand and fr being sworn. The Plaintiff's counsel duly excepted to t ruling. Judgment was rendered for the Defendant for t costs. The Plaintiff appeals.

"A husband shall not be a witness, for or against, wife, nor a wife for or against, her husband; nor can eith during the marriage or afterwards, be without the cons of the other, examined as to any communication made one to the other during marriage. But this exception sl not apply to an action or proceeding by one against other." (Utah Practice Act, sec. 379.) Did the wom Harbel, come within the prohibition of this statute, and she therefore properly rejected as a witness?

The Respondent's counsel cited Divoll v. Leadbetter, Pick. 220), which was a case of trespass on the freeh The Plaintiff in that case showed that about sixteen y before the trial, the bans of matrimony between the Defe ant and the woman, Abigail, were published; that they cohabited with each other for many years; that the Abigail had had two children, of whom the Defendant the reputed father; and that the Defendant had all that he had been lawfully married to her, and had exhib a certificate of the fact in due form.

It was held that the Defendant could not avoid resp

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JAMES H. NOUNNAN, *Respondent*, v. ALEXANDER TOPONCE, *Appellant*.

SETTING ASIDE DEFAULT.—Upon a motion to set aside default and judgment, the affidavit showed that the Defendant could not read writing; that when the summons and complaint were served upon him, he consulted his friend and business partner as to what was necessary to be done, and being incorrectly informed let the case go by default; that the defendant had a good defence to the action, and produced an answer that he desired to file.

HELD.—That the default should be set aside, and the judgment vacated. (See 16 Cal. 377; 23 Cal. 128; 29 Cal. 422; 34 Cal. 72; 20 Cal. 37; 33 Cal. 323; 2 Cal. 248; 9 Cal. 130; 4 Nev. 171; 49 Cal. 101; 41 Cal. 21.)

QUERE?—Whether the objection that there was no legal or valid service of the summons upon the Defendant could be raised on appeal from the judgment, notwithstanding it was waived upon the motion to set aside the judgment, discussed but not decided. (Lyman v. Milton, 44 Cal. 631; 8 Cal. 339.)

ENTERING JUDGMENT A MINISTERIAL ACT.—In entering a judgment by default the Clerk acts ministerially and not judicially. (Gray v. Palmer, 28 Cal. 416; Wallace v. Eldridge, 27 Cal. 495; 28 Cal. 212; Wilson v. Cleaveland, 30 Cal 192; Kelly v. Van Austin, 17 Cal. 564.)

JUDGMENT IN AN ACTION FOR DAMAGES, HOW ENTERED.—Where an action sounds in tort, and the complaint does not furnish the measure of damages, but leaves the question open for proof, the Clerk of the Court cannot enter a judgment by default, and a judgment so entered is a nullity. (Hartman v. Williams, 4 Cal. 252; Touolumne Redemption Co. v. Patterson, 18 Cal. 416; Kittridge v. Stevens, 16 Cal. 381; 32 Cal. 634.)

APPEAL from the Third Judicial District.

The Respondent brought his action in the Third District Court to recover the value of his interest in a certain lot of Railroad ties, of which the Appellant and he were joint owners, alleging that Appellant had sold the ties and used the money. After due personal service, the time for answering having expired, the Respondent took judgment in the Clerk's office by default.

To set aside judgment by default and for leave to answer, the Appellant filed his motion in the Court below; which motion, after argument by Counsel and consideration by the Court, was overruled. To reverse the action of the Court below this appeal is taken.

ing it was waived upon the motion to set aside the judgment and open the default. I understand that the obligation was waived after the judgment was taken by default for want of an appearance and answer, and for the purposes of the motion to set aside the judgment and default, and for that only.

As the Appellant was not allowed to appear, there was no waiver on his part of any irregularity in the service of the summons, if there was any, by an appearance.

I have very grave doubts of there being any validity in the objection itself. And as it will make no difference in the final determination of this case what my views are in regard to this point, I decline to express any opinion in regard to it, preferring to consider it in some case, if such an one shall arise, where it is a material point in the decision of the case.

Its determination would require an examination into the whole doctrine of *de facto* officers, and I prefer that it should be after a more elaborate argument than was made in this case, upon that point.

The third assignment of error denies the right of the Clerk to enter judgment on default in vacation. I am clearly of the opinion that in cases coming under the first subdivision of section 151 of the Practice Act, and where it does not require the proof of any fact, this may be done.

It has been so held in States where the whole judicial power is conferred upon the Courts in their fundamental law, and certainly the Organic Act of the Territory can not be, in this respect, a more sacred instrument than a State Constitution. That is to say, a State Legislature is as much restrained from conferring this power upon the Clerk, under a State Constitution, conferring all judicial power upon the Courts, as the Territorial Legislature is under the Organic Act.

The weight of authority is that in doing this the Clerk acts ministerially and not judicially.

I am also clearly of the opinion, that the case made by the complaint is not one in which the Clerk would be

Marshal & Royle, for Appellants.

Rosborough & Merrit and *Hempstead & Kirkpatrick* for Respondents.

EMERSON, J., delivered the Opinion of the Court.

The Appellants in this cause aver in their complaint, that they together with one William Clark, are the owners of a mining claim, known as the Shoo Fly Lode Westerly, in Ophir Mining District in Tooele County, in this Territory, and also aver a full and complete compliance upon their part with all the laws, local rules and regulations respecting mining property, and averring and setting up a complete possessory right in themselves and said Clark.

The complaint sets out the discovery and location of said claim, and the Appellants' claim of title from the locators, but alleges that one of the deeds under which they claim, and a copy of which is filed with the complaint, is void for uncertainty and ambiguity, in not definitely stating who are the parties of the first part to that conveyance, and the contract under which that deed was given is set out in full, in order, as is alleged by Appellants, to show an equitable interest arising to them from said contract, and an agreement to convey. The complaint further avers that the Respondents have applied for a patent from the general Government, for certain mining ground and property, called by them the Mono Lode, situated in said district, and that by the survey of said Mono Lode, filed with said application, it is made to conflict with and cover certain portions of said Shoo Fly Lode Westerly, and that the Appellants, on the 31st day of December, A. D. 1872, filed in the Land Office, where said application was pending, a protest and notice of adverse claim, and were in return served by the Register of the Land Office with a notice to commence suit in some Court of competent jurisdiction, to settle said adverse claim, within thirty days from the date of filing said notice and protest. The Appel-

WILLIAM H. FOLSOM, *et al.*, *Appellants*, *v.* E. McLAUGHLIN *et al.*, *Respondents.*

PRECEDING CASE AFFIRMED.—The principle as to pleading under the code, decided in the preceding case of Houts *v.* Gisborn, *et al.*, affirmed.

APPEAL from the Third District Court.

The facts appear in the opinion.

Jonasson, Rosborough & Merritt, for Appellant.

Marshall & Royle, for Respondent.

EMERSON, J., delivered the opinion of the Court.

This case is the reverse of the one just decided. The Respondent applied to the Government for a patent to certain mining property. The Appellants are adverse claimants, and brought this suit at law to determine this adverse claim. The Respondents demurred to the complaint, and the principal ground of demurrer was that it should have been commenced upon the equity side of the Court, and was not properly a case at law.

The case was argued before me, while acting as the Judge of the Third District Court, during the temporary absence of my brother McKean.

At that time regarding these suits when they were brought by the parties in possession of the premises as proper subjects of equity jurisdiction, I followed the decision in Orchard *v.* Hughes, sustaining the demurrer and dismissing the complaint.

The reversal of the decision in the case above referred to leaves but one course to be pursued in this case, as the complaint is sufficient under the code, whether the relief sought be purely legal or statutory, or partially so, and partially equitable, or purely equitable.

Judgment of the Court below reversed, with instructions to overrule the demurrer, with leave to answer in twenty days.

McKEAN, C. J., and BOREMAN, J., concurred.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COUR

AT

THE JANUARY TERM, 1875.

J. B. McKEAN, CHIEF JUSTICE.
P. H. EMERSON, ASSOCIATE JUSTICE.
J. S. BOREMAN, ASSOCIATE JUSTICE.

LEWIS BURNES, *Appellant, v.* JOHN K. CRANE, *et*
Respondents.

STATUTE OF LIMITATIONS RAISED BY DEMURRER.—The defense the Statute of Limitations may be taken advantage of by murrer. (25 Cal. 89; 28 Cal, 106; 19 Cal. 476; 18 Cal. 67; 12 (811; 23 Cal. 16.)

Lex Fori—It is a well settled rule of law that in respect to Statute of Limitations, that all suits must be brought wit the period prescribed by the local laws of the country where suit is brought, and this rule applies to contracts made beyonc political jurisdiction.

WHEN THE STATUTE RUNS IN FAVOR OF NON-RESIDENTS.—Un our Statute of Limitations, where the parties to a contract s upon were non-residents of the Territory at the time the contr was made, or when the cause of action accrued upon the sa but moved here after it accrued, the Statute does not begin to against the cause of action until the parties come into the ritory.

CONSTRUCTION OF WORDS "DEPART" AND "RETURN."—The wc "depart" and "return" used in our Statute, apply as well persons coming from abroad as to citizens of the Territory go abroad for a temporary purpose, and then returning.

APPEAL from the Third District Court.

The facts appear in the opinion of the Court.

W. C. Hall, for Appellant, made the following points:

The intent of our Statute of Limitations plainly expressed, is that every creditor shall have four full years to sue in the Courts of this Territory, and that he shall not lose his demand except by such an omission as the Law deems voluntary, or negligent. (Utah Statute Limitations, Sec. 15 and 23; Sec. 506, Utah Practice Act; 5th Nev. R. 73; 20th N. Y. Ap. 223; 16 Cal. 95; 3 Foster R. 384, 6; 4 Gill Ill. R. 125; 24 Conn. R. 432; 15 Mo.)

The 15th Section of the Limitation Act viewed in connection with the saving clause (23rd Sec.), clearly evinces an intention to except every case where the creditor is prevented from suing by the absence of the debtor from the Territory.

The expression "he is out of the Territory," and "resides out of the Territory," and "the time of his absence," have the same meaning; they are correlative expressions. So that while the Defendants were not residents of this Territory they were out of same, or non-residents thereof, and accordingly until they became residents, the suspension of the operation of the Statute continued. (5 Denio 535; 26 Barb. 215; 14 Pet. U. S. 141.)

A person being at a place is *prima facie* evidence that he is domiciled there. (4th Barb. 519.)

J. C. Hemingray, for Respondent.

No points on file.

EMERSON, J., delivered the opinion of the Court.

This suit was brought on the 2d day of May, 1874, upon a replevin bond, executed in the State of Kansas, and upon which a cause of action accrued on the 6th day of May, 1869.

The respondents were not residents of this Territory,

did not. And that, under our Statute, when the parties to a contract sued upon were not residents of this Territory at the time the contract was made, or when the cause of action accrued upon it, and the party against whom the action is brought has moved here after it accrued, the Statute of Limitations does not begin to run against the cause of action until he comes to the Territory.

It was argued, that, by the words "return" and "depart" used in the Act, it is evident the Legislature intended to confine the exception to the inhabitants of the Territory.

We are of the opinion that the exception comprehends all persons who are without the Territory, and that the Statute will not begin to run until the Defendant is subject to process here. In other words, the Statute never runs in favor of non-residents. In this we are supported by an abundance of authorities, among which are the following: Dwight, admr. &c., *v.* Clark, 7 Mass. 515; Tagart, admr. &c., *v.* The State of Indiana, 15 Mo. 209; Carpenter *et al.*, *v.* Wells *et al.*, 21 Barb. 593; Robinson *v.* Imperial Silver Mining Co., 5 Nev. 44; Bonifant *v.* Doniphan & Walker, 3 Kan. 26. In Palmer *v.* Shaw, 16 Cal. 96, the Supreme Court of California says: "It has been uniformly held, in the construction of Statutes similar to ours, that the word *return* applies as well to persons coming from abroad, as to citizens of the country going abroad for a temporary purpose and then returning."

Our Statute of Limitations, then, does not, from the facts admitted by the demurrer, afford the Respondents a bar to the Appellants' action. Sufficient time had not elapsed since the Respondents came to this Territory. It is clear, therefore, that the Court below erred in sustaining the demurrer and giving the Respondent judgment.

The judgment is reversed, and the Court below is directed to overrule the demurrer.

McKEAN, C. J., and BOREMAN, J., concurred.

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This was not a civil action to recover a penalty or forfeiture. The proceeding was by complaint and warrant of arrest, and was in its character so far criminal as to require that they should be governed by the law regulating the practice in criminal cases.

The appeal was taken by simply giving notice of appeal and a deposit of money in accordance with the provisions of the Practice Act regulating appeals from Justice's Courts in civil cases. The affidavit required in appeals from Justice's Courts in criminal cases was not filed. It was necessary that this should be done to give the Appellate Court jurisdiction.

The Act of Congress known as the Poland Bill does not change the mode and manner of taking appeals, either in civil or criminal cases. It simply changes the forum to which the appeal must be taken.

The judgment of the Court below is reversed, with instructions to dismiss the appeal.

McKean, C. J., and Boreman, J., concurred.

HENRY THOMAS AND WIFE, *Appellants*, *v.* THE UNION PACIFIC R. R. CO., *Respondent.*

Appeal from Order Sustaining Demurrer.—No appeal lies from an order of the District Court sustaining a demurrer.

Appeal from the District Court of the Third Judicial District.

Motion in the Supreme Court to dismiss the appeal.

The facts appear in the Opinion.

J. C. Hemingray, for Appellants.

Hempstead & Kirkpatrick, for Respondent.

Boreman, J., delivered the Opinion of the Court.

en delayed by the amendment. Nor would it
ked any injustice to the Plaintiff. The an
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the Court below, upon the ground that it did not
meritorious defense.

the whole case then we consider that it was ext
discretion of the Court too far to refuse the
eave to file his answer with the amended veri
e judgment of the Court below is there
d the cause remanded, to be proceeded wit
urt, in accordance with this Opinion.

. Being satisfied that I committed an
elow, I cheerfully concur in reversing

Appellant, v. HENRY W. WILS
et al., Respondents.

DEFENDANT.—Plaintiff in an actic
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to the Defendants by various parties. He asked for title and other relief. Defendants demurred to the bill and demurrer was sustained and bill dismissed. The bill shows that the Appellant applied to the Probate Court for title to this land, at one time in connection with other lands, and title was denied him, because the ground was used as a public road. That when the road was removed he took possession, and intended to apply to the Probate Court for title, but never did so. He was ousted of the possession of the various parts of the land by the various Defendants, who claimed separate and distinct portions. Various parties made deeds to the Defendants, and they do not appear to have received title from the same source; and in fact it is not asserted in the cases of some of these Defendants at least that they ever applied to the Probate Court for title, or that they now or ever did have title from the source required by statute. It appears that the interests of the Defendants are totally distinct, each party having claimed separate parts of the land. This is sufficient to dispose of the case, for the Defendants having totally distinct claims, and having title from no common source, cannot in such a case as this, be joined in the same proceedings. It does not become necessary, therefore, to consider whether a party have a right to come into equity, when barred by the statute of limitations, and when alleged equities exist. The judgment of the Court below is affirmed.

McKEAN, C. J., and EMERSON, J., concurred.

ERNEST GREENFIELD AND PHILIP STRAUSS, *Respondents, v.* H. WALLACE, *Appellant.*

CORRECTING THE NAME OF A PLAINTIFF.—Plaintiffs moved in the Court below to strike out the name of "Greenwood" and insert the name of "Greenfield" in the complaint. *Held*, That the Court below may permit the complaint to be amended by the substitution of the true name of Plaintiff.

Held Further.—That such amendment was merely the correcti
a clerical error, and not the addition of a new party Plaintiff
Cal. 412; 9 Cal. 56; 13 Cal. 558; 1 Cal. 192; 1 Cal. 175.)

MOTION PENDING, DOES NOT OF ITSELF PREVENT DEFAULT.—
pending of a motion of Defendant to set aside "the ame
complaint," does not prevent Plaintiff from taking judgme
default, for failure to file answer The Defendant should in
case obtain a stay of proceedings, if he desires to pr
ault.

L from the Third District Court.

ts are stated in the opinion of the Court.

urmester, for Appellant.

Royle, for Respondents.

delivered the opinion of the Court.

nstituted in the name of Greenwood
Greenfield and Strauss. The sum
l the Defendant appeared and fil
plaint, which was by the Court
t then filed his answer denying
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HENRY J. FAUST, *Appellant,* IN THE MATTER OF APPLICATION OF ALBINA M. WILLIAMS, CAROL M. KIMBALL, AND OTHERS, FOR A DEED TO A TION OF A CITY LOT, UNDER THE "TOWNSITE A *Respondents.*

APPLICATION FOR A DEED UNDER THE "TOWNSITE ACT" C AMENDED.—An applicant for a deed under the "Townsite has the right to amend his application, so as to change the ber of the lot applied for. Such amendment, although mor one year after the first publication of the notice as provide in said Act, is within time.

ORDER REFUSING TO DISMISS APPEAL NOT APPEALABLE appeal lies from an order allowing an amendment to a ple Neither does an appeal lie from an order of the District refusing to dismiss an appeal from the Probate Court.

APPEAL from the Third District Court.

The facts are stated in the opinion of the Court.

Williams, Young & Sheeks, for Appellant.

McCurdy & Morgan, and *Robertson & McBride,* Respondents.

EMERSON, J., delivered the opinion of the Court.

The Respondents filed an application in the Pr Court, under what is known as the "Townsite Act," deed to a portion of a lot in the City of Salt Lake. the hearing in the Probate Court, the Respondents d ered that there was a clerical error in their applicatio the number of the block, in which the property they ac applied for is situated. They then filed an affidavit sh that the number of the block should have been stat 57, and that by error it was put down as 37. They upon moved to amend their application in this regard

Appellant, who was an applicant for a deed to the which would be included in the description in the am complaint, resisted this motion to amend, and it was d by the Probate Court. It is stipulated in the record th motion to amend was made more than one year from th publication of the notice required by said Act.

$20. *Third*—From the order of the Court made on the 6th of April refusing to quash and set aside the execution. *Fourth*—from the order refusing to retax costs. *Fifth*—from the order of the Court refusing the relief asked by Defendant; from the judgment and other proceedings.

The Plaintiff appeals from the order of the Court vacating the judgment opening the default, and allowing the defendant to answer on terms; also from the order of the Court refusing to strike from the files a certain affidavit, and in refusing to expunge scandalous and impertinent matters from other affidavits filed by Defendant; and from the order refusing to allow the Plaintiff to file and read certain affidavits offered by him.

The Defendant's appeal from the judgment must be dismissed. There was no judgment to appeal from. The order of the Court vacating the judgment and opening the default was absolute, and effectually disposed of the only judgment that was ever entered in this case. The only condition that was attached to the order was in reference to the Defendant's leave to file an answer. Leave was given to file that within five days upon payment of twenty dollars as costs upon the motion; if this was not done the Plaintiff could again take judgment. The order does not seem to contemplate that the judgment and default which were then the subject of consideration, were to remain in force and effect, but they were absolutely annulled by the terms of the order, and upon the failure of the Defendant to comply with the terms imposed upon it by the latter part of the order the Plaintiff was to "have judgment." Upon proof of such failure upon the part of the Defendant, the Plaintiff should have taken a default, and had a judgment entered against it. This was not done, and the parties have proceeded under the mistaken idea that there was a judgment still standing in the case.

The Defendant paid the twenty-five dollars to the Clerk of the Court below, and filed an answer within the time limited in the order, and tendered a copy to the Plaintiff's attorney, who did not receive it. The answer is

still on file. We think, in view of the peculiar wording of the order, that the payment of the money to the Clerk of the Court was a substantial compliance with its terms in reference to the payment of the costs of the motion, and especially as the Clerk informed the Plaintiff's attorney that it had been paid to him, and that he held it subject to his, the attorney's orders. The answer then was in time, and at the time the subsequent proceedings were had, and the appeals taken, the case stood in the Courts below upon complaint and answer.

The appeals from the orders of the Court in fixing the terms upon which the judgment was vacated, and default opened, and in refusing to retax the costs of the motion are not appealable orders. They are many interlocutory orders made in the progress of the case. The Court had a right to fix the terms upon which it would allow the Defendant to answer, upon vacating the judgment and opening the default, and in addition to the terms fixed in the motion the Court should have required the Defendant to pay all the costs in the case up to that time. But if there was any error in this it is not such error as the Defendant can take advantage of, even if he could appeal from the orders, as it was to his benefit. A judgment or order will not be reviewed in this Court for an error favorable to the Appellant.

An appeal does not lie from an order on a motion to retax costs, such an order can only be reviewed by an appeal from the judgment and annexing a statement to the judgment roll.

The other motions from the orders made upon which the Defendant appeals were properly overruled. The motions themselves were made upon the false supposition that they were motions made after judgment, and were appealed from as such, when in fact there was no judgment to base them upon, or to which they could refer.

The first appeal of the Plaintiff is from an order which is not appealable. An order of the Court vacating a judgment and opening a default, can be examined in this Court

APPEAL from the Third District Court.

The appellant was indicted for forging and uttering a promissory note for $400.00, in the name of one Hugh White, with intent to defraud, &c. He was tried and convicted in the Third District Court, in December last. He appeals to this Court. The facts are sufficiently set forth in the opinion of the Court.

J. H. McCutchen, for the Appellant.

Wm. Carey, U. S. Attorney, for the People.

McKEAN, C. J., delivered the opinion of the Court.

At the trial in the District Court, one Haynes was called as a witness on the part of the people, and testified that he was the business clerk of Hugh White, and that he knew the handwriting and signature of White. The witness was then shown the promissory note alleged to have been forged, and was asked, by the public prosecutor, if the signature thereto was Hugh White's.

The Defendant's counsel objected to the question. The Court overruled the objection, the Defendant excepted, and the witness answered, "No, it is not Hugh White's signature." This ruling is claimed by the Appellant to have been erroneous.

Without pausing to inquire whether the grounds of objection should have been stated, let us consider the argument now urged by the Appellant's Counsel, that White, and not his clerk, was the only competent witness, under the circumstances, to prove that the signature to the note was spurious.

In Usher's case; Captain Smith's case; Akehurst's case, and Dr. Dodd's case (2 East's Pleas of the Crown, 999 to 1003), the doctrine laid down would have excluded White as a witness herein, because he would have had an interest in the question of the genuineness of the note. But this Court does not so hold. The question is, however, was the testimony of Haynes improperly admitted.

In Jackson v. Phillips (9 Cow. 112), the Court sa
"The deed from Barnes to Fowler being properly in
dence and showing a title out of the lessors, they ha
right to show that the deed was a forgery by proper testimo
and they contended that Barnes' account book was pro
for that purpose, by way of comparison of handwriti
The rule is settled in England, and I believe in this St
that comparison of hands by juxtaposition of two writi
in order to ascertain whether both were written by the s
person, is inadmissible."

In Titford v. Knott, (2 John Cas. 211) Kent, J., s
"If the witness has no previous knowledge of the hand
cannot be permitted to decide it in Court from a compar
of hands." But this doctrine has no application to
case. Haynes testified solely from his knowledge of Wh
hand, and made no comparison of different specimens
w iting. In the case last cited, Justice Kent says:
is usual for witnesses to prove handwriting from prev
knowledge of the hand, derived from having seen the
son write, or from authenticated papers received in
course of business." This is precisely what Haynes

"The proof that the writing is false and counte
may be made by the evidence of any person acquai
with the handwriting of the party whose autograph i
pretended to be." (3 Greenleaf on Ev. sec. 106.)

"And it is now well settled, that the person whose
nature or handwriting is said to be forged, is a compe
witness in a criminal trial, to prove the forgery; but
is not an indispensable witness, his testimony not being
best evidence which the nature of the case admits, the
it is as good as any, and might, in most cases, be r
satisfactory than any other." (Ibid.)

"In the Scotch law, the oath of the party whose signa
is said to be forged, is considered the best evidence of
forgery. Other evidence is estimated in the following or
1, That of persons acquainted with his handwriting,
who have seen him write; 2, that of persons who

corresponded with him, without having seen him write; 3, a *comparatio literatum* with his genuine writing; 4, that of experts, or persons accustomed to compare the similitude of writing. See Allison's Crim. Law of Scotland, Ch. 15, Sec. 24, p. 412. But in England and the United States, in those different kinds of evidence there is no legal preference of one before another, however differently they may be valued by the jury." (Greenleaf on Ev. Vol. I, Secs. 84, 576, 581, and Vol. III, Sec. 106, and notes. See Commonwealth *v.* Smith, 7 Serg. & Rawle, 570-1.) The testimony of Haynes was properly admitted.

At the trial in the Court below, Eugene Lasselles, a member of the Bar, was called as a witness on the part of the people, and the public prosecutor offered to prove by him, that before the note in question was made, the Defendant went to the witness and asked him what would be the effect of making a note and signing another man's name to it to raise some money, and proposed to do so. The witness stated to the Court that what knowledge he had was obtained professionally, and asked to be excused from answering. The Defendant's Counsel objected that the communication sought to be proved was privileged, and could not be disclosed. The objection was overruled, and the witness directed to answer. The Defendant's Counsel excepted. The witness then testified in substance to the facts as stated in Mr. Carey's office; and further, that the Defendant consulted him as to the legal effect of making a note or check in some good man's name, and that he advised the Defendant not to do it, as it would be forgery and contrary to law. It is insisted that the admission of this testimony was contrary to law.

In Chirac *v.* Reinicker (11 Wheat. 294; 6 Curtis 596), the National Supreme Court says: "The general rule is not disputed, that confidential communications between client and Attorney are not to be revealed at any time. The privilege, indeed, is not that of the Attorney, but of the client; and it is indispensable for the purpose of pri-

and we are of opinion, both upon principle and authority that on both points the District Court ruled correctly.

The judgment is affirmed.

BOREMAN and EMERSON, J. J., concurred.

Bennett & Whitney, for Respondent.

BOREMAN, J., delivered the Opinion of the Court.

The Appellants executed a mortgage to Respondent upon certain land in Salt Lake City. The note, secured by the the mortgage having become due, the Respondent entered suit to foreclose the mortgage. The subpœna in Chancery sued out was served upon the Defendants by the United States Marshal. The Defendants (Appellants) did not appear in the action, and a decree of foreclosure was duly rendered on the 10th day of September, A. D. 1873. The property was sold under the decree, and the Respondent became the purchaser and received his deed.

The Appellants refused to deliver possession, upon demand, and on application to the District Court, a writ of assistance was granted, the Appellants appearing at the time and objecting.

It is from the order of the Court granting the writ of assistance that this appeal is brought.

Appellants assign as an objection to said order, that the Court did not have jurisdiction of the persons of the Defendants (Appellants) in the foreclosure suit.

The service of process by the United States Marshal was not good. It should have been made as prescribed in the Civil Practice Act, Sec. 28. The Act of Congress authorizing the United States Marshal to execute such process was not passed until after that time. The Court had not, therefore, acquired jurisdiction of the parties and its proceedings, so far as the Appellants were concerned, was void. The order of the District Court granting the writ of assistance is reversed.

EMERSON, J., concurs.

LOWE, C. J., not participating, the cause having been submitted at a former term.

In re GEORGE C. BATES, FOR A WRIT OF *Certio*

WHEN CERTIORARI WILL BE GRANTED.—An application to r proceedings in a lower Court by *Certiorari* when there w judgment or final determination in such Court is premature will be denied.

APPLICATION for writ of *Certiorari.*

G. C. Bates, in person.

EMERSON, J., delivered the Opinion of the Court.

This is a petition in this Court for a writ of *certi* to the Second District Court.

The petition sets forth certain proceedings, in the c of which an order was entered against the petiti requiring him to show cause, at a time fixed, why he sl not be punished for contempt. When the matter cam on filing an answer to the rule, upon his application hearing was continued until the next term of the C and now pending that continuance he asks this Court writ of *certiorari* to remove the cause here.

We are satisfied the application is premature. The no judgment or final determination of the case. It ca be claimed that there is any lack of jurisdiction in Second District Court over the subject matter, and that Court acts in the matter we cannot tell wheth "has regularly pursued the authority of such tribun not." When that Court comes to act upon the case may be nothing in its action of which this petitioner complain, or would desire to have changed.

The petition states that a suggestion from the jud the Second District is one of the reasons why he in the action of this Court at this time. And although Associate who is the judge of that District waive objection to our reviewing the case, yet we are sat that it is our duty to refuse the writ. The petiti denied.

LOWE, C. J., concurs.

BOREMAN, J., did not participate in the deliber upon this case.

CORA CONWAY, *Respondent, v.* JETER CLINTON, *et*
Appellants.

CHALLENGE FOR CAUSE HOW WAIVED.—A Defendant who i
poses a challenge to a juror for *cause*, which is denied,
subsequently peremptorily challenges the same party, is not p
diced by the ruling of the Court.

QUALIFICATION AS JUROR MUST EXIST WHEN THE PERSO
OFFERED.—The provision of the Territorial statute that a pe
shall not serve as a petit juror unless he is the owner of tax
property is express and cannot be disregarded. The qualifica
must exist at the time he is offered as a juror, and it does
satisfy the statute that he possessed the qualification when
jury list was prepared.

POLAND BILL NOT EXCLUSIVE AS TO QUALIFICATIONS OF JUR
—The Poland Bill does not profess to prescribe *all* the quali
tions of jurors in this Territory, and it supercedes and con
the Territorial laws only so far as it prescribes a new quali
tion of the same kind as embraced in the Territorial law.

WHEN JUROR SHOULD BE EXCLUDED —A juror who has forme
unqualified opinion as to the merits of a case, and states th
would require evidence to remove such opinion, should
a challenge be excluded from the jury.

BASIS OF JUROBS' OPINION NOT MATERIAL.—It is not material
what the opinions of the juror are founded, whether upon ru
or fact, for it is the unbiased state of mind that is requisite.

ERROR ONCE SHOWN, HOW REMOVED.—When error appears i
record, to avoid its effect, resort cannot be had to presump
but it can only be removed by matter affirmatively shown b
record.

WHEN WITNESS NOT BOUND TO ANSWER QUESTION.—A witne
not bound to answer, nor is a Court to compel an answer t
inquiry to disgrace a witness unless the evidence is materia
the issue being tried.

INQUIRY AS TO MOTIVE OF WITNESS WHEN MADE.—When
motive of a witness in performing a particular act or maki
particular declaration becomes a material issue in a cause
may be permitted to testify in regard to it.

INCONSISTENT DEFENSES, HOW OBJECTED TO.—If inconsistent
fenses are set up in an answer, advantage of it must be take
motion or demurrer, otherwise the defect is waived, and
the trial the party may rely upon such defenses.

INSUFFICIENT DENIAL RAISES NO ISSUE.—Under our rules of pl
ing a denial of the exact sum claimed by Plaintiff, or if dam
in the precise amount alleged, is insufficient and raises no is

PROPERTY NOT AFFECTED BY THE CRIMES OF THE OWNER.—
private household goods of a criminal cannot be deemed t

affected by the crimes and misconduct of the owner, and such property cannot be destroyed or taken, except by due process of law.

APPEAL from the Third District Court.

The facts necessary to explain the decision of the case appear in the Opinion.

Sutherland & Bates, for Appellants.

Robertson & McBride, for Respondent.

LOWE, C. J., delivered the Opinion of the Court. BOREMAN, J., dissenting.

The Plaintiff sued the Defendants above named and three others for the malicious destruction of goods and chattels, and verdict and judgment were rendered for Plaintiff against the above named Defendants, who appeal.

The challenge by the Defendants to the array of the petit jury was properly overruled. For aught that appears the list from which they were drawn was constituted in accordance with law.

In the impaneling of the jury Geo. W. Scott was challenged for cause by the Defendants, and the challenge denied, which is assigned as error. It appears, however, that he was subsequently challenged peremptorily by the same party, and was not sworn as a juror. Whether, therefore, the challenge was properly denied or not, as he did not serve as a juror, the Defendant was not prejudiced by the ruling, and the assignment of error cannot be sustained. (Mimms *v.* The State—Ohio State Reports 221.)

On the examination of Orlando Crowell, a juror, he testified upon his *voir dire* that he was not the owner of taxable property at that time; that he was the owner of taxable property at the time of making the jury list in the preceding August, but had not paid taxes, and did not know that he was assessed. The defendant challenged for cause which was denied. The 163d section of the Practice Act provides that challenges for cause may be taken on the following grounds:

"1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror." By

section 4th of the Act of January 21st, 1859, it is provi that "A person is not eligible to serve, and therefore s not serve on any grand or petit jury unless * * * o taxable property and pays taxes in this Territory." provision that a person shall not serve as a petit ju unless he is the owner of taxable property is express cannot be disregarded. The qualification must exist at time he is offered, and it does not satisfy the stat that he had the qualification when the jury list was pared. The necessity of this qualification is not obvis by the Act of Congress of June 23d, 1874. That Act not profess to prescribe all the qualifications of jurors this Territory, but only prescribes the qualifications of th who shall be placed on the general list from which ju are drawn. It provides that the officers who prepare list shall "alternately select the name of a male citizen the United States and who has resided in the district the period of six months next preceding, and who can r and write the English language." Jurors must there have the qualifications thus indicated, but they are exclusive of other qualifications. If the statute were to regarded in defining all the requisite qualifications of jur it would result in allowing jurors to serve who are in c sanguinity with parties; who are debtor or creditor to parties, or in relation of guardian or ward, or had forr or expressed opinions, or who had been convicted of infamous crime—all of which are subjects of challenge express Territorial statute. This cannot for a moment admitted to be the intent or effect of the Act. So far the Act of Congress prescribes a new qualification or so as it covers and embraces a qualification of the same k as any contained in the Territorial laws, it supercedes controls the latter. Thus it adds a new qualification t the juror must be able to read and write the English l guage, and it authorizes a juror who has been a resid of six months, thus superceding the twelve months' qualif tion of the Territorial Act; but the subject of ownership taxable property is not embraced in the Act, and nothing

the Act is inconsistent with the Territorial law on that subject, and the latter must be held to be in force. It results that the Court erred in denying the challenge of Mr. Crowell.

Mr. James Lowe was also called as a juror, and being examined as to his qualifications, testified as follows:

Plaintiff—Do you know anything about this case? A. I do; I have heard it spoken of.

Q. From what you have heard, have you formed or expressed an unqualified opinion? A. I have.

Q. Did you hear what purported to be the facts? A. No, I have not; I don't know anything about it only what was spoken of on the streets, and read about in the papers.

Q. Then the opinion you formed is an opinion based upon that rumor? A. Yes, sir.

Q. Do you say that that opinion is an unqualified one? A. It is qualified by what I have heard.

Q. Have you any bias or prejudice for or against either of the parties? A. No, sir.

Q. Is there anything to prevent you from rendering an impartial verdict? No, sir.

Q. Have you any business relations with either of the parties? A. I guess not; I don't know of any.

Q. You reside in town? A. Yes, sir.

Q. Did you in August 1872? A. Yes, sir.

Q. You think you could render an impartial verdict? A. I could from the testimony.

Q. What did I understand you to say in reply, in regard to an unqualified opinion? A. At the time when I heard of the case I formed an opinion; it was only based on the rumors.

Passed by plaintiff.

Defendants—I understood you, Mr. Lowe, that at the time you heard the rumors you had formed an opinion? A. Yes, sir.

Q. And at that time it was an unqualified opinion? A. Yes, sir.

Q. Then it would take evidence to remove that opinion?

act complained of in this case at No. 41 Commercial street, when you went to execute the writ now in your hands." Also, "State whether at that time you had any ill-will against the plaintiff." To these questions the plaintiff objected, and the Court sustained the objection. One of the issues of the case was the malice of the defendants. The witness, as defendant, was charged with maliciously and wantonly destroying the goods of the Plaintiff. It was incumbent upon the plaintiff to prove, and the right of the defendant to disprove, that the acts were done maliciously. Where the motive of a party is thus in issue, he may testify to it himself. If he should say his motives were malicious, it would properly inure to the advantage of the plaintiff, and it is none the less competent for him to disclaim the malice. Doubtless, a witness in thus speaking of his own motives may state as a fact that which no other witness can directly and categorically deny, but the weight of the testimony is for the jury to determine. This question has been directly so decided in New York and Ohio. McKown v. Hunter, 30 N. Y. 625; White v. Tucker, 16 O. State, 468. In the former case Hoogboom, J., giving the opinion of the Court of Appeals, and speaking of several cases previously decided embracing the same principle, says: "These cases go very far to establish the general principle that where the motion of a witness in performing a particular act or making a particular declaration becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness." We are of the opinion that the questions were proper and that they should have been allowed.

It appears from the record that the Court charged the jury, "that the defendants, Jeter Clinton, John D. T. McAllister, Wm. Hyde and Charles Crowe have admitted by their answers in this case that they destroyed the property of the Plaintiff, and in order to escape liability therefor

they must show that their acts in destroying were lawful," and this is assigned for error. No such express admission is found in any of the answers. Upon inspection of the answer of Jeter Clinton we find this denial: "He, this Defendant, further denies that he, this Defendant, on the 29th day of August, 1872, or at any other time, at No. 17, Commercial street, in Salt Lake City, in said county and Territory, or at any other place, wantonly or maliciously or otherwise, destroyed or took and carried away the personal goods of the Plaintiff described in the complaint, or any part thereof." Similar language is used in denying that he employed or assisted the other Defendants to do the acts complained of. This denial is full and explicit, and surely puts in issue the averments of the complaint to which they were directed. It is probable, however, that the instruction was asked and given upon the theory that the matter attempted to be set up by way of justification, and avoidance was inconsistent with the denials, and should be regarded as an admission of the destruction of the property. But this theory is untenable. If inconsistent defenses are set up in answer, advantage of it must be taken by motion or demurrer, otherwise the defect is waived, and at the trial the party may rely upon both defenses. See Klink v. Cohen, 13 Cal. 623; and Uridias v. Morrell, 25 Cal. 21, where this point is directly ruled. Also Bell v. Brown, 22 Cal. 671; and Stiles v. Comstock, 9 Howard 48. The instruction was erroneous.

The defendant asked this instruction: "The pleadings contain no admission of the value of the property in question, and there can be no recovery in any event beyond the amount of damages actually proved," which instruction was refused and the refusal is assigned for error. An examination of the answers shows that the denials of value were simply a denial of the value alleged, $6,457, without any words of denial as to any less value, excepting that the value of a diamond ring was specifically put in issue. Under rules of pleading like our own it is held by the Supreme Court of California that a denial

of value, or of damage in the precise amount alleged without more, raises no issue. Houston *v.* F. & C. C. T. R. Co., 45 Cal. 550; Higgins *v.* Mortel, 18 Cal. 330; Patterson *v.* Ely, 19 Cal 28. The case of Houston *v.* T. & C. C. T. R. Co. was an action of tort in which damages were alleged in eight hundred dollars, and the Defendants denied in these words: "They deny that Plaintiff has suffered damages in the sum of eight hundred dollars." No proof of damages was given, and the Plaintiff had judgment for $800. On an appeal the Supreme Court said: "No proof of damages was required as no issue was made on that point. A denial that the Plaintiff has suffered damage, in the exact sum claimed by him, is insufficient." There was no error in refusing the instruction.

The instruction of the Court to the effect that the warrant issued by Clinton to McAllister was no justification for the destruction of the property, was correct. The supposed writ was void on its face. It directed the destruction of property which was not authorized by any valid law or ordinance. The declaration of *magna charta* incorporated as part of the fundamental law of the land by the Sixth Article of Amendment to the Constitution, that "No person shall be deprived of life, liberty or property without due process of law," was clearly violated. Saying nothing of the right under proper statutes and due modes of adjudication to destroy the immediate instruments and devices of gambling, the private household goods of a criminal cannot be deemed to be affected by the crimes or misconduct of their owner, and criminals as well as honest men are entitled to the protection of the law in their rights of person and property.

It is suggested that the Defendants cannot have been prejudiced by the errors referred to, and therefore the verdict should not be disturbed; but we do not know and cannot ascertain from the record that the errors are not prejudicial, for the record nowhere shows that the evidence contained in the statement was all the evidence introduced in the trial. When error intervenes, it follows that there is

prejudice, unless the contrary is also shown from the record.

We have thus adverted to those questions presented by the record most likely to be of importance on a retrial of the cause; and for the errors referred to, the judgment is reversed, the verdict set aside, and the cause remanded for trial *de novo.*

Dissenting Opinion.

Boreman, J., delivered the following opinion, dissenting from a majority of the Court:

In the opinion just read, it is held that the Court below committed four errors, for which its judgment should be reversed.

Two of the errors have reference to challenges to jurymen Crowell and Lowe. The challenge of Lowe was not in my opinion good, and the Court committed no error in overruling it. The juryman had no opinion, and not such opinion as he or any one would act upon in the usual affairs of life. People *v.* Reynolds, 16 Cal. 128. The other challenge (the one to Crowell) may be good. But if we consider both of these challenges good yet the Defendants waived all their objections to these jurymen by not trying to get clear of them by peremptory challenge. The record does not show that Appellants had exhausted their peremptory challenges, and until they do this they have no right to complain. Graham & Waterman on New Trials, p. 468. Whitaker *v.* Carter, 4 Iredell 461. See also Fish *v.* The State, 6 Mo. 426. This is a civil action, and a party may waive more than in a criminal case.

A third error is said to be the refusal of the Court below to allow witness, Hyde, to be asked in reference to whether he had any malice in destroying the property. I cannot see that this refusal was improper. Hyde had admitted that he had done the acts complained of, then if such acts of destruction be not lawful, the law conclu-

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abate said house—and "that the wrongs and injuries herein justified are the same wrongs and injuries complained of by the plaintiff." These are in my mind express admissions. Here, then, we find inconsistent positions taken in the cause of defense. Both positions taken by Defendants cannot be true, and a pleading should always be taken most strongly against the pleader. This is a long settled rule.

Upon the whole case, therefore, for the reasons given above, I am unable to unite with the majority of the Court in reversing the judgment of the Court below.

THE UNITED STATES, *Respondents*, *v.* GEORGE REYNOLDS, *Appellant.*

(See Same Case, Post.)

RELIGIOUS CONVICTIONS CANNOT EXCUSE CRIME.—On the trial of Defendant for the crime of Polygamy, evidence was offered by him to show that polygamous marriage was a part of his religion; *held*, such evidence not admissible and has no foundation for its admission in either justice, reason or law.

NUMBER OF PERSONS CONSTITUTING A GRAND JURY.—The Act of Congress commonly called the "Poland Bill," does not fix the *number* of persons that shall constitute a Grand Jury. Nor does it by express terms or by implication repeal the existing Territorial laws fixing the number of persons that shall constitute the Grand and Petit juries in the District Courts. (See 13 Wallace 434), also (People *v.* Green, Ante 11.)

LAWS NOT INCONSISTENT.—A law which declares that the number necessary to constitute a Grand Jury, is not inconsistent with a law which provides the mode of procuring the number out of which to compose the jury.

NUMBER REQUISITE FOR A GRAND JURY.—Under the "Poland Bill" and the existing Territorial laws, a Grand Jury must be composed of fifteen members.

JUROR WHEN INCOMPETENT FROM CONSCIENTIOUS SCRUPLES.—A person who has conscientious scruples against indicting persons for the crime of polygamy, is wholly incompetent to serve as a Grand Juror in the investigation of such charge. The same rule applies to his competency to sit upon a petit jury.

COURT CAN SUMMON ADDITIONAL JURORS.—If from any cause the jurors summoned prior to the term do not appear, the Court is

jury is to be drawn for any term the judge of the District Court shall give public notice thereof, and shall preside at the drawing; and that the Clerk shall put the two hundred names on separate slips of paper and place them in a covered box and thoroughly mix and mingle them, and that thereupon the United States Marshal shall draw from the "box such number of names as may have previously been directed by said judge," the Grand Jury to be drawn first; that a venire shall issue and the persons whose names are thus drawn shall be duly summoned before the term of Court; and that "the jurors so drawn and summoned shall constitute the regular Grand and Petit juries for the term for all cases." It was under this Act that the Grand Jury which found the indictment was procured.

Let us, then, first consider how the law stood at the passage of this Act. In the well-known case of Clinton *v.* Engelbrecht (13 Wallace), the Supreme Court of the United States, after referring to the power of the Legislature as extending to rightful subjects of legislation, say, "The method of procuring jurors, for the trial of cases is * * a rightful subject of legislation, and the whole matter of selecting, impaneling and summoning juries is left to the Territorial legislature;" and further that "the action of the Legislatures of all Territories has been in conformity with this construction; and still further, in another part of the opinion, "that the whole subject matter of jurors in the Territories is committed to Territorial regulation."

The general jury laws of the United States are not by express words made applicable to the Territorial Courts, and if they are to be considered applicable thereto, it can only be so upon the theory that these Territorial District Courts are United States Courts. In the case of Clinton *v.* Engelbrecht referred to, Chief Justice Chase, in speaking of such a theory and of the action of the Territorial District Court in selecting juries under the United States jury laws, said, "We are of the opinion that the Court erred, both in its theory and in its action;" and in speaking, in the same case, of the Judiciary Act of 1789, he says, "The regulations of

that Act in regard to the selection of jurors have no reference whatever to Territories. They were framed with reference to the States, and cannot without violence to the rules of construction be made to apply to Territories of the United States. For similar reasons no Act of Congress respecting juries in United States Courts, enacted subsequent to the Act of 1789, could be made to apply to the Territorial Courts, unless by some express provision to that effect. It is not shown, nor do we believe that it is claimed, that any such provision exists."

The position of the Supreme Court of the United States, so broadly laid down, as before stated, is as we conceive, well supported by the reasoning of the same Court in the subsequent case of Hornbuckle *v.* Toombs (18 Wall).

When the Act of Congress, termed the "Poland Bill," was passed, the Territorlal jury laws and the United States jury laws were the same as when these decisions of the Supreme Court of the United States were rendered. We cannot, therefore, in the face of the opinion of the highest tribunal of the nation to the contrary, say that, at the passage of the Act of Congress referred to, the general jury laws of the United States were applicable to Territorial Courts. The question then arises, did this Act of Congress change the rule? It certainly changed the rule so far as the two acts are inconsistent. It cannot be said that that Act, however, fixes the number necessary to constitute a Grand Jury. If the panel drawn by the order of the judge determines the number, then it likewise fixes the number of the Petit jury. The language is alike in respect to both. If this construction be correct, a Grand Jury of thirty or any other number, less than two hundred, could be a legal Grand Jury in this Territory. Could Congress ever have intended any such thing? It is but reasonable to suppose that if Congress had intended to fix the number, it would have said so, and not left it to vague supposition. The purpose evidently was to allow the judge to fix the number necessary to be drawn, out of which to form the jury, the jury to be of the number as then established by law.

It is claimed that if the United States jury law be not applicable, nor the number of the jury be allowed to be fixed under the "Poland Bill," yet that the act went far enough to repeal the Territorial law in respect to the number of the Grand Jury and allowed the Common Law to rise up to control the matter. This position, of course, can only be maintained upon the ground that the repeal is by implication merely. Such repeals are not favored, and will not be declared to exist except in case of inconsistent or incompatible enactments. We are unable to perceive any inconsistency or incompatibility between the Territorial statute fixing the number of the Grand Jury and this Act of Congress. The Territorial statute seems rather to fill and supply a place not covered by the Act of Congress. A law which declares the number necessary to constitute a Grand Jury is not inconsistent with a law which merely provides the mode of procuring the number of jurors out of which to compose the jury. The laws are entirely reconcilable and consistent, and it is the duty of the Court to declare that both of them shall stand.

So far as the Act of Congress goes it becomes exclusive as to all that it properly embraces, and if Congress is to be considered as having in this Act legislated upon the question of the number of the Grand Jury, then of course the Territorial Legislature is precluded from doing so. If that Act supersedes the Territorial law now on the statute book as to the number of the jury, it would likewise exclude any future legislation upon the subject by the Territorial Legislature. But the Supreme Court of the United States say, that full authority concerning this matter was given to the Territorial Legislature by the "Organic Act." We cannot say, therefore, that this positive authority given by the "Organic Act" is negatived by implication, when the Act of Congress does not embrace the point.

Under all proper rules of construction, therefore, we are forced to the conclusion that we must resort to the Territorial statute to ascertain the proper number for a

Grand Jury. The statute declares fifteen to be the] number and does not authorize a Grand Jury of any number. The Grand Jury which found the indictm the case before us, having been composed of twenty members instead of fifteen, was not such a Grand Ju the law requires, and by not being properly constitute action became vitiated.

There are some minor points in the case which pe we should notice. One of the parties appearing as (Juror stated, upon his *voir dire,* in answer to a qu by the prosecution, that he had conscientious scruples a indicting persons for violation of the law of the U States of 1862, against polygamy. On that ground h challenged for cause, the challenge sustained and the discharged and not sworn upon the Grand Jury. action of the Court, in excluding this party from the is assigned for error.

A person who upon his conscience could not find i ments under a law, would not make a good jurym enforce that law. And if all members or a majorit Grand Jury had like scruples, that ancient and ven body would not only become useless, but also an al hindrance to the enforcement of the law. A party l these conscientious scruples would, if sworn upon the Jury, have to commit moral perjury. He, upon oat mits that his conscience forbids his aiding in the en ment of a specific law, yet as a Grand Juryman he to go counter thereto, and enforce the law. Such a would be wholly incompetent to sit upon a petit And the same ground which would exclude him fro Grand Jury, would also exclude him from the petit (Wharton's Am. Crim. L. Sec. 469; Burr's trial, Se

We think there was no error in the exclusion of th from the jury.

It is claimed that the drawing and summoning o of the Grand Jurors after the beginning of the terr error. So far as the drawing and summoning of juro the number of fifteen had been obtained, it was erro

so long as that number was not exceeded on the jury there was no error. If, from any cause, the jurors summoned prior to the term do not appear, the Court is authorized, under the act referred to, to have such additional number summoned as the Court may deem necessary to complete the panel. If those thus drawn do not appear, the Court is not compelled to delay indefinitely, but can order the drawing of still a further number, if necessary, to complete the panel.

It is likewise asserted that one of the jurors did not pay taxes. He had taxable property, however, and was ready to pay taxes. If he was not assessed and not thus allowed to pay taxes, it was not his fault, and he cannot be excluded from the jury box for failing to pay taxes.

All of the objections respecting the constitution of the jury were raised by the Appellant by pleas in abatement.

The judgment of the Court below is reversed, and the cause remanded to the Court below, with instructions to set the verdict aside and quash the indictment.

LOWE, C. J., concurs.

EMERSON, J.: The only doubt in my mind in connection with this case was in reference to the constitution of the Grand Jury, but upon a more critical examination of the subject, I very cheerfully concur in the result arrived at.

HENRY THOMAS, *Appellant*, v. THE UNION PACIFIC R. R. CO., *Respondent*.

ACTION BY FATHER.—A father cannot maintain an action at Common Law for the death of his son occasioned by negligence.

THE COMMON LAW IN UTAH.—The Common Law recognized as furnishing the measure of personal rights and the rule of judicial decision in this Territory. (See ante People v. Green, and First National Bank v. Kinner.)

APPEAL from the Third District Court.

The facts appear in the opinion.

J. C. Hemingray, for Appellant.

Hempstead & Kirkpatrick, for Respondent.

LOWE, C. J., delivered the Opinon of the Court.

Complaint shows that Joseph Thomas was the m of the Plaintiff; that on the 27th of October, 1869, a passenger on the Defendant's railroad train, and the negligence of the Defendant and its servants tl collided and the son, was instantly killed. The act to recover damages for loss of the son's services, fo expenses, and for general damages.

Demurrer to the complaint was sustained, and ju rendered for the Defendant, from which the Plaintiff and the question is whether upon the above facts th can be maintained. That the death of a person ca another does not give rise to a cause of action in is a settled doctrine of the Common Law. The the point are numerous, of which the following are Higgins *v.* Butcher, Yelverton 89; Baker *v.* Bolton, 493; Carey *v.* Berkshire R. R. Co., 1 Cush. 475; V *v.* Panama R. R. Co., 23 N. Y. 465; Quinn *v.* M N. Y. 432; Kramer *v.* Street R. R. Co., 25 C Osborn *v.* Gillett, Court of Exchequer, Hilary Tern (Law Rep. for March 1873, London, p. 88.) In I Bolton, *supra*, Lord Ellenborough said: "In a Civ the death of a human being cannot be complained injury," and this doctrine has ever since been u followed. The case of Ford *v.* Monroe, 20 Wei which was to the contrary, was subsequently disapp the Court of Appeals. Pack *v.* The Mayor of New 3 Comst. 493. The particular case of the claim for ery by the father for loss of services, from the tim death of his minor child to the period of majority, expenses of burial, has been held to be within the rule as above stated. This question was directly

cated in the case of Osborn v. Gillett, above cited, in which the Court of Exchequer held that the special damages for loss of services and for burial expenses were not recoverable at Common Law. To the same effect is Quinn v. Monroe, 15 N. Y. 432.

As to the reasonableness of this doctrine it would be useless to speculate. It is so firmly established that we cannot disregard it unless we ignore the Common Law as a rule of decision. While this is conceded by the Plaintiff to be the rule of the Common Law, it is insisted that as the case is *res nova* here, we are at liberty to adopt a different rule if sufficiently commended to our judgment. We do not think so.

Although the Common Law has not been adopted in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here, so far as it is not incompatible with our situation and government, and that it is to be resorted to as furnishing to that extent the measure of personal rights and the rule of judicial decision. Such is practically the extent of its adoption and recognition in the Federal Courts and in the several States, although it has been reached in some instances by enactment, and in some of the States and in the Federal Courts by course of judicial decision.

At the May Term, 1874, this Court held, in the case of the First National Bank of Utah v. Kinner, Emerson, J., giving the opinion of the Court, that the Common Law was a part of the Law of this Territory, and the proposition cannot be regarded as doubtful or requiring special elaboration.

For a full and satisfactory statement of the extent and principles upon which the Common Law has been adopted in this country, and inferentially applicable to this Territory, see Kent's Com. vol. 1, p. 343 and 472; Railroad Co., v. Keary, 3 O. St. 201-5; Drake v. Rogers, 13 O- St. 28.

Questions arising under the Statute of Limitations have been argued in this case, but they are the same as those in

the case of Thomas & Wife *v.* U. P. R. R., decided at the present term.

There was no error in sustaining the demurrer to the complaint, and the judgment of the District Court is affirmed.

HENRY THOMAS AND WIFE, *Appellants, v.* THE UNION PACIFIC R. R. CO., *Respondent.*

SEC. 15 AND 17 OF LIMITATION ACT.—The term "liability," as used in Sections 15 and 17 of the Limitation Act, does not extend to tort.

ACTION FOR DAMAGES WHEN BARRED.—An action by a passenger against a carrier to recover damages for injuries received through the negligence of such carrier, not having been specially provided for in the Limitation Act, is embraced under the general provision of section twenty, and must be commenced within four years after the cause of action shall have accrued.

APPEAL from the Third District Court.

The facts appear in the Opinion.

J. C. Hemingray, for Appellants.

Hempstead & Kirkpatrick, for Respondent.

BOREMAN, J., delivered the Opinion of the Court.

This is an action by husband and wife against a common carrier for injuries sustained by the wife by reason of the negligence of the carrier.

The Defendant (the Respondent), demurred to the complaint upon two grounds, viz.:

First—Misjoinder of parties plaintiff, and

Second—The Statute of Limitations.

The demurrer was sustained and the suit dismissed.

In this Court the Respondent abandons the first ground, and relies entirely upon the Statute of Limitations, claiming that the action was barred by the two years provision of Section 17 of Statute. (Utah Laws of 1872, p. 22, Sec. 17.)

The Appellants rely upon Sec. 20 of the same Act, and claim four years as the limit.

That clause of Sec. 17, relied upon by Respondent, says, "An action upon a contract, obligation or liability *not founded upon an instrument of writing,*" may be brought within two years. Section 15 provides that "An action founded upon a contract, obligation or liability, *founded upon an instrument of writing,*" may be brought within four years. The word "liability" in both cases evidently embraces the same kinds of responsibility. The immediate context is the same, except that in one case this responsibility must appear from some writing, and in the other such responsibility is not to appear from any writing. In Sec. 15, no one would contend that a test was embraced by the word "liability," for that word is limited in its meaning by the words "contract" and "obligation." Such we think is also the case in Sec. 17. The term "liability" embraces a responsibility arising from a growing out of some express or implied consent of parties, not affirming from any writing, and the able context shows that such responsibility did not extend to tort. If we could say that it did embrace tort by reason of the liability in question having some connection with the written passenger ticket of the Respondent to Appellant, then we are bound to conclude that the liability is to be referred to Sec. 15 instead of Sec. 17, and thus it would not be barred under four years.

But we are inclined to think that the liability incurred is not embraced in either the 15th or 17th sections.

Section twenty (20) provides that an action for relief not herein before provided for, must be commenced within four years after the cause of action shall have accrued.

As this action is not embraced in any section preceding section twenty, and this class of torts having nowhere else been provided for in the statute, we conclude that it is embraced under the general provisions of Sec. 20. Judgment is reversed and the cause remanded for further proceedings.

LOWE, C. J., and EMERSON, J., concurred.

BENJAMIN BACHMAN, *Respondent*, v. SMITH & THOMPSON, *Appellants*.

RECORD ON APPEAL FROM JUDGMENT.—On an appeal from a judgment, papers and files of the Court below attached to the Judgment Roll will not be considered, unless they are incorporated in a statement, as provided for in Secs. 195 and 330 of the Practice Act.

RECORD, HOW MADE UP.—Merely attaching a mass of papers and files to the Record, does not by any means make such papers part of the Record on Appeal.

APPEAL from the First District Court.

The facts appear in the opinion.

O. F. Strickland, for Respondent.

Ashbrook & Lovell, for Appellants.

LOWE, C. J., delivered the opinion of the Court.

A number of questions involving supposed irregularities and errors in this case are urged upon the attention of the Court by Counsel for Appellants; but we find ourselves unable to consider them, as they are not presented by the Record. A mass of papers constituting the files of the case in the Court below, have been attached to and sent up with the Judgment Roll, but they do not by that means become a part of the record. What constitutes the Judgment Roll is specifically presc ibed by Sec. 203 of the Practice Act, and whatever else the Appellant desires to bring into the Record on Appeal from a judgment, must be made a part of the Record by a statement as provided in Secs. 195 and 330 of the Practice Act. As this has not been done in the present case, we can consider nothing but the Judgment Roll, and in that we find no error.

The complaint states a cause of action; both Defendants were duly served with process. An answer was filed by one of the Defendants. The t.ial was regularly had before the Judge of the Court, the Record showing that both the Defendants were present by Counsel, and specifically waived a trial by jury.

The judgment follows the complaint, and is within the scope of its averments.

Whether the Court erred in entering a default against the Defendant Smith, or in refusing to set the same aside, or in its findings of facts, or in refusing a new trial, are questions not presented by the Judgment Roll, and which we cannot consider.

The judgment is affirmed.

EMERSON, and BOREMAN, J. J., concurred.

THACKARA, BUCK & CO., *Respondents*, *v.* REID, KINSEY AND GREELEY, CO-PARTNERS, &c., *Appellants*.

ALLEGATION ON INFORMATION AND BELIEF.—When the Plaintiffs are non-residents, and their complaint is verified by their Attorney, an allegation of the facts of Plaintiffs' co-partnership capacity, "on information and belief," is sufficient.

DEMURRER FOR AMBIGUITY, WHEN PROPER.—The 7th Cause of Demurrer under Section 40, of the Code "that the complaint is ambiguous, &c.," has no reference to the mode of alleging facts upon information and belief, and a complaint is not ambiguous or evasive by reason of the single fact that allegations are made on information and belief.

VERIFICATION BY ONE NOT A PARTY.—Pleading must be in the name of the party, but may be in such form as to be truthfully verified by the Attorney within the limits, and under the circumstances provided by the Code.

APPEAL from the Third District Court.

The facts appear in the opinion.

J. C. Hemingray, for Appellants.

Marshall & Royle, for Respondents.

LOWE, C. J., delivered the opinion of the Court.

The action was upon an account stated. The alleged errors arise upon the overruling of the Defendants' demurrer to the complaint. The complaint commences in

these words: "Plaintiff, complaining of the Defe upon their information and belief allege," following are appropriate averments of the partnership capa the Plaintiffs and Defendants, and the necessary f show a good cause of action. The demurrer is upc alleged grounds:

1st. That the complaint does not state facts suffi constitute a cause of action; and,

2nd. That the complaint is ambiguous and uncer this, that all the allegations appear to be made information and belief, which is claimed to be evasi

The first ground of demurrer is obviously not well as all the averments that go to make up the cause of are fully stated. Reliance is principally had up second ground, and it is insisted among other thing as the fact of Plaintiffs' partnership capacity is a fac from its nature must be within the knowledge of the iffs, it should be positively alleged, and that omit do so is evasive. The complaint is verified by an A of the Plaintiffs, and is in form and substance sucl prescribed by Sec. 55 of the Practice Act, and show the Plaintiffs were non-residents of and without the The Code evidently contemplates that under such stances the verification of a pleading may be made Attorney of the party. But if the Attorney is not pe cognizant of the facts alleged, he can only verif information and belief. The pleading must run name of the party, who must appear to be the al of the party to the suit. The Attorney can not p his own name for the party.

It does not seem to be doubted but that a par verifies his own complaint may distinguish between the pleading alleged on knowledge, and those alle information and belief, and there seems to be no reaso the complaint is to be verified by the Attorney, why th ing may not also distinguish on its face the facts as l knowledge or on information and belief.

The pleading itself must be in the name of the

but may be in such form as to be truthfully verified by the Attorney within the limits and under the circumstances provided by the Statute. Nor is the suggestion, that in such a pleading the affiant verifying the complaint upon information and belief, merely swears that he believes what the party is supposed to believe, well founded. The legal as well as the natural construction and effect of the oath, is, that the affiant believes those matters to be true, which in the complaint are alleged upon information and belief to be true.

If these views are correct, it is no ground of objection that the partnership capacity of the Plaintiffs is alleged upon information and belief. It was a fact not presumably within the personal knowledge of the affiant. When a party verifying his own complaint shall state upon information and belief what is plainly to be presumed to be within his actual knowledge, it will be time enough to consider the effect of such pleading and the proper corrective. A complaint is not ambiguous or evasive by reason of the single fact that allegations are made upon information and belief. It is a common mode of averment to meet the actual state of knowledge of the party, under the system of pleading and verification in use in New York, California, and our own Territory. The 7th cause of demurrer under the 40th Section of the Code, "that the complaint is ambiguous, unintelligible and uncertain," has no reference to the mode of allegation under consideration, but is directed to that want of precision, completeness and directness of statement, which creates doubt and uncertainty as to the real matters alleged or intended to be relied upon as the substantive ground of action.

Doubtless a complaint in the ordinary narrative form of positive statement, and verified by the Attorney (where the necessary statutory conditions exist) in the usual form, would be good and perhaps more logically consistent, but there is no error by reason of the mode pursued in this case. The judgment is affirmed.

EMERSON and BOREMAN, J. J., concurred.

and the Court did not therefore have jurisdiction of the parties, so as to render a decree binding upon the Respondents; it was as to them void. There are not therefore sufficient facts stated in the bill to warrant the Court in saying that the Respondents should hold the legal title in trust for Appellant, Mary G. Hussey.

The other branch of the case has reference to a new foreclosure of the mortgage, and the Appellants ask that said Mary G. Hussey be subrogated to the rights of Bernheisel and Linforth in the matter. The bill says that Job Smith gave a mortgage on the property, to be void on payment of the note specified. Such an allegation is not sufficient, in case of default of defendants, to authorize a decree for the sale of the property. The bill stating that Job Smith gave a mortgage, is simply a conclusion of law. It does not leave the question open to the Court to decide whether the supposed mortgage be in fact a mortgage or not. Neither the mortgage nor its terms or conditions are set out.

Upon a default the Court could not render a decree acceding to terms or conditions not known to the Court. There do not, therefore, appear sufficient facts in the bill to authorize a decree of foreclosure.

The judgment of the Court below dismissing the bill was correct, and it is affirmed.

LOWE, C. J., and EMERSON, J., concur.

NOTE.—See same case on petition for rehearing—*Post.*

JOHN LEITHAM *et al.*, *Appellants*, *v.* PATRICK CUSICK *et al.*, *Respondents.*

ORDER MADE WITHOUT NOTICE, HOW VACATED.—An order for a temporary injunction, made out of Court, by the judge, without notice to the adverse party, may be vacated by the judge without notice.

IRREPARABLE INJURY, HOW PLEADED.—Where, upon an ap tion for an injunction to restrain the Defendants from wo certain mining ground, and from selling any ores therefron Plaintiffs alleged that the injury was irreparable, from th that it was impossible for them to know the amount and val the ores taken from the mine by Defendant; *held* that the si statement of the complaint to that effect is not sufficient, bu facts should be stated from which the Court could learn tha injury was irreparable.

RESTRAINING ORDER GOVERNED BY THE COMPLAINT.—A res ing order that goes further than the prayer of the com is improper, and should be set aside.

PRACTICE ON MOTION TO BE RESTORED TO POSSESSION.— the Defendants have been deprived of the possession of m ground by an officer acting under a restraining order, whic improperly issued, the judge who granted the same cannot application of the Defendants without notice, restore them possession.

APPEAL from the First District Court.

The facts appear in the Opinion.

O. F. Strickland, for Appellants.

Marshall & Royle, for Respondents.

BOREMAN, J., delivered the Opinion of the Court.

The Appellants, without any notice to the Respond applied to and obtained from the Judge at Chamb temporary injunction, restraining the Respondents working or taking out ores from a certain mining pro called the *Undine* Lode, and from removing or selling ore.

After service of the writ, the Respondents applied t judge at Chambers, without notice to the Appellants, obtained an order revoking the former order, and requ the United States Marshal to restore to the Respon the possession of the Alexander Lode from which they been ejected under the restraining order.

It is from this last order revoking the former order this appeal is brought to this Court.

The Respondents in their motion asked that the res ing order be revoked, upon the grounds that the com

did not state facts sufficient to entitle the Applicants to the relief sought, and that the order was improvidently issued.

The injury complained of as irreparable by the Appellants, consists in the impossibility of ascertaining the amount and value of the ores taken away from said mine by the Respondents, unless they be restrained. The Court cannot see that there is any great and irreparable damage, for the simple statement of the complaint to that effect, is not sufficient. The facts should be stated from which the Court could learn that the taking and selling the ores would be such injury. It is not alleged that the removal or sales were clandestine, or that the Respondents are insolvent or otherwise unable to respond in damages, or any other facts going to show the nature of the damages.

The writ which was issued upon the restraining order went further than the prayer of the complaint, and restrained the Respondents from ever going upon the premises. This would prevent them from removing their own private property. The Appellants did not ask that the Respondents be restrained from going upon the ground and the writ was improper in that respect.

The dissolving of an injunction, like the granting, is left to a considerable extent to the discretion of the judge, and unless he abuse that discretion, his action is necessarily held good. (High on Injunction, Sec. 899.) We cannot say, therefore, that the Court erred in revoking the restraining order unless his revocation without notice was an error.

The Practice Act, in Sec. 326, provides that orders made out of Court, without notice, may be vacated by the judge without notice. This is a very broad provision, and there seems to be no good reason why it should not apply to the case now before us.

That part of the order complained of by the Appellants, which required the Marshal to reinstate the Respondents, was, however, beyond the reach of the judge. When the former order was revoked, his authority in the

matter ceased, by reason of no notice to the opposite p

Upon the whole case, therefore, we conclude that th vocation was not improper, and to that extent the acti the judge below is affirmed, but as to reinstating the spondents, the order was not proper, and to that exte is reversed.

LOWE, C. J., and EMERSON, J., concur.

SAMUEL SMITH *et al.*, *Appellants*, *v.* J. M. RICHA SON *et al.*, *Respondents.*

(See same case, ante.)

DEFENDANT ENTITLED TO INJUNCTION, WHEN.—Under our s of Practice a Defendant, upon a proper showing by ansv entitled to affirmative relief by way of injunction.

APPEAL from the Third District Court.

The facts are stated in the opinion.

Marshall & Royle, and *Rosborough & Merritt*, for A lants.

Bennett & Whitney, for Respondents.

EMERSON, J., delivered the opinion of the Court.

The Appellants filed their complaint in the Court b claiming title to certain mining property, and alleging Respondents were committing waste thereon, by extr ores therefrom. The complaint states the pending of a suit in the Court below between the Appellants as P iffs, and the Respondents as Defendants, to determin title to the property in dispute.

This action was commenced to obtain an injunction a the Defendants to prevent them from further comm waste.

The Respondents answered the complaint, denyin

title of the Appellants; also denying that any waste had been committed.

In addition to this defense, they alleged trespasses by the Appellants upon their, the Respondents, mining claim, alleging that both claims are on the same lode, and are identical, and prayed for and obtained, as affirmative relief, an injunction against the Appellants.

The appeal is taken from this order, and the error specified and relied upon is the granting of such an order on the answer. This is, therefore, the only point in the case.

The case made by the Respondents in their answer, beyond the denial of that made by the Appellants in their complaint, arises out of and is connected with the subject matter, concerning which the Appellants sought the action of the Court.

The provisions of § 147 and § 199 of the Practice Act, seem to us to leave no room for doubt, but that the Respondents had a right to ask for affirmative relief of this nature in their answer, and if these allegations were supported by proper and sufficient proof, it was the duty of the Court to grant it.

No question is made as to the sufficiency of the proof, and as the Court had an undoubted right to grant affirmative relief of this nature upon a case made by an answer, the judgment of the Court below must be affirmed.

LOWE, C. J., and BOREMAN, J., concurring.

JOHN W. CLAMPITT *et al.*, *Respondents*, *v.* JOHN W. KERR *et al.*, *Appellants*.

PRESUMPTIONS THAT JURY APPLIED INSTRUCTIONS.—The Court may properly refuse to give instructions made up of abstract principles of law, having no particular reference to the evidence before the jury. Yet, if such instructions are given in general terms, it will be presumed that the jury properly applied them to the case before them.

ERROR NEVER PRESUMED.—Where an instruction is refused by the

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The eighth instruction contains the law, and was given to aid the jury. It is not misleading. Davis *v.* Davis, 26 Cal. 39-40, 44; Lickbarrow *v.* Mason, 2 Term R. 70.

The ninth instruction merely advises the jury that where parties make contracts, they are understood to make them in reference to the elements and natural objects with which they must come in contact. The instruction contains the law. 2 Pars. Con. 5th Ed. 672-3 and note *h*; Ib. 499.

EMERSON, J., delivered the opinion of the Court.

The Appellants have abandoned their points made upon the exclusion of certain testimony, and the remaining assignments of error are to portions of the charge of the Court as given, and to refusals to charge.

The fourth and eighth requests of the Respondents may be considered together. They are correct as abstract principles of law, and although it is difficult to see how they could be made applicable to the case, yet it is not perceived in what manner the jury could have been misled by them.

We do not believe the jury could have inferred from the fourth request as given, that they were left to construe the contract.

The same may be said of the Respondents' ninth refusal. It was a mere statement of what was in the contract itself, and was no more favorable to the Respondents than to the Appellants. It applied to the one party as well as the other. The Court may properly refuse to give instructions made up of abstract principles of law, having no particular reference to the evidence before the jury, yet if such instructions are given in general terms, it will be presumed that the jury properly applied them to the case before them. We see no error in the instructions given that would warrant us in reversing the judgment. Nor do we see any error in the refusals to charge as requested by the Appellants. These propositions were substantially covered by, and embraced in, their other requests, as actually given by the Court. We have regarded the thirteenth request of the Appellants

Hussey executed a promissory note to McLaughlin, who endorsed it to the Plaintiff, executing to the Plaintiff at the same time a mortgage to secure payment of the note. Potter brought suit against both Defendants, setting up both the note and mortgage, and praying for sale of the mortgaged premises, and application of proceeds to the debt, and for personal judgment against the Defendants for any deficiency.

A demurrer to the complaint was overruled, and the Defendants not desiring to answer, judgment was rendered for Plaintiff, from which the Defendants appeal. Two grounds of error are claimed under the demurrer; first, that two causes of action are improperly joined, and second, that the complaint does not state a cause of action against the Defendants, and in favor of the Plaintiff. If the complaint is to be regarded as setting out two causes of action, which we think may well be doubted, still there is no misjoinder, for they are both upon contract, they affect all the parties to the action, and do not require different places of trial, thus fulfilling all the conditions of joinder required by Sec. 64 of the Practice Act. It is true the two Defendants are not affected precisely in the same mode, nor to the same extent, but both are liable for the principal debt, and are therefore affected by the action.

The second point upon the demurrer is equally unfounded. Whatever may be said as to the supposed second count, not setting out by itself a joint cause of action against the two Defendants, there can be no question that the first count does, and where, if several counts in the complaint, one is good, a general demurrer should be overruled.

The action was to recover a debt evidenced by a promissory note upon which one of the Defendants was liable as maker and the other as endorser, and to secure which, one of the Defendants had executed to the Plaintiff a mortgage upon real property. To recover a debt secured by mortgage, the 246th section of the code provides that but one action shall be brought, and section 13 of the code provides that, "Any person may be a

Defendant who has or claims an interest in the contro adverse to the Plaintiff, or who is a necessary party complete determination or settlement of the question inv therein." It is not perceived how the Plaintiff could appropriately proceeded otherwise than he did, in vie the provisions of Sec. 246, and Sec. 13 of the code ample authority for uniting the two defendants. was no error in overruling the demurrer.

An objection is made to the judgment. It appears a bill of exceptions that the demurrer was overruled o 5th day of January; that the Defendants excepted, announced their determination to stand by their dem and that "thereupon upon motion of Plaintiff the ordered that said Plaintiff have judgment against Defendants, and the Court requested the counsel for P iff to prepare and hand the Clerk the proper judgmer decree in the premises. Judgment in fact was not e until the 9th of the month, four days subsequently t overruling of the demurrer, and in the mean time a eree had been appointed to ascertain the amount du Plaintiff. There was no error in this. There were nc final judgments rendered. The order of Jan. 5th was a ment upon issue of law, to wit: upon the issues rais the demurrer and a finding only that Plaintiff was e to final judgment. The amount for which Plaintif entitled to judgment was not stated, had not been tained, and a reference to have that amount ascer and computed was proper, and is specially provide under such circumstances by Sec. 181 of the code. this was done judgment in due form was rendere entered of record on the 9th. In this there was no No other assignments of error are made upon the and the judgment is affirmed.

BOREMAN J., and EMERSON, J., concurred.

THE ECLIPS
Appellant,
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subjects of a lien. Wademan v. Thorp, 5 Wen. 115.

Lien relates back from the filing, to date of comm ment of the work, and has priority to intermediate co ance. *In re* Coulter, 2 Sawyer 42, and cases cited; 1 v. Desmond, 68 Penn. 449; U. S. Digest, New Series 3-444, Secs. 16 and 18; Fleming v. Baumgarner, 29 425; U. S. Digest, vol. 29, p. 424, Sec. 17; U. S. I 27, p. 409, Sec. 21; Sec. 7 Mechanics Lien Law, p. 8; Crea v. Craig, 23 Cal. 525; Soule, &c., v. Daws, 7 Cal. Weaver v. Sells, 10 Kans. 619.

Workman, contractor and material man, have each all of them the right to file their Lien at any time w three months after building is completed.

See argument on rehearing.

Bennett & Whitney, for Respondents.

No Brief on file.

LOWE, C. J., delivered the opinion of the Court.

The action was brought to recover compensatio materials furnished in constructing a building, and to e a Mechanics Lien upon the premises for the amount It appears from the complaint that the notice of Lie filed in the Recorder's Office more than three months the materials were furnished, but within three month the completion of the building.

The Defendants demurred, the demurrer was sust and the Defendants had judgment, from which the Pl appeals.

By the first section of the Mechanics Lien Law (A 1869, p. 8), it is provided "that any person who shall after, by virtue of any contract with the owner (agent) of any building, or other improvement, perfor labor upon, or furnish any materials for, the construc repairing of such building, or other improvement, shal filing the notice prescribed in the next section, have &c."

The second section provides that "any person may avail himself of the provisions of this Act, whether his claims be due or not, by filing in the Recorder's Office of the county in which such building or other improvement is situated, at any time within three months after the labor performed or material furnished, or after the completion of such building, or other improvement, a notice of his intention to hold a Lien upon such building, &c."

It is insisted by the Defendants that a proper construction of this Act requires "that the Lien must be filed, in case of labor, within three months after performing the labor; in case of material, within three months after the time when the material was furnished; in case of building or improvement by contract, within three months after the completion of the building or improvement."

I cannot concur in this view of the Act. The first section of the Statute provides for a lien in favor of two classes of persons, who are described as those persons "who shall perform any labor upon, or furnish any materials for," the construction, &c., of any building. All persons, therefore, who come within this description, are entitled to a Lien, and none others.

The Statute provides for no third class, and no distinction can be made among those provided for by the Statute, which the Statute does not itself make.

The Statute does not in terms provide for the contractor of the entire improvement as such, and does not provide for such as a distinctive class. Doubtless a general contractor for the entire job, or the person who contracts for the last work and completion of the improvement, may have the Lien, but this is because he is embraced within the language of the Act as performing labor and furnishing material, but he is embraced within it by no other designation and in no other sense than he who furnishes but a portion of the labor or material. The Lien is given to those who "perform any labor" or "furnish any materials," and the lien may be secured by filing in the Recorder's Office, "at any time within three

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according to the obvious and natural import of their language, and the construction I have given seems to be within this rule.

But the construction of the second section contended for, that the three months' limitation of notice applies to those who perform labor and furnish material, to the exclusion of the right to file within three months after completion of the building, would be equally obnoxious to the rule that effect should be given to all the words of a Statute; for upon such construction the words giving three months after the completion of the building become inoperative and superfluous. In the case supposed of a contractor for the entire work, he is entitled to a Lien only because he is embraced within the description of persons who perform labor and furnish material, and as such he must file his notice within three months from the time of performing the labor and furnishing the material, and hence as to him the three months would be three months from the completion of the building, and the express words of three months from the completion of the building become useless and inoperative. So that by the Defendants interpretation nothing is gained in reconciliation to the suggested rule of construction.

The language of the second section seems not to have been very well guarded and selected, but I am clearly of the opinion that the object and intent was to give to all parties entitled to a Lien under the Act, privilege of filing the notice at any time within three months after the completion of the building. Some support, I think, is derived to this view, if it were necessary, from the fourth section, which requires that in a suit for enforcing the Lien the time of completing the building should be averred. This could be of no possible avail if the notice was to be filed in all cases within three months from the furnishing of labor or material.

A question is made in argument as to the effect of a conveyance of the premises after the furnishing of the material, and before the filing of the Lien, but as no such

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material furnished after the end of the first three m
Such an inference cannot possibly be drawn from th
struction given. But one Lien would attach in such
and it would be for *all* of the material furnished
the contract, and must be filed within three months
the last material is furnished. 47 Cal. 87, Cox v. W
Pacific R. R. Co.; 14 Cal. 18, Same v. Same; St
Austin, 9 Mo. 554; Viti v. Dixon, 12 Mo. 479; Squ
Fathian, 27 Mo. 134.

The Appellant lays much stress upon the fact th
one point was argued in the Court below, and that
reference to a sale of the property upon which th
was demanded, and says that it supposed, and well
suppose, that this point "would be *the point* upon
the Superior Court would determine the case as far
Lien was concerned."

This Court held at the former hearing that th
plaint did not show a sale or transfer of the propert
this statement is very earnestly objected to. The
could not find otherwise. The complaint does not sh
sale or transfer, and the Appellant took occasion
briefs at the former hearing to three times remind th
of this fact. Hence it was not a matter to whi
attention of the Court had not been called. But asi
this fact, it was the duty of the Court to notice so
a defect of statement, upon the well settled practi
an appellate tribunal will notice any material defect
are apparent, even though neither party ask the C
to do. This is the practice in the United States S
Court, and of appellate Courts generally.

THE PEOPLE, &c., *Respondents*, v. PHILLIP SHAFER, *Appellant*.

QUALIFICATIONS OF JURORS.—Under the Act of Congress commonly called the "Poland Bill," a person whose name is placed upon the jury list by the Clerk of the District Court or the Probate Judge, must be a *male citizen*, and must have resided in the Judicial District six months next preceding the time of his selection by such officers.

JURY NOT ALLOWED TO SEPARATE IN CAPITAL CASE.—In capital cases the jury should never be permitted to leave the presence of the Court, even on an adjournment over night, except in charge of a sworn officer, and then they must be kept together.

DEFENDANT CANNOT CONSENT TO SEPARATION.—The Defendant in a capital case is not in a condition to consent to a separation of the jury during an adjournment, for he must run the risk of improper influences reaching their minds if he consent, or of prejudicing them against him if he refuses.

VERDICT MUST SPECIFY DEGREE OF MURDER.—On the trial of the Defendant indicted for the crime of murder, the jury returned the following verdict: "We the jury find the Defendant guilty as charged in the indictment;" *held*, not a proper verdict, for the degree of the homicide is a fact to be found by the jury, and in their verdict they must declare whether he be guilty of murder in the first or second degree.

STATUTES CONSTRUED.—Sec. 14, Chapter 30 of the Laws of Utah, does not affect or in any way repeal Sec. 7 of Chap. 22.

APPEAL from the Third District Court.

The facts appear in the Opinion.

J. H. McCutcheon, for Appellant.

Wm. Carey, District Attorney for the People.

EMERSON, J., delivered the Opinion of the Court.

The Defendant and one William B. Kelly were indicted for the murder of Peter Van Valkenburg.

The indictment contained two counts, charging the crime of murder as at the common law.

At the trial the Defendant interposed a challenge for cause to two of the jurors, Anthony Metcalf and Aaron DeWit. On the trial of the challenge it appeared that the two jurors named were not citizens of the United States at

the time their names were placed upon the jury list, the time they were drawn and summoned, but were alized two days after the commencement of the te the Court for which they were drawn and summo serve and did serve. The challenge was overruled a ceptions taken, and this is assigned as error.

At each adjournment of the Court, during the pr of the trial, which lasted several days, the jury were al to separate and go to their homes and about their or business. This also is assigned as error.

On the trial the jury returned a verdict as follows: the jury in the above entitled case, find the Defe Phillip Shafer, guilty as charged in the indictment."

Upon this verdict the Court proceeded to judgmen sentenced the defendant to be hung.

A motion for a new trial was made, which was d and the case appealed to this Court.

The assignment of errors contains objections to th ceedings in the lower Court other than these above tioned, but none which we deem entitled to any e notice.

The objection that the indictment was not read jury, seems to us trivial, and is not well taken. The shows that it was read to the Defendant, and that he "Not Guilty;" and it is admitted that the District ney stated to the jury, after they were sworn, the sul of the indictment, and informed them of the issu were to try. The exceptions taken to a portion charge of the Court to the jury are not noticed by counsel upon the argument, and we have treated t abandoned by the defendant.

The other objections are of a more serious natur are of the opinion that the challenge to the two named ought to have been sustained. The law r that the District Clerk and Probate Judge "shall alte select the name of a male citizen of the United Sta has resided in the district for the period of six mont preceding, and who can read and write in the Engli

is ground for a new trial. The authorities, differ as to whether (1) this ground is abso (2) *prima facie,* subject to be rebutted by prc the prosecution that no improper influence reac jury, or (3) merely contingent, upon proof to be o the defence that no tampering really took place.

(2) That such separation in a capital case is *pri* ground for a new trial, subject to be rebutted l from the prosecution that no improper influence the jury, is the position generally taken by the *A* Courts. Wharton's Criminal Law, Sec. 3135.

We deem this to be the current doctrine and t rule. In this case there is no attempt to show, part of the prosecution, or a suggestion even improper influence reached the minds of the jurors the several periods they were allowed to separate a their homes and about their places of business. It sible for us or any one to tell what impressions, ot those drawn from the testimony were made up minds.

Mr. Bishop states the doctrine thus: "It is a prevailing almost everywhere in this country, that, tal cases the jury can never be permitted to leave ence of the Court, even on an adjournment ove except in charge of a sworn officer, and then they kept together." 1st Bishop Crim. Procedure, Sec.

The reason stated in the record for allowing the tion of the jury, did not in our minds constitute *imperious necessity,* as will excuse its being done.

When those, whose duty it is to provide the c officer of the Court with funds, so that he can a all the necessary duties of his office, among which of preparing accommodations for keeping jurors to capital cases, learn that if this is not done the pu be put to the trouble and expense of a second trial, ligence mentioned in the record will probably be r

We do not think the error complained of was the consent given by one of the attorneys for the

ant, even if it should be admitted that the attorney could give such consent for the prisoner. The Defendant is not in a situation to exercise a fair choice, for he must run the risk of improper influences reaching their minds, if he consents, or of prejudicing them against him if he refuses. "According to what is probable, the better doctrine the consent of the prisoner to a separation which the general rules of the law do not permit, should never be asked of him, and if it is asked and granted, or even granted without his being asked it will avoid nothing." 1 Bishop Crim. Prac. Sec. 827. It was error to allow the jury to separate, and the error was of such a natnre as to vitiate the verdict.

The remaining assignment of error is that the jury did not in their verdict ascertain and declare the degree of the crime, as required by law. Section 7 of chapter 22 of the Laws of Utah, provides that "Upon the trial of an indictment for murder, the jury, if they find the Defendant guilty, must inquire, *and in their verdict declare*, whether he be guilty of murder in the first or second degree. But if such Defendant be convicted upon his own confession in open Court, the Court must proceed by the examination of witnesses to determine the degree of murder and award sentence accordingly."

The degree of the homicide is a *fact* which the statute requires to be specially found by the jury and it makes this finding imperative upon them. The reason of the rule is apparent, and is supported by an abundance of authority.

The provisions of Sec. 14 of Chap. 30 of the Laws of Utah, although passed subsequent to the passage of the Act above mentioned do not affect Sec. 11 of that Act.

The evident intent and purpose of the latter Act was to take from the Court power to fix the sentence and give it to the jury in all criminal cases, less than capital. But it takes this very finding of the jury required by Sec. 11 of Chap. 22 to determine whether it is a capital case or not.

This the jury have not done, and in a capital case the Court cannot assume that they designed from a general finding to fix the grade of the crime.

day, and afterwards as the complaint states, "The Commissioner of Internal Revenue being of the opinion that said distillery was not and had not been surveyed and assessed at its true producing capacity, a new survey was accordingly made," and upon that survey its producing capacity was increased to 266 gallons per day. It is upon the failure of the principals to pay the increased revenue, based upon this last survey and estimate that this suit is brought upon the bond.

The Defendants answered. A demurrer, that it did not state facts sufficient to constitute a defense to the action was interposed to the answer. The demurrer was sustained and judgment given for the plaintiff.

We think the action of the Court below correct. There is nothing in the claim attempted to be set up in the answer that the bond was an involuntary one. It was the duty of the Assessor to demand it, or at least to insist upon its being given before allowing the parties to carry on their business. It was left entirely with them whether they would carry on the business or not, but if they choose to carry on the business it was the duty of the Assessor to see that the bond was given.

The answer sets up by way of defence the want of notice to the sureties of the increased producing capacity of the distillery. This would constitute no defence. Notice was given to the principals. This is all the notice that the law contemplates or provides for. Upon the part of the sureties the condition of the bond is that the principals shall conform to all the provisions of the law relative to carrying on the business of distilling; and the Act under which the bond was given contemplates and provides for just such action on the part of the authorities as was taken in this case.

The allegation in the answer of an agreement with the Assessor that they might run their distillery after the last survey, increasing the capacity to 266 gallons per day, and pay taxes on 80 gallons per day, if true, would constitute no defence to this action.

The Assessor had no power or authority to mak a contract, and he cannot bind the Government contract allowing parties to violate a plain provisi the law. If the parties did not wish to run their lery to its full capacity the law points out a plai specific mode for them to adopt to relieve themselve the duties imposed by the Act. This they did not to adopt, and they must suffer the consequences.

On the appeal, objections were urged against the con itself. The objections are not well taken. The bond s in the complaint is a good statutory bond, being drawn i stantial compliance with the Act of Congress requiri giving of such bonds. The facts from which the liabi the Defendants arise are clearly and sufficiently set out complaint. The judgment is affirmed.

LOWE, C. J., and BORBMAN, J., concurring.

MARO J. CHAMBERLAIN, *Respondent*, *v.* RIC WARBURTON AND JOHN ROWBERRY, *Appell*

STATEMENT ON APPEAL WHEN FILED.—The statement provi in Section 330 of the Practice Act, can be filed after the has been perfected, provided it is filed within the number required by that Section.

JURY TRIAL.—Section 450 of the Practice Act, which in discretionary power in the Court to try issues of fact bef Court, or submit the same to a jury, cannot be exercised deprive a Defendant of a jury trial if one be demanded right of trial by jury cannot be abrogated by legislatio the discretion of a Court or judge.

MANDAMUS A CIVIL ACTION.—A proceeding by mandamus i action and subject to the rules, pleadings and practice pr by the Practice Act. (27 Cal. 655.)

JURY TRIALS IN MANDAMUS CASES.—The seventh article amendments to the Constitution of the United States, wh vides, that "in suits at Common Law, where the value troversy shall exceed twenty dollars, the right of trial shall be preserved," embraces proceedings by mandamu there is an issue as to damages.

APPEAL from the Third District Court.

The Respondent applied to the judge of the Third District Court at Chambers, for a writ of Mandamus to compel the Appellant to deliver over to him the papers, books and records appertaining to the office of Clerk of the Probate Court of Tooele County, and claiming damages in the sum of $500.

Mandamus issued after trial of the issues before the judge. Defendant appealed.

The appeal was heard upon a statement attached to the judgment roll, from which it appeared that the statement was filed within twenty days from the date of rendition of judgment, but not until *after* the Appellant had fully perfected his appeal. Respondent in this Court moved to strike the statement from the files, and that the appeal be heard upon the judgment roll only.

The other facts appear in the Opinion.

J. G. Sutherland, for Appellant.

Tilford & Hagan, for Respondent.

LOWE, C. J., delivered the Opinion of the Court.

EMERSON, J., concurring.

BOREMAN, J., dissenting.

A question is made as to whether the statement in this appeal can be regarded as a part of the record. It appears that the notices for appeal were served and filed and bond given before the statement was filed and served on the adverse party. The statement was filed, however, within twenty days after judgment. Sec. 330 of the Practice Act, expressly gives twenty days after judgment within which to file a statement, and as the statute makes no exception as to whether the appeal has been taken we can make none. It might often work a hardship to hold otherwise, as a party may properly desire

an appeal for the purpose of a supersedeas before
ment could be prepared. As the statute is e:
giving twenty days for filing a statement, I think
tion can be made, and if the statement is settled
tached to the judgment roll before transmission of t
to this Court, it becomes part of the record on th

This is a mandamus case, having some features in
with that of Brown v. Atkins, just decided. The
awarded and proceedings had in vacation. The
claiming to be Clerk of the Probate Court of Tooel
procured an alternative writ of Mandamus against
fendants to compel the delivery to him of the record
etc., appertaining to the office, and also claimed a
of damages in the sum of $500. The Defendants
the alternative writ, raising issues of fact, and th
its own motion formed four issues of fact, of w
was: "What, if any damages has the Plaintiff
herein." The claim for damages had been contro
the Defendants answer. On the forming of the
the Defendants demanded a trial by jury, which t
denied, and exception was taken. The judge proc
the trial of the case without a jury, and found
Plaintiff, and among other things found damages
Plaintiff in the sum of four hundred and fifty dol
rendered judgment therefor, and awarded a peremp
of Mandamus. The refusal of a jury trial and pr
to try the issues of fact without a jury is assigned
I think the assignment is well made. The demand
trial was made promptly, and no rights were waiv
true that Sec. 450 of the code seems to imply a
in the Court whether the trial of issues of fact sh
the Court or by a jury, but no such discretion can be
or can exist to the prejudice of a party's Cons
right. The seventh article of amendments to the
tion provides that "In suits at Common Law
value in controversy shall exceed twenty dollars,
of trial by jury shall be preserved," etc. This
not be abrogated by legislation, or by the discr

Court or judge. What is meant by suits at Common Law in this article has been defined by the Supreme Court of the United States in Parsons v. Bedford, 3 Peters Rep. 447. It is there said, "By Common Law they (the framers of the amendment) meant what the Constitution denominated in the third article *law*, not merely suits which the Common Law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered, or where as in the Admiralty a mixture of public law and of maritime law and equity was often found in the same suit. Doubtless this exposition of the article shows it to embrace a case such as this. Besides other issues of fact here was an issue of damages of $500, and an express demand for the right of jury trial. I entertain no doubt that the Defendant was entitled to it. In England and in most of the states the practice is to try issues of fact in Mandamus cases by jury. Moses on Mandamus, 222.

It has been decided in California under statutes similar to our own, that a proceeding in Mandamus is a civil action, and subject to the rules and proceedings as to pleading and practice prescribed by the code. People v. Supervisors, 27 Cal. 655. It is true that it was impossible to have a jury in vacation, for the law makes no provision for one, but that is no reason for trying the case without a jury to the deprivation of the rights of a party. When it appeared that important issues of fact were to be tried embracing a claim for large damages, and a trial by jury was demanded, the proceeding should have been dismissed or adjourned to the Court in term where a jury trial could be had. For the error alleged the judgment should be reversed, and the cause remanded to the Third District Court for such proceedings as may be according to law.

EMERSON, J., concurs.

NOTE.—Judge Boreman's dissenting Opinion is with the next case following.—REPORTER.

ENOCH MARTIN, *Respondent*, v. RICHARD W TON, *Appellant*, AND JAMES M. LYNCH, ent, v. WM. H. LEE, *Appellant*.

[Tooele Mandamus Cases.]

PRECEDING CASE AFFIRMED.—Judgment reversed upon th ity of Chamberlain v. Warburton, *Ante*.

PROPERTY HELD BY OUTGOING SHERIFF.—Articles of perso erty held by an outgoing sheriff under an attachment property *pertaining* to the office, in the sense that a del be compelled by Mandamus.

IN such a case the incoming Sheriff has an adequate remedy Replevin or by a suit on the bond of the outgoing Sheri

APPEALS from the Third District Court.

The facts appear in the opinion.

J. G. Sutherland, for Appellants.

Tilford & Hagan, for Respondents.

LOWE, C. J., delivered the Opinion of the Court

EMERSON, J., concurs.

BOREMAN, J., dissents.

These two cases are appeals from the Third Court of the same character as the preceding c affected by the same error, and like order will be them.

In the last case, Lynch v. Lee, it appears that no right of recovery shown in any view. Lynch, iff, claimed a surrender from the Defendant of th records, &c., appertaining to the office of Sh appeared in evidence that the Defendant had s nothing of that character within his control, but

did have in his control articles of personal property held under a writ of attachment, which writ of attachment had been returned to the Court. The Court upon the mandamus proceeding ordered a delivery of this property to the Plaintiff. Plainly these articles did not appertain to the office of Sheriff in such sense that mandamus would lie for their delivery. If the incoming Sheriff was entitled to their possession, his remedy at law was simple and adequate. He could either proceed in Replevin, or by action upon the bond of the outgoing Sheriff.

EMERSON, J., concurred.

BOREMAN, J., delivered the following dissenting opinion in the cases of Martin *v.* Warburton and Chamberlain *v.* Warburton:

I am compelled to dissent from the judgment of a majority of the Court in these two cases. The judgment of the Court is based upon the fact that a jury trial was demanded and refused. The matter of damages was the only thing which would warrant a claim for jury.

Had the judgment in respect to damages in this case been as it was in the case of Brown *v.* Atkin, the grounds of complaint in respect to a jury would have been taken away, and the Defendants (Appellants) would not have been harmed by the refusal of the Judge to grant a jury. The judgments, according to my view, should in these cases have been as in the case of Brown *v.* Atkin, as to the matter of damages, and otherwise these judgments should have been affirmed.

BOREMAN, J., delivered the following opinion, concurring in the judgment in the case of Lynch *v.* Lee.

I cannot agree with a majority of the Court in the matter of the jury, for reasons given by me in the cases of Chamberlain *v.* Warburton, and Martin *v.* Warburton.

Upon the other ground given in the opinion of the Court, I agree to a reversal of the judgment below,

although the right of the Respondent to the prop
the office is apparent.

BERTRAND KUHN, *Respondent*, *v.* JOHN D. T
ALLISTER, *Appellant*.

FORMS OF ACTION UNDER THE CODE.—Under our Practice A
immaterial whether the language used in the complaint
belonging to one form of action or another, or to no f
action; the material question is, do the facts stated show t
Plaintiff is entitled to any remedy, legal or equitable.

"SHARES" OF STOCK IN CONVERSION.—Shares of stock in a
porated company are recognized as a subject of converi
suit can be maintained therefor and a recovery of the val

MOTION TO OPEN DEFAULT.—A judgment by default will
vacated and a new trial had unless where the affidavits
show any meritorious defense.

DEFENSE IN CONVERSION.—In an action for conversion of sto
no defense that some other party took the property in t
instance.

WANT OF DILIGENCE IN MAKING MOTION.—When the dem
Defendant was overruled more than six months before h
to be allowed to answer; *held*, want of diligence, and such
should be denied.

DEFENDANT'S RELIANCE UPON THIRD PARTIES.—It is no ex
a motion to set aside a default, that the Defendant ha
upon the promises of others.

APPEAL from the Third District Court.

The facts appear in the Opinion.

Sutherland & Bates, for Appellant.

Tilford & Hagan, for Respondent.

BOREMAN, J., delivered the Opinion of the Court.

This is a suit to recover damages for the conver
the Defendant of two hundred and fifty shares of
stock of a mining company.

In the Court below judgment went against the De

by default, and Defendant has appealed to this Court, and now here alleges that the complaint does not state facts sufficient to constitute a cause of action. The insufficiency is alleged to consist in bringing this suit for damages for the conversion of "shares" of stock, as "shares" are incorporeal, and a party cannot be charged with taking and converting the same, or in other words, that this is an action of trover, and that trover cannot be maintained for shares of stock. We do not think that this is exactly the question which we are called upon to consider. It is not necessary for us to consider that this is an action of trover, and that trover is not the proper remedy. To do so would be to tie the pleadings down again to set forms. Some of the language used may be that used in trover, but some certainly is not, and it matters very little under the Practice Act, whether the language used be that belonging to the form of one action or another, or to no form of action. The material question is, do the facts stated show the Plaintiff entitled to any remedy, legal or equitable. If so then the Court could not say that the complaint did not state facts sufficient to constitute a cause of action.

It is asserted that the Defendant "took" these shares, and great stress is laid upon that word. If this were an action in trover that word would not be proper, it belongs to replevin, but the word "found" would take its place, yet whether the one or the other word be used, it would in trover be not very material, as the gist of the action is the conversion.

But cannot a man convert shares in stock? He can mortgage them; they can be sold under judgment and execution; they can be attached; and they can be pledged. Wilson *v.* Little, 2 Comstock 443.

At Common Law, strictly speaking, shares could neither be mortgaged, sold under execution, attached or pledged. This rule has, however, been greatly relaxed, in some instances by statute and in others by the rulings of the Courts. Joint stock companies are becoming so numerous, and so large an amount of the property of the community is invested in them, that it

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matter by the Defendant for whom he was acting. He was thus the agent of the Defendant. This fact does not show merits in the defence, for the action of Richard W. was the action of the Defendant. As to the conversion, it makes no matter of difference that some other party took the property in the first instance. Briggs v. Wagenhein, Cal. Cal. S. C. Oct. 7, 1869. Where "certificates of stock" were even purchased from another the holder was liable if they were wrongfully taken from the owner, and the purchaser had reason to suspect this. Anderson v. Nicholas, 28 N. Y. 600. The witnesses seem to swear to all they know about the case, yet we can discover no special merits that would justify a reversal of the action of the Court below, even if the Defendant did show proper diligence. And we do not think any diligence whatever was used; certainly no reasonable diligence was used. The action was begun on the 9th of September, 1873, and upon the following day Defendant was served with the summons. On the 18th of said September he appeared and demurred. On the 15th of April, 1874, he withdrew the demurrer and took ten days in which to answer. On the 28th of the same month (April), no answer having been filed, default was entered. Then on the 13th of October following, nearly six months after default, Plaintiff introduced his proof and judgment was entered in his favor. Afterwards on the 29th of October Defendant filed his motion to vacate the judgment and set aside the default, having given notice on the same day. The motion was denied, and a few days afterward renewed. We do not think this shows very great diligence, especially when we remember that the affidavits allege that the Defendant was the acting officer of the very Court in which this case was pending. The only excuse given for the negligence is that he depended upon the words of other men in regard to making him safe. If such negligence can be excusable in one case it should be so in all. But if admitted as good, it would lead to great confusion, and parties would never know when their cases were really settled. The

judgment and subsequent action of the Court l affirmed.

LOWE, C. J., concurs.

LAWRENCE A. BROWN, *Respondent*, v. TH(ATKIN, *Appellant*.

DISTRICT JUDGE CAN HEAR MANDAMUS.—A District Judge and determine Writs of Mandamus at Chambers.

SEC. 592 OF PRACTICE ACT.—Section 592 of the Practice A incompatible or inconsistent with the provisions of of the Organic Act.

MANDAMUS TO COMPEL APPROVAL OF BOND.—The Ap showed that Relator had been elected Probate Judge County, and that it was the duty of the Defendant tc the Bond of the Probate Judge. Relator presented a sufficient Bond to the Defendant for approval, which D declined to accept or approve.

HELD.—That it was the duty of Defendant as County Tre approve the Bond, and upon failure so to do, he will pelled by Mandamus to approve the same.

APPEAL from the Third District Court.

The facts appear in the opinion.

J. G. Sutherland, for Appellant.

Tilford & Hagan, for Respondent.

LOWE, C. J., delivered the opinion of the Court.

The case was mandamus, and the writ was issu the hearing and proceedings were had before the J the Third District Court in vacation, in pursuanc 592nd Section of the Practice Act. It is assigned that there was no jurisdiction in the Judge at Cl for the reason that it was not competent for the ture to confer this jurisdiction upon the Judge in and that the Section referred to is in violation o of the Organic Act. I do not think there is a

incompatibility between the two. A similar Act has been sustained by the Supreme Court of California under legal conditions very similar to these. There may be practical difficulties in exercising the power in vacation, owing to our jury system, but they do not occur in this case.

It appears from the affidavit of the Relator Brown that he received at the general election of 1874 votes for the office of Probate Judge of Tooele County; that on a canvass of the election he was declared elected by a majority of the votes; that the County Clerk issued to him a certificate of election; that the Governor had issued and delivered to him a commission as Probate Judge, and that he had taken the oath of office; that he prepared and presented to the Defendant as County Treasurer an official bond with sufficient sureties, which the Defendant refused to approve and file. Upon this affidavit an alternative writ of mandamus was issued, and upon its return, a motion was made to quash the writ upon grounds that were deemed untenable, and the motion was overruled. The Defendant then answered, denying that the Plaintiff was elected Probate Judge, alleging that one John Rowberry was in possession of the office of Probate Judge, and that the selectmen of the county at a time subsequent to the presentation of the bond by Plaintiff had increased the penalty of the bond, to be given by the Probate Judge. On the filing of the answer the Judge framed three issues, to be tried as material to the decision of the case, and the case proceeded to trial by the Court, neither party demanding a jury, nor has the trial without a jury been assigned as error. Upon the trial the averments of the complaint were sustained by the proofs, and from the facts elicited there is no doubt that the Plaintiff was entitled to have the bond approved and filed by the Defendant. The Plaintiff had the certificate of election, and the commission of the Governor, the fact that Rowberry had also been voted for, for Probate Judge, and that a contest was likely to arise between him and the Plaintiff as to who was elected, was a question with which the Defendant

had nothing to do. The Plaintiff, showing the proper c dentials of office, it was the duty of the Defendant to prove and file the bond, if the same was sufficient. appears that when the bond was presented to him, the o reason he assigned for not approving and filing was that office would be contested by Rowberry. It is true that m damus will not compel an officer to approve an insuffici or a doubtful bond; but if he refuses to approve a g and sufficient bond without good cause, he may be co pelled by mandamus to perform the duty. It appears fr the evidence that the bond was proper in form, and su cient as to the sureties. It was in the sum provided Statute, and the fact that the selectmen subsequently creased the penalty for the Probate Judge's bond, does excuse the Defendant's neglect of duty. The finding judgment of the Court below upon this part of the c was correct.

There was a claim in the complaint for damages Counsel fees, traveling expenses and hotel bills claimed $500, in and about the prosecution of the suit, and ju ment was rendered for damages for $400. This was erro ous. The party had no claim for such expenditures damages in a suit of this kind any more than in an o nary action. Practice Act, Sec. 472; Sedgwick on Dama p. 97, and cases there cited. Other points of supposed e are urged, but I think they are immaterial.

As the plaintiff is not entitled to a recovery in respec the damages alleged, no re-trial of the case is necessary. order may be entered modifying the judgment of the C below, by setting aside so much of it as awards damage $400. And as to the judgment, in other respects, it wil affirmed and cause remanded.

It is said in the statement that the Judge refused grant a stay of proceedings as to the issue of the pere tory writ, but this is not presented in a mode in which effective order can be made. I see no reason, however, a supersedeas should not have been granted.

BOREMAN, J., concurs.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COU

AT

THE JANUARY TERM, 1876.

ALEX. WHITE, CHIEF JUSTICE.
P. H. EMERSON, ASSOCIATE JUSTICE.
J. S. BOREMAN, ASSOCIATE JUSTICE.

JOHN YOURT, ADMINISTRATOR, &c., OF JOHN C DECEASED, *Respondent*, *v.* HUGH McKEE JAMES DUNCAN, *Appellants*.

MONEY RECEIVED BY A FIRM.—C delivered to M a sum of m be deposited by M in Bank to the credit of C. Ins placing the same to the credit of C, as directed, M depo to the credit of M & D, a firm of which M was a m C sued the firm to recover the amount.

HELD.—The money was not loaned to M, and the latter w Agent for C.

HELD FURTHER.—That the firm having received the money responsible for its re-payment to C.

APPEAL from the Third District Court.

In November, 1873, Defendants were merchant partners; Cole, the deceased, then delivered to McK to carry to and deposit in a bank where deceas deposit account. McKee received the money for th

pose, took it to the bank, but deposited it to the credit of his firm on their account in that bank. About 1st July, 1874, the firm dissolved, McKee going out and Duncan continuing the business; whereupon Cole, on inquiry at the bank, learned that the money had not been deposited to his account, but had been placed to the credit of, and used by the firm. He then applied to McKee, who gave him the evidence of the debt set forth in the complaint. Soon after this, Cole mentioned the matter to Duncan, who denied and repudiated both the note and the debt.

The complaint, as a foundation, sets forth the original transaction, charging that the Defendants had received so much money to his use, and had converted the same to their own use.

On the trial, it was shown that Duncan, before this action was brought, being told of his partner's statement that the money had been deposited to the credit of the firm on its bank account and used by the firm, and being asked what he had to say to that, answered that he had examined the bank book and found that the money had been received by the firm and that it was all correct.

The other facts appear in the opinion.

Robertson & McBride, for Appellants.

Rosborough & Merritt, for Respondent.

BOREMAN, J., delivered the Opinion of the Court.

John Cole delivered to Hugh McKee a sum of money to be carried by said McKee to the bank, and there deposited to the credit of said Cole. He took the money to the bank, but instead of placing it to the credit of Cole, he deposted it to the credit of McKee & Duncan, a partnership firm of which said McKee was a member. The firm afterwards dissolved, and Cole sued the partnership for the amount and obtained judgment in the District Court, from which the Defendant, Duncan, appeals to this Court. McKee never appeared in the case.

Cole having died during the pendency of the suit Court below, the cause was revived in the name of l ministrator.

In reviewing the evidence in this case, we cannot p that Cole ever intended to part with his property money. The very reverse seems to have been th McKee was to take Cole's money and place it to credit. As long, therefore, as it remained in McKee's it was Cole's money. In other words, McKee's po was Cole's possession, and Cole never parted with th session until McKee & Duncan received it. The mo not loaned to McKee; nor was any credit given to regard to it. He acted solely as the Agent of Col violated his instructions as Agent, and made a w deposit of Cole's money; and McKee & Duncan hav ceived it to their use and benefit, as admitted by D they became responsible for its re-payment to Col therefore see no error in the action of the Court bel

The judgment and order are affirmed, with costs.

EMERSON, J., and WHITE, C. J., concur.

ROBERT ZEILE, *Respondent*, *v.* JACOB MOR *Appellant.*

ORDER SUSTAINING A DEMURRER.—No appeal lies from a sustaining a Demurrer.

ACTION OF COURT ON DEMURRER, HOW REVIEWED.—W Judgment Roll shows the action of the Court below up murrer, the same can be reviewed on appeal without a st or Bill of Exceptions.

LAW AND EQUITY STILL DISTINCT.—The Practice Act aboli forms of the several actions only—the distinction betwe and Equity is as broad as ever.

EQUITABLE DEFENCE AND COUNTER CLAIM.—Action on pro note Defendant by his answer sets up a claim for against the Plaintiff for the willful destruction of the pro Defendant to the amount of $1,000, and avers the insol Plaintiff.

HELD.—Not an equitable defense to Plaintiff's action.

HELD FURTHER.—That the same is not a Counter Claim, as it does not arise out of the transaction set forth in the complaint.

ACTION AT LAW—COUNTER CLAIM.—In an action at law under the Practice Act, the Defendant cannot set up a defense in tort, notwithstanding the insolvency of the Plaintiff, when the tort does not grow out of the cause of action sued on.

APPEAL from the Third District Court.

On the 23rd day of July, 1875, the Plaintiff brought an action against the Defendant on a promissory note for $700. The Defendant answering, admits the execution and delivery of the note, but alleges that the Plaintiff whilst in the service of Defendant and one Johnson, as partners, subsequent to the execution of the note sued on, as a beer brewer, "negligently and carelessly, and wantonly and maliciously injured and destroyed materials for making beer, and negligently and carelessly, and wantonly and maliciously injured and destroyed beer already manufactured, to the value, in all of such materials and such beer, of ($1,000) one thousand dollars;" that on the 1st day of July, 1875, the said Johnson sold and assigned his interest in the cause of action for said damage to Defendant for value; that Defendant had duly demanded payment for said damage from Plaintiff, which Plaintiff refused to pay; that "the Plaintiff is wholly and utterly insolvent, and an action against said Plaintiff for said damage would be unavailing."

Defendant then "offers to credit the amount due him for such damage with the sum claimed by Plaintiff, and take judgment for the balance of said one thousand dollars."

To this answer Plaintiff interposed a general demurrer. On hearing the argument, the Court sustained the demurrer, and Defendant duly excepted. Defendant stood by his answer; judgment was given for Plaintiff, and Defendant appeals.

J. C. Hemingray, for Appellant.

Tilford & Hagan, for Respondent.

EMERSON, J., delivered the opinion of the Court:

The suit was upon a promissory note. The Defend answered; the Plaintiff demurred to the answer; the dem rer was sustained; the Defendant excepted; elected to sta upon his demurrer, and judgment was given for the Plainti reciting the action of the Court upon the demurrer.

The Defendant appeals.

1st. From the order sustaining the demurrer.

2d. From the judgment.

As to the first, it is sufficient to say that it is not, such, an appealable order.

On the appeal from the judgment, the question is rai as to whether this Court can review the action of the Co below on the demurrer, there being no statement or Bill Exceptions.

The object of a Statement on Appeal is to bring i the record those orders and rulings, together with the fa necessary to explain them, which are made in other sta of the proceedings in the case, and not during the progr of the trial, and not contained in the Judgment Roll. H per v. Minor, 27 Cal. 110.

The judgment in this case discloses the action taken the Court on the demurrer. The recitals in it bring bef us all the facts necessary to enable the Court to determi whether there was error or not; that is the sufficiency the answer. They accomplish all that could be accomplish by a statement.

We cannot separate the action of the Court upon t demurrer from the judgment based upon, and made a p of it in the record, and properly included in the Judgm Roll.

The complaint is in the usual form upon a promiss note; the answer admits the execution and delivery there and sets up new matter in defence by which he seeks only to defeat the Plaintiff's claim, but to recover a ju ment against him. This new matter consists of a claim damages for the willful and malicious destruction of t

partnership property of the Defendant and one Johnson, to the amount of $1,000, Johnson having assigned his interest in the claim before the bringing of this suit. It is further alleged in the answer that "the Plaintiff is wholly and utterly insolvent and an action against said Plaintiff for said damages would be unavailing."

The Defendant claims that under the Practice Act this constitutes an equitable defense to the Plaintiff's action.

The Practice Act does not abolish the distinction between Law and Equity. This distinction is as broad as ever. The act affects the forms of the several actions alone. The substantial allegations of the pleadings must be the same as under the old system. Miller v. Van Tassel, 24 Cal. 463; Jones v. Steamship Cortez, 17 Id. 487. "The abrogation of the ancient forms of pleading, and the establishment of a uniform system of remedies in the Courts, do not abrogate the distinction between Law and Equity, nor require that every cause of action should be set forth in the same terms." Willard's Equity Juris. 36.

Construed by these principles, this answer falls far short of setting up any sort of defense whatever to the Plaintiff's cause of action.

The Defendant rests his claim to have this defense allowed solely upon the allegation of the Plaintiff's insolvency. In other words, to defeat an action upon a promissory note, he sets up a claim for damages, growing out of the tortious act of the Plaintiff, not in the remotest degree connected with the subject of the action, and by simply alleging in addition the insolvency of the Plaintiff asking the Court to make an equitable application of the claim for that purpose.

With equal propriety he might defeat a claim for damages in an action of ejectment, by setting up a claim for damages for an assault and battery committed upon him by the Plaintiff, by alleging the insolvency of the Plaintiff and his consequent inability to respond in damages for the tort.

The new matter constitutes no defense, either legal or equitable in any other sense than as a Counter Claim, and as such it cannot be pleaded in this action, because it does

not arise out of the transaction set forth in the com as the foundation of the Plaintiff's claim; neither connected with the subject of the action; nor is cause of action arising upon contract. Practice Sec. 47.

If the Defendant has a remedy against the Plaint must seek it in another suit.

The judgment of the Court below is affirmed costs.

WHITE, C. J., and BORKMAN, J., concurred.

JAMES L. NEWTON AND GEORGE H. NEW *Respondents, v.* WILLIAM BROWN, *Appellant.*

FORM OF VERDICT—WAIVER.—A form of verdict can be pr (leaving the amount blank), and by the Court given to th when they retire, and if the adverse party has any objec such a course, he must interpose his objection at the time too late to urge it for the first time on a motion for a nev or on appeal.

OFFICER AUTHORIZED TO TAKE DEPOSITION.—A person appoin the Court to take a deposition in another State, must be the specified local officers mentioned in Section 410 of the F Act, otherwise such person is not authorized to take the dep

MEASURE OF DAMAGES, EVIDENCE.—Action against a She Replevin for certain property seized by such sheriff, wh property was *in transit*, from Ogden City to San Francis

Held.—That evidence as to the market value of such property Francisco, was admissible as tending to show in connecti other testimony its market value at the place of detention

Held Further.—That in assessing the amount of damages the I sustained, the jury must be governed by the value property at the place of detention.

JUSTIFICATION BY OFFICER.—When an officer justifies a sei property, under and by virtue of a writ of attachment l him, his justification depends solely upon the regularity attachment proceedings in the case, and it is immaterial v the proceedings have ever ripened into a judgment or not

MOTION FOR A NON-SUIT.—The fact that the Plaintiff is a cannot be urged on a motion for a non-suit. This objecti be taken advantage of in some other manner.

DEPOSITION AS EVIDENCE.—A deposition will not be received in evidence unless the party against whom it is offered was either present at the examination, or had an opportunity of being so for the purpose of cross-examining the witnesses; but this power and privilege can be waived by his own voluntary act.

APPEAL from the Third District Court.

The facts appear in the opinion.

Miner, Haydon & Gilchrist, for Appellant.

Bennett, Whitney & Kimball, for Respondents.

EMERSON, J., delivered the opinion of the Court.

This was an action for the claim and delivery of personal property, and a jury trial had, and a verdict for Plaintiff.

The first assignment of error is, that the form of a verdict in his favor was prepared by Plaintiff's Counsel, leaving a blank for the amount of damages. This was handed by Counsel to the Court, and by the Court to the jury, when they retired to consider of their verdict. The jury returned this verdict into Court, with the blank filled with the amount of damages as assessed by them.

We are unable to discover upon what ground a valid objection can be made to the course adopted. It is the duty of Counsel to see that the verdict of the jury returned in their favor is so formally expressed as to sustain the judgment of the Court thereon.

If it were possible to discover any valid objection to this course, it could not possibly be anything more than a mere irregularity, which the Defendant waived by not objecting at the time, and he ought not to be allowed to urge it for the first time either on a motion for a new trial, or in this Court.

The second ground of error relates to the admission in evidence of certain depositions, taken in the City of Omaha, in the State of Nebraska, on the part of the Plaintiffs.

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After telling the jury that if they found the Plaintiffs were the owners of the property, they would then assess the damages for its detention, the Court gave this instruction:

"In fixing the amount of damages for detention, you can consider the market value of the property at Sacramento and San Francisco, the points to which the property was consigned, and legal interest on the value thus found during the detention at Ogden."

The use of this language was well calculated to convey a wrong impression to the minds of the jury. It is more than probable, that they inferred from it that they were at liberty to take the market value of the property at the points named, as the basis upon which to assess the Plaintiffs' damages, when in fact the testimony as to its market value there was only admissible as tending, in some degree, to establish the value at the place of detention, the latter furnishing the true basis upon which to assess the damages.

The giving of this instruction was error.

It appears that the Defendant was Sheriff of Weber county; that he seized the property as such Sheriff under and by virtue of a writ of attachment issued out of the Third District Court, at the suit of Greenwell & Co., against one Forbes, and as the property of said Forbes. He pleads this in justification.

On the trial the Defendant offered in evidence the Court files in the attachment case, all of which were received except the judgment, to the introduction of which an objection was made and sustained. We can not see how the reception or rejection of this piece of evidence could in any view affect the Defendant's case. His justification depended upon the regularity of the attachment proceedings, whether those proceedings ever ripened into a judgment or not.

At the close of the Plaintiffs' case the Defendant moved for a nonsuit, on the ground that one of the Plaintiffs was a minor at the time of the commencement of the suit, This motion was denied, and is assigned as error.

This objection should have been taken advantage
some other manner; it cannot be reached by this m
It is not one of the grounds upon which a non-suit w
granted.

There is nothing in the record to show that the dar
as assessed by the jury are excessive. The interest
the value of the property for the time it was detain
not the only measure of damages. The testimony
that a portion of it was of a perishable nature, and
this portion was rendered worthless by the delay.
can be no doubt the jury took this into consideratio
fixing the amount of damages, and gave compensation

The depositions of a number of witnesses for the De
ant, were taken in the City of Omaha, on a stipu
between the parties. Both parties were represented by
sel before the Commissioner agreed upon by them.

It seems that the examination extended through s
days. At the close of one day's proceedings, it was adjo
until the day following, pending the examination of
ness. The next day the Counsel for the Defendant ap
with his witnesses. The Plaintiff's Counsel did not a
The testimony of the witness, whose examination was
menced the day before, was concluded, and that o
others was taken, when the further examinatio
adjourned until the next day. After this adjourn
Plaintiff's Counsel appeared and demanded that he
have an opportunity to cross-examine the witnesses
testimony had been that day taken. In the meantime
witnesses had been discharged by the Defendant,
seems had left the room. An effort was made by an
armed with a subpœna, to bring them before the Co
sioner, but they could not be found.

On the trial the Defendant offered the depositi
those witnesses in evidence, to the introduction of
the objection was made that the Plaintiff's Counsel
opportunity to cross examine the witnesses. The ob
was sustained, and the depositions excluded.

It is a general rule that a deposition or examinati

not be received in evidence, unless the party against whom it is offered was either present at the examination, or at least had an opportunity of being so, and cross-examining the witnesses. But if he by his own voluntary act or neglect has renounced the power and privilege of examination, the fact that there was no cross-examination furnishes no ground for the exclusion of the depositions. It was the duty of the Plaintiff's Counsel to be present at the time to which the examination was adjourned, if he desire to avail himself of the privilege of cross-examination.

The record discloses that he was present the day before, and must, therefore, have known to what time the examination was adjourned. If he chose to absent himself, the Defendant should not be made to suffer for it. This objection should have been overruled.

For the errors above mentioned, the judgment of the Court below in refusing a new trial is reversed, and a new trial ordered. The Defendant to recover costs in this appeal.

WHITE, C. J., and BOREMAN, J., concurred.

BOLIVAR ROBERTS *et al.*, *Respondents*, *v.* ROBERT WILSON *et al.*, *Appellants*.

EVIDENCE OF LOCAL MINING LAWS.—In order to introduce evidence of the local Mining Laws of a District, it is necessary that it should be made to appear *aliunde* that the copy offered comes from the proper custodian, and that such person was empowered to give certified copies thereof, so as to become evidence, and that such was a copy of the laws in force in such District.

MINING GROUND, HOW HELD.—A party claiming mining ground, not actually possessed and worked, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works or monuments, or by the local Mining Laws and rules, and compliance therewith.

CASES APPROVED.—Atwood *v.* Fricot, 17 Cal. 48; and English *v.* Johnson, Id.; and Hess *v.* Winder, 30 Cal. 355, referred to and approved.

APPEAL from the First District Court.

The facts appear in the opinion.

Marshall & Royle, for Appellants.

D. Cooper, for Respondents.

BOREMAN, J., delivered the opinion of the Court.

This is a suit for mining property. The Plaintiffs alle that they were "seized in fee of a certain tract of la and mining claim," fourteen hundred feet long by t hundred feet wide, which they call the "Coresa Lode and that being so "seized," the Defendants ejected th from the premises and withhold the possession from the Defendants in their answer deny that the Plaintiffs w "seized in fee, or otherwise, of the property described the complaint;" and they allege that they (Defendan hold under a location, called the "Mountain Tiger," m at a date subsequent to the alleged date of the "Core location, and within the boundaries claimed by the Plai iffs, but allege that Plaintiffs were never in possess thereof, and that said "Mountain Tiger" is a separate distinct lode, or vein, from that of the "Coresa," and t being such, the Defendants could hold it, even if wit the boundaries claimed by Plaintiffs, the Plaintiffs bei under the Law of 1866, entitled to locate and hold one lode or vein within the boundaries specified in complaint. A jury trial was waived, and the Cou t, hav heard the case, gave judgment for the Plaintiffs for property claimed by them. The defendants, thereup moved for a new trial, which being refused the Defend appealed to this Court, both from the judgment and order of the District Court overruling the motion f new trial.

The Appellants (Defendants below) assign as error admission in evidence of a paper writing, "Exhibit offered by the Plaintiffs, as the local Mining Laws

Tintic Mining District, where the property in question is alleged to be situate. In order to introduce the written local Mining Laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper repository, and that such party was empowered to give certified copies so as to become evidence, and that such was a copy of the laws prevailing and in force in the District at the required date. Harvey *v.* Ryan, 42 Cal. 626.

These things have not been, and could not be shown by the certificate attached to the alleged laws. Nor is there any authority for showing them by affidavit. This could only be done by express Statute, and no such Statutes exist. In attempting to prove these facts the opposite party is entitled to his right of cross-examination, from which he is cut off, if *ex parte* affidavits are sufficient. The affidavit does not allege that this paper is an examined copy, or that it is a copy of the originals, or that the originals are in his office.

Nor does it appear either in the certificate or affidavit that the exhibit is a copy of all the laws of the District. English *v.* Johnson, 17 Cal. 115.

None of the requisites having been complied with to make the Exhibit evidence, we are necessarily brought to the conclusion that it was error for the Court to admit it in evidence.

The question then arises, was it such error as requires a reversal of the judgment below?

Injury is presumed from evidence erroneously admitted, unless it manifestly appears that there is no injury. Grimes *v.* Fall, 15 Cal. 63.

It is claimed by Plaintiffs that the introduction of the local laws was not necessary to their case, as the Defendants have, as they allege, admitted Plaintiffs' title, claiming only that the "Mountain Tiger" is a separate and distinct lode or vein.

The Defendants certainly hold that the "Mountain Tiger" is a separate and distinct vein or lode, but do they admit that Plaintiffs had any title to the "Coresa" lode?

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course, before the possession of, or working upon part, gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim."

The converse of this proposition would require that in proving a claim, if its limits be not defined, and the entry be not in pursuance of the local rules and customs, the possession would give title only to the ground actually worked. And such is the doctrine of English *v.* Johnson, (17 Cal. 115), according to which, if no mining rules are sworn to exist under which the location was made and claimed, the party so claiming could, as against another party not claiming under the mining rules, hold his prior claim if its boundaries be "distinctly defined by physical marks," even without proving the local customs or rules.

The same Court, in afterwards commenting upon the case of English *v.* Johnson, just referred to, says: "While it has been the object and endeavor of the Courts of this State to protect miners in the enjoyment of their mining locations on the public lands, justice and policy at the same time require some practical mode of notifying others of the extent of their claims. What that mode shall be, and what the extent of the mining claim may be, is generally regulated by the miners of the particular locality, whose rules in this respect are adopted as rules of law." And the Court there says further, that in the absence of these local rules, "the boundaries of the land claimed for mining purposes must be indicated by such distinct physical marks or monuments as will fairly advertise to all concerned where, and what it is, or in other words, *its extent.*"

In that case there being no such physical marks as required, nor any mining rules or customs shown, whereby the locator could extend his possession beyond what he actually worked, that is, beyond the *possessio pedis,* his rights did not extend beyond that, and he had nothing

JOHN SNELL, *Respondent*, v. FRANK CISLER, *Appellant*.

NEW TRIAL ON THE GROUND OF SURPRISE.—A new trial will not be granted on the ground that the moving party was surprised at the testimony of his adversary at the trial, when such testimony was pertinent and within the issue, unless there was some trick or fraud perpetrated.

ID.—NEWLY DISCOVERED EVIDENCE.—A new trial should not be granted upon the ground of newly discovered evidence, where no proper diligence had been used to procure it at the trial.

FACTS ON APPEAL, WHEN REVIEWED.—Upon appeal the Court will not review the facts unless a motion for a new trial was made in the Court below upon the insufficiency of the evidence.

APPEAL from the Third District Court.

The facts are stated in the Opinion of the Court.

Robertson & McBride, for Appellant.

J. G. Sutherland, for Respondent.

EMERSON, J., delivered the Opinion of the Court.

The firm of Holbrook & Townsend contracted with the Defendant to furnish the material and erect for him a brick building in Salt Lake City.

The Defendant was bound to the contractors to pay eighty per cent. of the contract price as the work progressed, and the remainder on its completion.

Holbrook & Townsend employed the Plaintiff to do a portion of the work. They drew orders for him, from time to time, on the Defendant, on which he received from Defendant eighty per cent. of the face of the orders, or what was specified in the original contract to be due.

This action was brought to recover the remaining twenty per cent., and the complaint alleges an express agreement by the Defendant to pay this balance to the Plaintiff. The answer denies this agreement. This claim and denial form the real and vital issues in the case.

The case was tried by a referee, who found for the Plaintiff. Upon the coming in of this report, the counsel for the Defendant excepted to it, and moved the Court

"I relied on my own statement as contradicting that found in the deposition of Holbrook on this point, and was advised by my counsel that there would be no necessity for anything new, unless Holbrook was corroborated by some other witness, and I knew that no other could truthfully do so."

It would seem that the accident and surprise at the trial grew out of the fact that the Plaintiff was able to produce more testimony upon the issue than the Defendant expected.

This testimony was pertinent and material to the issue, and he makes no charge that he has been misled by any trick or fraud on the part of the Plaintiff, or by any misstatement as to what any witness would swear to. He seems to have relied wholly upon the Plaintiff's not being able to prove the issue by any other witness than Holbrook, whose deposition he must have seen before the trial, judging from the language used by him in referring to it, and thus became apprised of what the line of proof would be. Holbrook was one of the contractors. Townsend, the other contractor, was present during the whole of the settlement.

What right had the Defendant to presume that Townsend would not be called to corroborate Holbrook. In his affidavit he says:

"I had no notice that the said Townsend would be a witness in said cause, and had no reason to infer, if he was a witness, that he would testify to any such fact. The same being an entire mistake, as will more fully appear from the affidavits of other parties hereto appended. And I further state that no such agreement was made at that time with said Holbrook and Townsend, or either of them, at that time or any other time. I further state, that knowing the said statement to be incorrect, and that said Townsend was present when the final settlement was made, I had no reason to suppose he would make such a statement as he did in his testimony, and was surprised that he should do so."

He cannot be serious in urging any claim to the con-

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and Holbrook and Townsend relative to a claim for damages for non-completion of the building at the time agreed upon. I think it is clearly shown by all the testimony in the case that every thing was arranged and agreed upon at the store except this claim for damages. Pending this negotiation Holbrook and Townsend left the store. In the evening of the same day the Defendant and Holbrook and Townsend met at the building, and this claim for damages was finally agreed upon at that place. The Defendant misapprehends the effect of the testimony, when he states, as he does in his affidavit on the motion for a new trial, that it was established that the promise was made at the Cisler building. None of the witnesses testify that it was made there. It is shown by the affidavits of the proposed witnesses, that their evidence would be that no such promise was made at the Cisler building or later in the evening, when the negotiations were finally closed. If they had been sworn on the trial their evidence would have had no tendency to disprove what occurred at another time and place during the pendency of the negotiations. The proposed testimony therefore is not material.

And even if it was material we do not think the Defendant has used reasonable diligence in reference to it. In his affidavit he states: "That since the trial of this action I have discovered evidence that will show conclusively, as I am advised and believe, that no promise, express or implied, was made by me at the time of the settlement between Holbrook and Townsend and myself, on January 4th, 1873, to pay the amount then due to Snell for his labor on the building; and that the allegation of the Plaintiff and the evidence by which it was sustained on the former trial, are wholly unfounded in fact. I further state, that until the trial had taken place, and the circumstances of the settlement revealed to my mind by the matters occurring at the trial, and by reflection upon it, I did not recollect that any person was present at the final settlement except myself, Holbrook and Townsend. That afterwards I recollected that the persons whose affidavits are annexed hereto were present

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JOSEPH G. HUSSEY, AND MARY G. HUSSEY, *Appellants, v.* JOB SMITH, SAMUEL A. MERRITT, AND J. B. ROSBOROUGH, *Respondents.*

PRACTICE IN AMENDMENTS.—In case a Demurrer to the Complaint in the Court below is sustained, and the Bill is dismissed, the Plaintiff should apply to that Court for leave to amend. This Court will not grant leave, unless application is made in the Court below.

AMENDMENTS.—In the case at Bar, the proposed amendments considered and declared insufficient. (See same case, *ante.*)

PETITION for a Re-hearing.

At the last term of this Court the judgment of the lower Court was affirmed, whereupon the Appellants filed a petition for a Re-hearing, and also for leave to amend their complaint in the Court below.

The other facts are stated in the opinion.

Snow & Hoge, for the Petition.

Rosborough & Merritt, Contra.

BOREMAN, J., delivered the opinion of the Court.

At the last June term of this Court this cause was heard, and the judgment of the District Court dismissing the Bill affirmed.

Thereupon the Appellants filed their petition for a Re-hearing.

The various grounds urged for a Re-hearing of this cause resolve themselves substantially into one point—that this Court having affirmed the judgment of the court below, dismissing the Bill, should have allowed the Appellants to amend. In the Court below, the Bill was demurred to upon the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was sustained, and no leave being asked to amend, the Court dismissed the Bill.

No effort was ever made in the Court below to obtain leave to amend. Nor has it ever been asked in this Court, except as specified in this Petition for a Re-hearing. We

think it is too late for this Court to interfere
relief of the Appellants now.

Having looked over the whole cause again, we ar
inion that the conclusion arrived at on the form
should not be disturbed. Were we to now a
ıdment asked, to be made, giving the terms an
of the mortgage, still the complaint would be
no authority being shown for the Plaintiffs
ıe mortgage the second time. A purchas
ale buys at his peril, the rule of caveat em
There is no warranty, and if the buyer tak
purchase and shows no reasons for set
ıd refunding the money, he is at the en
t abide the consequences. He cannot
placed in the situation of the Plaintif
prior to the foreclosure, and have t
th again. The object of that suit h
ent of the notes sued on by the
ıle.

fore, will refuse to re-open th
-hearing is denied.

EMERSON, J., concurred.

Respondents, v. STEVEI
F, Appellants.

ON ON DEMURRER.—A
aken, the exception is no
ering over.
e proposed amendme
ial are duly filed, as
Act, the Record n
party has been ser
will not be prec
. from objecting

prepared as a s

for the proposed statement of the moving party, under the pretense of amendment. Levey v. Fargo, 1 Nev. 421.

ERROR, HOW WAIVED.—Where a party applies to the appellate Court for leave to correct the settled statement on appeal, he precludes himself from urging the error that a substitute statement was allowed by the Court.

WRITTEN CONTRACT, RULE OF EVIDENCE.—The rule that where a written contract expresses the entire agreement, and there is in it no latent ambiguity, then it is the sole expositor of the intention of the parties, and in the absence of fraud, parol evidence cannot be received to "contradict, add to, or vary its terms," is subject to exception.

PAROL EVIDENCE, EXPLAINING WRITTEN CONTRACT.—Evidence in furtherance of and necessary to the full and fair enforcement of a written contract, may be given.

ID.—Parol evidence is admissible to prove any collateral, independent fact or agreement about which the writing is silent, in a case where the silence does not amount to an implication of a particular agreement.

ID.—Evidence offered not to contradict or vary the terms of a written agreement, but simply to explain how it is to be carried out, is admissible.

ID. APPLIED.—Where a written contract for the sale and delivery of cattle provides that they shall be selected by the vendees from certain bands, on certain ranges, but is silent as to which party shall collect the cattle for selection, parol evidence that the vendors were to so collect the cattle is admissible.

OBJECTION TO EVIDENCE.—Where evidence is *prima facie* relevant and competent, it should be admited over a general objection. In such case the objection should be specific, showing that the evidence should be excluded; otherwise it should go to the jury for what it is worth.

APPEAL from the Third District Court.

The facts are stated in the opinion of the Court.

Geo. E. Whitney, for Appellants.

J. C. Hemingray, for Respondents.

WHITE, C. J., delivered the opinion of the Court.

This is an appeal from a final judgment in the District Court of the Third Judicial District, and from an order of said District Court overruling a motion for a new trial, and

"And it is mutually agreed and understood between the parties, that whenever the said parties of the second part (the Defendants) shall desire the delivery of any portion of said cattle as herein before mentioned, that they shall select, or cause to be selected, and designated to the said parties of the first part (Plaintiffs), or their agents, such cattle and calves as they may desire; and that the said parties of the first part, upon such selection and designation, shall immediately drive and deliver the same." &c. * * * "Provided that not less than fifty head shall be selected at each selection, and that the whole number is to be selected and delivered before the 1st day of June next. And it is further agreed that the said parties of the second part shall have the privilege of selecting said cattle and calves, or any portion thereof, from either the band at Tintic or Rush Valley, as they may desire."

The first error assigned is, that the Court overruled Defendants demurrer to the complaint. It is insisted by the Counsel for the Respondents that the Appellants, by further answering after the demurrer to the complaint was overruled by the District Court, waived the error, if any; that if they wished to bring the ruling of that Court to this Court for revision, they should have allowed judgment final to go against them upon the demurrer, and that after the pleading upon the demurrer was overruled, they cannot assign the ruling of the Court on the demurrer as error.

This is a rule which formerly appertained in a system of pleading different from ours, but which could not well prevail under a system which allows a Defendant to demur and answer to a complaint both at the same time. Pr. Act, p. 24, § 42.

The assignment of error must be considered, but the demurrer was properly overruled. The complaint sets forth a good cause of action, with proper recitals which are sufficient to put the Defendant upon his answer in bar, or in avoidance, and unanswered would constitute a legal foundation for a judgment.

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But it is insisted that in such case the Defendants, if they objected, should have given written notice within five days after the service of the amendment of the Plaintiffs upon them, that they declined admitting the amendments, and that on their failure to do so, "that they (the amendments) are to be deemed accepted." The proposed amendments were endorsed and filed April 21st, 1873, but it does not appear when, if ever, they were served on the Defendants, or their Attorney, and in the absence of this notice Defendants would not be precluded under this provision of the Act.

On the 28th of April a notice of a motion to strike out the proposed substituted statement, was filed by the Defendants' Attorney, and was served on the same day upon the Attorneys of Plaintiffs; and on the same day Plaintiffs' Attorneys gave notice to the Attorneys of Defendants, that on the 1st day of May they would move the Court to settle the statement, &c.; and that Plaintiffs' amendments to Defendants' statement be adopted and certified as the statement in the action.

The Plaintiffs notice specified the 3d day of May as the day when they would make their motion. By a Bill of Exceptions of the presiding Judge, made in February, 1874, it is certified that these motions were heard before him on the day of May, 1873, at the same time, and Plaintiffs' motion was denied and Defendants' motion was granted.

This action of the Court we regard as irregular, and so far as it adopted the substituted statement proposed as amendments by Plaintiffs as the absolute settlement of the statement, erroneous. Upon the case as presented by the statement, and motion of the respective parties, the Court should have settled the engrossed statement after giving to the statements of both parties the examination and consideration to which each was entitled. The object of the rules in the Practice Act upon this subject, is to provide that the parties themselves shall agree upon the statement on the motion for a new trial, and if they do not agree that

the following: Was there any agreement as to who should collect the cattle together for the purpose of making the selection? The question was objected to by Plaintiffs' counsel as an attempt to add to or vary the written contract.

Defendants' counsel stated that he proposed to show that the Plaintiffs were to collect their cattle together by their herders in order that Defendants could make their selection. The objection was sustained by the Court and the Defendant excepted.

When a written contract expresses the entire agreement, and there is in it no latent ambiguity, then it is the sole expositor of the intention of the parties, and in the absence of fraud, parol evidence cannot be received to contradict, add to, or vary its terms. This rule is based upon the certainty of written evidence and the uncertainty of parol testimony. It was the Common Law before the Statute of frauds, and has received the sanction of all English and American Courts. The wisdom and propriety of the rule are so cogent that it has been enforced by the Courts with a rigid constancy, but it is nevertheless subject to exceptions, which in the endless variety of human transactions are ever multiplying, and which illustrate the capacity of the law for adapting itself to the end for which all law is ordained, the establishment of rules by which men and communities are governed in consonance with reason and justice. We do not propose an enumeration of the exceptions to this rule, nor will we attempt to classify them, if indeed they are not, as occurs to us, in their very nature, incapable of classification, but we will refer to such recognized exceptions as may serve as guides in the decision of the case under consideration.

Contracts are to be construed in the light of surrounding circumstances; from these alone are they tangible to sense and made susceptible of application and improvement. The law which imparts to it validity, and which constitutes a part of every contract with the nature of the subject matter, which is usually designated by mere words of description, are to be considered in determining the situation of the parties, and in

carrying out the contract. These are external, and imply, when not otherwise understood, the necessity of resorting to ıtside proof to render the contract intelligible and make effectual. The introduction of such evidence is no viola- of the rule we have stated, and no impeachment of written contract, but is in furtherance of and necessary fair and full enforcement.

l evidence is admissible to prove any collateral, inde- fact or agreement about which the writing is silent, where the silence does not amount to an impli- ı particular agreement. Cramer v. Stephenson, 15

offered not to contradict or vary the terms of eement, but simply to explain how it is to be admissible. Willis v. Fernald, 33 N. J. L.

Walton, 1 Starke R. 269, in an action aking proper care of a horse hired by the fendant, the written contract was "six ıs," Lord Ellenborough said the written ɣulates the time of hiring and the rate all not allow any evidence to be given se terms, but I am of opinion that Plaintiff to give in evidence sup- ·t of the agreement.

ıight be cited illustrating excep- hich we have above quoted, but upon a subject so familiar to

e as we conceive pertinent and h the question arises in this

evidence by the Plaintiff in its execution, by par- understood the subject to, and did express the ıct, but upon a care- light of its surround-

ings, it will be seen that it omitted an important item in the execution of the contract. The beef cattle which Plaintiffs agreed to sell to Defendants were not identified by the contract farther than that they were to be taken from the bands of Plaintiffs' cattle in Tintic and Rush valleys. The cattle which the Defendants were to have, were to be separated from these bands and identified before they could become the cattle to be delivered by Plaintiff, or purchased by Defendants under this contract, and the first thing specified in the written contract to be done towards its execution was the selection by the Defendants of beef cattle out of these bands of cattle of the Plaintiffs in Tintic and Rush valleys. By the contract the Defendants had the right to select out of all the cattle in these bands. They could not make such selection unless the cattle were together in some place or places where they could view them and point out to the Plaintiffs which they selected. Had the cattle been scattered they could not have made the selection, and the gathering them together while it would have been practicable and easy for the Plaintiffs would have been difficult, if not impracticable, for the Defendants. With regard to this preliminary and important act, the contract is silent. By no fair intendment can it be inferred from the contract who of the contracting parties was to gather the cattle together that Defendants might select such as they would take under the contract. The Defendants offered to show by parol proof that there was an agreement between the parties "that the Plaintiffs were to collect the cattle together on the ranges, by their herders, in order that the Defendants might make their selection." This evidence does not contradict or vary, nor does it in a strict sense, add to the written contract. It relates only to the manner in which the contract was to be executed and is in furtherance and affirmation of it. We hold that the evidence was competent, and should have been received, and that the District Court erred in sustaining the objection to it and ruling it out.

The Defendants also offered to prove on the trial in

the District Court by certain witnesses, who were to be butchers in Salt Lake City, and familiar w subject, that the market value of beef cattle Lake City increased from seven cents per pound middle of January, 1872, to twelve cents per p April and May, 1872. The evidence was objecte the Plaintiffs, and the Court sustained the objectio out the evidence and the Defendants excepted. Th tion was general, and if in any point of view the was legal the objection should have been overrule Plaintiffs sued for damages for a breach of contrac receiving and paying for the cattle agreed to be p by Defendants. The cattle were to be delivered slaughter house of Defendants near Salt Lake C that was the market in which the beef was to Whether beef was higher or lower in that marke the period of proposed fulfillment of the contract price stipulated to be paid by the Defendants n a material fact in ascertaining the damages and the Defendants would be liable to pay for the alleged formance of the contract.

Prima facie the evidence was both relevant and tent, and in the absence of some specific objectio ing that it ought to have been excluded, it shou been allowed to go to the jury for what it was wo the Court below erred in sustaining the objectio excluding it.

For the errors we have stated let the judgmen District Court be reversed, annulled, and the remanded for new trial.

BOREMAN, J., concurs in the conclusion reached.

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Court against the Defendants, in which he charges that on or about the 28th of February, 1872, an account was stated between Plaintiff and Defendants, and upon such statement a balance of two thousand eleven and 65-100 dollars was found to be due to the Plaintiff; that Defendant then agreed to pay said sum to Plaintiff; that the same has not been paid, and that the same is now due to the Plaintiff, and he prays judgment, etc.

The answer of the Defendants denies that a statement of accounts was had, and also denies that that sum or any other sum is due from Defendants to Plaintiff, and prays for judgment, etc.

On the trial below the Plaintiff offered to prove the statement of accounts as alleged in his complaint. The Defendants, by their Attorneys, objected, on the ground that a copy of the items of the account and the amount stated, had not been furnished to them, although the same had been demanded under the Statute, and therefore all evidence thereof was precluded. The Court sustained the objection, and the Plaintiff excepted. Judgment was rendered in favor of the Defendants for costs, and the Plaintiff appealed to this Court and assigned for error the refusal of the Court to allow the Plaintiff to give evidence of an account having been stated as alleged in the complaint. Section 56 of our Practice Act provides, that "It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within five days, or such other time as the Court shall direct, after demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof."

An action upon an account stated is not founded upon the original items of the account, but upon the balance ascertained by the mutual consent of the parties; it alleges the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. Carey v. P. & C. Petroleum Co., 33 Cal. 694.

It is true that upon a proper showing an account stated

TESTIMONY OF A WITNESS ON A FORMER TRIAL.—Where it appears that a witness who testified on the former trial has concealed herself by the aid of Defendant, it is competent for the Court to allow evidence of her former testimony to go to the jury.

INSTRUCTIONS.—On the trial of Defendant for polygamy the Court, among other things told the jury that they "Should consider what are to be the consequences to the innocent victims of the delusion;" *held*, not erroneous.

APPEAL from the Third District Court.

The facts are stated in the Opinion of the Court.

Williams & Young, Sheeks & Rawlins, for Appellant.

S. Howard, U. S. Attorney, for the People.

BOREMAN, J., delivered the opinion of the Court.

The Defendant was indicted for the crime of bigamy or polygamy, found guilty and sentenced to imprisonment in the penitentiary, and to pay a fine. He appeals to this Court.

The Defendant filed his various pleas in abatement. The first plea raised the question of the proper number to constitute a Grand Jury, it being contended by the Defendant that it should have been composed of any number from sixteen to twenty-three, and not of the number of fifteen members. This question has been heretofore at a former term, decided by this Court in the matter of indictment of this very defendant for this very crime. It was upon the hearing of that case at that time in this Court, strenuously contended by the Defendant, that fifteen was the proper number to constitute a Grand Jury, and in that view this Court coincided. He now comes into Court when an indictment has been found against him by a Grand Jury formed in accordance with that ruling, and says that such a Grand Jury is illegal. The Court cannot have much respect for his sincerity of purpose in pursuing a course deemed very reprehensible.

The action of the Court below upon the second plea

the guilt or innocence of the accused, but he did not think that opinion was such as to influence his verdict. There was nothing shown either by the juror or by his extrinsic testimony to give the Court any idea of the character or nature of the opinion. The Court, therefore, took the juror's statement as true, that the "opinion was not such as to influence his verdict." The opinion may have been from indefinite rumor, and amounted to nothing above a vague supposition. It would have been very easy to have asked the character or nature of the opinion. It not having been done, we can see no error in the acceptance of the juror by the Court.

The record sufficiently shows the finding of the indictment. The endorsement shows it clearly. It would have been improper for the record book to have disclosed the name of the Defendant, as he was not then under arrest.

A witness named Amelia Jane Scofield had given testimony upon the former trial of the Defendant for the same crime. But when the trial of the case at bar came on she could not be found. She was a resident at the house of the Defendant, but when sought there by the officer, it was said that she was not at home. Defendant told the officer that she would not appear in the case, and he refused to tell where she was. It is true that the Defendant was not required by law to aid the prosecution in supplying witnesses against himself, but in his effort to avail himself of such right, he went to the extent of showing that he was favoring and aiding in her concealment, and endeavoring to thwart the efforts of the officers of the law, to procure her presence as a witness. In such a case he has no right to complain if the Court allows the next best evidence to be introduced, and the proof of her former testimony to go to the jury. On the former trial she was under oath and subject to cross-examination by the defendant, and then he was confronted by the witness. The main objects of producing the witness upon the stand had been attained, and no rights of his were violated by the proof on this trial of her testimony upon the former trial.

THE PEOPLE, &c., *Respondents*, *v.* JOHN G. WIGGINS, *Appellant.*

CONTINUANCE IN CRIMINAL CASES.—An affidavit for a continuance in a criminal case, on account of the absence of Defendants' witnesses, which shows that the witnesses left the Territory "temporarily," and to "spend the winter elsewhere," without showing *when* they left, and that the Defendant did not know of their intention to leave, and that he made no effort to subpœna them, does not show proper diligence upon the part of the moving party.

UNCOMMUNICATED THREATS.—Where it is clear from the evidence that the defendant was the assailing party, and the deceased was unarmed at the time of the homicide, proof of uncommunicated threats is inadmissible.

INSTRUCTIONS.—When the propositions of Law, arising in a criminal case, are given to the jury in *separate* instructions, the Court should remind the jury that the instructions are all to be considered together; but when all the instructions are embodied in one statement, this rule does not necessarily apply.

APPEAL from the Third District Court.

The facts appear in the opinion.

Hoge & Hempstead, for Appellant.

Sumner Howard, U. S. District Attorney, for the People.

BOREMAN, J., delivered the Opinion of the Court.

The other Judges concurring.

In October last the Defendant was indicted for murder. Having been duly arraigned and pleading "not guilty," his case was set for trial on the 24th day of November following. At the latter date, upon application of Defendant, by reason of the absence of material witnesses, the cause was continued for the term. At the following term, on the 8th day of March, 1876, Defendant filed his affidavit for a further continuance, on account of the absence of material witnesses, but this application for a continuance was denied. Thereupon a trial was had, and a verdict of

guilty of murder in the first degree rendered, and
ant sentenced to be shot on the 23d day of the
month, a motion for a new trial having been over

The Defendant appeals to this Court.

The first error assigned is the overruling of the
tion for a continuance in March last. From the aff
Defendant it appears that the desired witnesses wen
Francisco "on business and to spend the winte
their homes at the time were in Salt Lake City,
they were absent "temporarily," only. But when t
to San Francisco "to spend the winter," does not
and whether they did spend the winter there or
out of the Territory, does not appear. It is not sh
Defendant did not know they were going, nor tha
not know before they went away that they were mat
nesses for his defense. Indeed, there is nothing in
davit to show that the witness did not go away by his
And there is nothing whatever to show that they c
have been subpœnaed before they left. Yet no e
made to have them subpœnaed or to get their testi
the trial. We do not, therefore, think that proper
was shown. Applications for continuance bein
addressed to the sound discretion of the Court, w
say that the Court below has abused that discretion

The second error assigned is the action of the
ruling out the testimony of threats made by the
against the Defendant shortly before the homicide, b
threats were not communicated to the Defendant b
killing.

It is a general rule that such uncommunicated t
inadmissible. There are, however, exceptions to
Defendant claims that in this instance there is an
to the rule, and that there is a conflict of testim
who fired the first shot, and that the evidence of su
should have been introduced to aid the jury in a
a correct conclusion on the point.

As the prisoner and one of the witnesses were
down the street, and saw the deceased, he (dece

sitting upon a carriage step in front of a public hotel, with his hands up to his face and his head bowed down, and was apparently in a stupor or asleep. As they were thus passing, the Defendant jumped behind the witness and immediately the firing began, and the testimony of two witnesses is that the firing was from east to west. The prisoner was on the east of deceased. The fact that the witness who was walking with the prisoner did not know who fired the first shot, is in its character negative testimony, and cannot be weighed against the positive testimony of two witnesses referred to, which showed that it was impossible that deceased should have fired the first shot.

The fact that Defendant stooped down as if to pick up something after the shooting, and the fact that deceased was shown to have had a pistol shortly before his death, might, if there were no other facts proven, be sufficient to raise a doubt as to whether deceased had a pistol at the time of his death—but it could not raise a doubt as to who fired the first shot. But we do not think that the deceased even had a pistol when the shooting took place. His pistol was in the hands of Defendant just before and just after the shooting, and if deceased had a pistol, as one witness testifies, shortly before his death, it was evident that he did not have it when he was killed, for after the first shot he threw up his hands and said: "Do not kill me, I am unarmed!" a thing which it is not reasonable to suppose he would have said if he had just fired the first shot; and besides, no pistol was found on his person, nor near him, after the homicide: If Defendant had picked up a pistol, it would certainly have been found upon him. This second pistol—if any existed—could not have been in deceased's possession when he was killed.

We do not therefore think there was a conflict in the evidence as to who fired the first shot, and we cannot see that there was any error in the action of the Court below in refusing to allow proof of the uncommunicated threats referred to.

The giving of what are called the 5th, 6th, 9th, 11th,

12th and 13th instructions, is objected to. Some instructions, if taken separately, might be obje It is a well established rule that all of the instructi are to be considered together, and in some cases is reminded of this duty. The rule, that all of th tions are to be considered together, is the true o the propositions of Law are given separately to

In the present case, however, the declarations of not given separately, but all are embodied as a one statement of the Law. In such a case it cert not necessary to remind the jury that they must instructions together as a whole, for they were g whole, although for convenience in this Court the have divided the charge up into various parts, a nated and numbered these parts as distinct instru

Taking the whole case together, therefore, w find any error. It was fairly presented to the jury have found their verdict, and we do not se they have erred in so doing. The painful charact cases—the prisoner being under sentence of deatl ishes the Court to be especially careful that no done, yet the character of the case cannot be ex influence the Court to depart from what it belie clearly the law and justice of the cause.

It is therefore the order of this Court that the of the Court below be affirmed.

SCHAEFFER, C. J., and EMERSON, J., concurre

D. C. DAN HARTOG AND GEORGE BUNE, *Respondents*, *v.* ROSEWELL TIBBITTS AND ANTHONY GODBE, *Appellants.*

WHEN NOTES DUE UNDER THE TERMS OF A MORTGAGE.—A mortgage to secure the payment of several notes, contained, among other things the following clause: "but if default be made in the payment of said notes or any of them, when the same shall fall due, then, said parties of the first part shall have the power to enter a suit in equity for the foreclosure of the same,"&c.; *held*, that such provision does not justify the construction that a failure to pay any of the antecedent notes at maturity, would authorize the mortgagee to declare the notes due, which by the terms thereof are then undue.

ALLEGATIONS AND EVIDENCE.—The evidence offered in a case must correspond with the allegations of the complaint, and in case of default the complainant is entitled to such a decree as the well pleaded allegations will justify.

PLEADING AND EVIDENCE.—A complaint to foreclose a mortgage, which is drawn upon the theory that the unpaid notes are due by the terms of the mortgage, will not support a judgment based upon the theory that the Court might order the whole of the property sold to pay the entire debt under Section 248 of the Practice Act.

APPEAL from the Third District Court.

The Defendants demurred to the complaint. Demurrer overruled, and Defendants failing to answer, the default and judgment was entered, whereby all the property was ordered sold, and all the notes ordered paid out of the proceeds of such sale.

Marshal & Royle, for Appellants.

First.—The Court erred in overruling the demurrer to the amended complaint.

Whatever may be the rule under a general demurrer, or under the first ground assigned in this demurrer, the demurrer was a special demurrer as to the other grounds assigned.

And whilst the first ground of demurrer in this case is insisted on, as sufficient, it is claimed by us, that as to the other grounds the court should not have hesitated to sustain the demurrer. Utah Practice Act, Sec. 64; 41 Mis-

souri Reports, 258, Peyton v. Rose; 47 Cal. 8
Western Pacific Railroad Company.

For the sufficiency of the third ground of
reference is made to the demurrer and complaint.

Second—The Court erred in giving the judg
decree rendered in this action.

First—In holding and reciting that said G
indebted thereon.

Second—In rendering judgment of foreclosur
the payment of one of the notes named in the
which was not due or payable when the suit was

Hoge & Jonnasson, for Respondents.

First—As to the first ground of the demurrer
well taken. Whiting v. Heslep, 4 Cal. 327;
Pearson, Cal. 448; Weaver v. Conger, 10 Cal.
dard v. Treadwell, 26 Cal. 294.

Second—The second ground of the demurrer i
taken. It is a well settled rule, that "when a
Chancery has gained jurisdiction of a case for on
it may retain it generally for relief. Story's Eq.
71; Armstrong & Barnwall v. Gilchrist, 2 Johns, ca

So under the code, where the party is entitle
legal and equitable relief, the whole matter may
and finally settled in the same action. Gray v.
25 Cal. 266.

SCHAEFFER, C. J., delivered the Opinion of the

The other judges concurring.

This was a proceeding to foreclose a mortgag
by the Defendant, Roswell Tibbitts, to the comp
secure the payment of six several promissory not
notes and mortgage bearing date February 2d,
said notes were payable at different times, and a
paid except the one for three hundred dollars,
years after date, and the one for three hundr
payable five years after date, each with interest

of 10 per cent. per annum from date until paid. By the terms of this latter note it was not due until the 2d of February, A. D. 1876, almost a year after this suit was commenced in the Court below.

The complaint seems to be based upon the theory that by the terms of the condition of defeasance in the mortgage, the aggregate amounts of the unpaid notes became due upon the failure to pay, at maturity, any of the notes embraced in the mortgage. The condition in the mortgage referred to is as follows: "Now if the said party of the first part, shall well and truly pay, or cause to be paid, the said promissory notes hereinbefore mentioned, according to the true intent and meaning of the same, together with the interest thereon, then this obligation is to be void; but if default hereof be made in the payment of the said notes, or any of them, when the same shall fall due, then, and in such event, the said parties of the first part, shall have the power to enter a suit in equity for the foreclosure of the same, and sell the property mortgaged, to satisfy the same."

It is very clear that this provision in the mortgage does not justify the construction that a failure to pay any of the antecedent notes at maturity, will be sufficient to authorize the mortgagee to declare the notes due, which by the terms thereof are then undue.

It is insisted, however, that by virtue of Sec. 248 of our civil Practice Act, the whole of the property mortgaged might be ordered to be sold, and the entire debt and costs ordered to be paid with a proper rebate of interest; but it must be observed that in the case at bar, the complaint does not base the rights of the Plaintiff upon the statute, nor does it contain the necessary averments to bring the case within the provisions of that section of the Practice Act.

There are two well established rules of evidence and practice, which should not, and dare not, in cases of this kind, be disregarded. First the evidence offered must correspond with the allegations in the complaint; and secondly, in cases of default the complainant is entitled to such a decree

Robertson & McBride, for Appellant.

Bennett & Sutherland, for Respondent.

BOREMAN, J., delivered the opinion of the Court:

Injunction relief is all that is prayed in this action. Pending the settlement of the question of perpetual injunction, a temporary one was granted. The Defendants filed an answer and moved the Court below to dissolve the temporary injunction, which motion was by the Court overruled, and thereupon the Defendants appeal to this Court.

In order to entitle the Plaintiff to the relief asked, where that relief is injunctive only, the title of the Plaintiff to the property said to be trespassed upon, must be clearly shown and be undisputed, or steps taken to establish the title by action at Law, or valid and satisfactory reasons be shown for not doing so.

In the case at Bar, the title is doubtful and disputed, and defendants are in possession as appears from the Bill itself. It is not claimed that steps had been, or were then being taken, to establish the title, and no reason appears why this was not done. The gist of the whole matter seems to be that the Plaintiffs desire the Defendants enjoined from trespassing upon ground, the title to which is disputed by Defendants, and Defendants are in possession alike with the Plaintiffs. It is clear that no perpetual injunction could be granted in such a case, for by so doing the Court of Equity would become an engine of injustice instead of a shield and protection to legal rights. Where upon the face of the papers it appears that no perpetual injunction could ever be granted in the action, it would be the grossest wrong to allow a temporary one. If such were allowable a temporary injunction might easily be sought and used to harass and annoy Defendants, and the trial of the ultimate rights of the parties as to the title be indefinitely postponed or delayed. The temporary injunction would work as an action of ejectment, and the Defendants deprived of their rights in a manner unjust and without

Robertson & McBride, for Appellants.

Hoge & Jonasson, for Respondent.

BOREMAN, J., delivered the Opinon of the Court.

The Plaintiffs held an account against the Defendant for merchandise. It had run two years before suit was brought, but Plaintiffs allege in the complaint by reason of a new promise in writing made by the Defendant the bar of the statute of limitations was removed. The Defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, because the action did not accrue within two years. The demurrer was sustained, and Plaintiffs electing to stand on their complaint, the Court gave judgment for Defendant. Thereupon Plaintiffs bring the cause to this Court. It is urged here that this Court cannot consider the order sustaining the demurrer, as it is not brought up in a statement, and is no part of the judgment roll. Whatever might be our view upon the merits of the objection, we deem the point already settled by this Court in a decision at a former term. It is likewise settled in California in Smith *v.* Lawrence, 38 Cal. 28. We accordingly conclude that the order sustaining the demurrer being the basis and part of the judgment and embraced therein, can be considered on this appeal.

Then let us consider whether this action is barred by the statute of limitation. The statute says that to remove the bar, the acknowledgment or promise must be in writing signed by the party to be charged. The account was dated in 1872. Afterwards, on July 31st, 1872, the Defendant wrote to plaintiffs, saying: "I shall express to you this day through Wells, Fargo & Co. ($100.00) one hundred dollars, hoping you will accept it in *part payment of my debt. I shall as quick as possible forward the balance.*" Certainly no stronger language could have been used to give an acknowledgment, and to create a new promise. But it is urged that if this language include the acknowledgment and promise, yet as it was written before the

Opinion by M. Schaeffer, C. J.

This was an action brought in the First Judicial District by Respondent against the Appellants as partners doing business under the firm name and style of Chipman Brothers. This complaint alleges that on the 1st day of June, 1873, the Plaintiff was the owner of 144 sheep, of the value of $720, and 430 pounds of wool of the value of $108, which were in the possession of the Defendants under a contract subject to be delivered to the Plaintiff whenever demanded; and then avers a demand and refusal and a wrongful conversion by the Defendants to the damage of Plaintiff, and prays judgment, &c.

The answer of the Defendant, Washburn Chipman, denies all the material allegations in the complaint, and he prays to be dismissed with his reasonable costs, etc.

The answer of Willian Henry Chipman, the other Defendant also denies the material allegations in the complaint, and then sets up special facts which we need not detail, intending to aver that the promise to deliver the sheep and wool in question was obtained from this Defendant, if any such were made, by misrepresentation and fraud, and further avers that the said sheep were never set aside or delivered to the Plaintiff.

The construction which is most favorable to the Plaintiff that can be placed on the evidence in this cause is that an agreement was made between the Plaintiff and the Defendant, William Henry Chipman, by which the said William agreed to sell and deliver to this Plaintiff 144 sheep, and the stipulated amount of wool per year for each head of sheep so to be delivered—that these 144 sheep were in a flock of some two thousand sheep, which were owned by and in the possession of the Defendants. That these 144 sheep were never separated from the others, nor were they in any way designated, marked or segregated so that they could be distinguished from the others. No actual change of possession took place, nor was there anything done by which the Plaintiff was enabled to point out the sheep which he claimed was his, as contra distinguished from the others.

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Utah," approved June 23d, 1874, it is provided that "The District Courts shall have *exclusive* original jurisdiction in all suits or proceedings in chancery, and in all actions at law in which the sum or value of the thing in controversy shall be three hundred dollars or upwards."

Regarding the acts of Congress as the supreme law of this Territory, having a controlling power similar to, if not co-extensive with the Constitution of any particular State over their respective Legislatures and judicial departments, we are forced to the conclusion that, in so far as section 445 of our Practice Act, which provides that the writ of mandamus may be issued by *any* Court of this Territory, except a justice of the peace, is in conflict with the acts of Congress above referred to, it is wholly inoperative and void.

We think, however, that the Territorial Legislature did not intend to confer original jurisdiction upon this Court to issue such writs; but that it simply intended to authorize this Court to issue the writ when it was necessary, to enable it to exercise its appellate jurisdiction; and with this construction, we think there is no conflict between these several acts. It is a well established rule that the appellate jurisdiction may be exercised in a variety of forms, and that if it is the will of the Legislature that a writ of mandamus should be issued for that purpose, that will and must be obeyed, but the jurisdiction must be appellate, and not original. And it is an essential criterion of an appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.

By the phrase, "shall be limited by law," we understand Congress to mean that the jurisdiction of the several Courts provided for shall be designated or specified by law, and not that such Courts shall have general jurisdiction when the same is restricted or confined by law. And the section which provides that writs of error, bills of exceptions and appeals shall be allowed from the final decisions of the District Courts to this Court makes this an appellate Court, but confers no original jurisdiction upon it. And if there were any doubt upon this point, it

is dissipated by the act of Congress which provides "The District Courts shall have exclusive original juri tion in all suits and proceedings in chancery; and i actions at law in which the sum or value of the thi controversy shall be three hundred dollars or upwards.

The same act of Congress confers and defines the diction of Probate Courts and Justices of the Peace; it does not confer original jurisdiction upon this Court have we been referred to or discovered any section of act of Congress conferring any except appellate jurisdi upon this Court in cases of this character.

We are therefore clearly of the opinion that this has no authority to grant the writ prayed for and wi passing upon the other points raised, the writ prayed must be denied and the petition herein dismissed.

EMERSON, J., concurred.

THE PEOPLE, &c., *Respondents*, v. WILLIAM TR *Appellant.*

DYING DECLARATIONS.—Statements of the deceased respecti cause of his death, made when he had a dread of appro dissolution and at a time when he believed that the hand of was upon him, are to be considered as dying declarations

PAROL EVIDENCE OF DYING DECLARATIONS.—When such stat have been reduced to writing, and signed by deceased, pa dence is not admissible, to prove such declarations, unl loss or absence of the writing is accounted for.

MALICE.—On a trial for murder, the homicide of itself do imply malice, still the circumstances attending the homic to be considered by the jury in ascertaining whether the malice.

BURDEN OF PROOF—REASONABLE DOUBT.—In no criminal case burden of proof ever shifted from the prosecution to the d it rests upon the prosecution throughout the entire trial, rule of a reasonable doubt applies in every such case.

CHARACTER OF THE DECEASED.—Where the deceased had thr the life of the Defendant, evidence of the character

deceased for violence should be admitted, to show that he was likely to carry out such threats.

APPEAL from the Third District Court.

The facts are stated in the opinion.

Robertson & McBride, for Appellant.

The District Court erred in admitting evidence of the dying declarations, because

1st. The declarations were reduced to writing, signed and sworn to, and the writing should be produced. 10 Cal. 32, People *v.* Glenn; 11 Iowa 359; 1 Greenleaf Ev., Sec. 161; 7 Car. & Payne, 230; 1 East P. C. 356; Rex *v.* Trouter.

2nd. The declarations were not made under any sense of immediate dissolution. 3 C. & P., 629, 631; 9 C. & P., 395; 2 Park C. Cases, 325; People *v.* Robinson; 1 Gr. 158 (sec.); 9 C. & P. 418, 420; 24 Cal. 17; People *v.* Sanchez.

3d. The instructions that a killing clearly proved implied malice, and that on that state of facts a reasonable doubt did not apply to the case. See Stoke's Case, 53 New York 178, *et seq.* The language of the instruction in that case and the present are almost identical, and the doctrine laid down the same. It is there overruled. See also Tweedy's Case, 11 Iowa; 10 Mich. 212; 33 Iowa 270; 34 Iowa 131; 1 Gray 61; 5 Nev. 134.

4th. The exclusion of the testimony of threats by deceased against the Defendant, and not communicated to Defendant, was erroneous. See 31 Texas, cited in Cases on Self Defense, 419; 22 Ark., Cases on Self Defense, 574; 16 Ill., Cases on Self Defense, 527; 18 Georgia, 194, Cases on Self Defense, 552; 19 Vermont, Cases on Self Defense, 554; 15 B. Monroe, Cases on Self Defense, 569; 37 Cal., Cases on Self Defense, 601.

5th. That the evidence of the character of the deceased as a man of violence, &c., was improperly rejected. See Cases on Self Defense Summarized, 695, 690; Wharton Crim. Law, Sec 643; Cases on Self Defense, 641.

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Upon the trial the statements of the deceased, made on the evening prior to his death, were allowed to go to the jury as dying declarations, the Defendant objecting to their admission.

The deceased seemed to have a dread of approaching dissolution; he did not want to talk about death. He declared that "this is the last time I shall ever stand on my feet." "I got a bad one," meaning the shot. "I'll never get over it." Such language would strongly indicate that he believed and realized that the hand of death was upon him. It was upon him, and he died in a few hours thereafter.

Statements of the deceased respecting the cause of his death, made under such circumstances, were, we think, properly considered as dying declarations.

But such declarations had been reduced to writing and signed by the deceased. The writing was the best evidence of these, and it ought to have been produced or its absence accounted for. Such was not done. The introduction of the verbal evidence, therefore, was error. 1st Greenleaf's Ev. Sec. 161, 12th edition.

The Court instructed the jury that the killing being clearly proved, the act of killing implies malice, and that in such a case the burden of proof is shifted to the Defendant, who must then show that the act was done in self-defense, and that further in such a case the "rule of a reasonable doubt" does not apply.

The accepted doctrine now is that the homicide of itself does not imply malice. The circumstances attending the homicide are to be considered by the jury in ascertaining whether there was malice. Malice may be inferred from circumstances. Yet it must be proven beyond a reasonable doubt, or else the jury should acquit. In no criminal case is the burden of proof ever shifted from the prosecution to the defense. It rests upon the prosecution throughout the entire trial, and the rule of a reasonable doubt applies in every such case. Malice is part of the offense charged, and the Defendant has the right to have the whole crime charged, proved, and

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lot upon an individual who was *never* the personal occupant of such lot.

APPEAL from the Third District Court.

When the case was heard in the Court below Hon. Alex. White was the presiding judge and delivered the following Opinion:

The Appellant and Appellee both claim, under the act of Congress, of March 2d, 1867, entitled, "An Act for the relief of the inhabitants of cities and towns upon the public lands," and the Act of the Territory of Utah, of February 17th, 1869, prescribing rules and regulations for the execution of the trust arising under said Act of Congress.

The relief which was designed to be granted by said Act of Congress, was to enable the inhabitants of cities and towns settled upon the public lands of the United States to secure a title to such lands from the Government by paying to the Government the minimum price for such lands. As a means of doing this most conveniently it was provided that when a city or town was incorporated that the corporate parties thereof, and when not incorporated the Judge of the County Court of the county in which such city or town "may be situated," should enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupant thereof, according to their respective interests. These provisions created the corporate authorities of an incorporated city or town, and the Judge of the County Court in case the city or town was not incorporated when the land was entered, under the provisions of the Act of Congress, trustees, depositories of the legal title for the inhabitants of the city or town who had settled and occupied the land for the several use and benefit of the occupants thereof according to their respective interests. The execution of which trust, as to the disposal of lots in such town and the proceeds of the sales thereof, was to be conducted under such rules and regulations as might be prescribed by the legislative authority of the state or territory in which the same was situated. Whatever

may have been the purpose of Congress in reference to cities and towns, as communities, it is evident that the leading object was to secure individual rights to the inhabitants of cities and towns who were occupants of the lands embraced within the limits of the entry contemplated by said acts. These individual rights flow from and are based upon the grant in the Act of Congress. It confers the right, defines its character, limits its scope and points out the manner of its consummation.

The power conferred upon the Territorial legislature is to execute the trust. It has no power to interfere with the individual rights which vested or became vested under the Act of Congress.

If this proposition be true, then we are to look to the Act of Congress alone to determine who are entitled under it. The primal fact which gives the right to the inhabitants of the city or town as a community is that they have settled and occupied the public lands as a city or town, and the primal fact that gives to any individual a right to any lot or subdivision of such public lands, is that he or she was the occupant of such lot or subdivision of such public lands. Occupancy is the central and leading idea of the grant, and upon this, in a positive or qualified sense must depend any right which can be asserted under it. It is in trust for the several use and benefit of the occupants thereof according to their respective interests. The execution of this trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, is to be conducted under rules and regulations prescribed by the legislative authority of the State or Territory. What these rules and regulations shall be is left to legislative discretion, limited only by the condition that they must be in furtherance of the execution of the trust and must not violate its letter or its spirit. As to rights which may accrue to individuals under the grant, the legislature can only make rules and regulations to eliminate and define, and establish them. As to the rights which may accrue to the community, it has the power to dispose of the proceeds of the sales. In

determining what are the rights of individuals under the Act of Congress, the rules and regulations adopted by the legislature could be looked to at most as only a legislative exposition or construction of the Act of Congress, and could not be regarded as authoritative or binding upon the Court as a legislative enactment. There being no controversy as to compliance with the rules and regulations enacted by the territorial legislature in bringing the claims of the parties before the Judge of Probate in the Court below, and none as to the regularity of the appeal to this Court, the Court will not look to the act of the legislature of Feb. 1869, in the determination of the question at issue in this case, but will address itself to the construction of the Act of Congress as the source from which whatever rights may be asserted, by either of the parties, must flow, and as the standard by which their respective claims must be tested and determined.

It has for a long time been the settled policy of the government of the United States to encourage the actual settlement of the public lands, and it has also regarded with disfavor the entry of public lands for purposes of speculation. The settlement required by law includes actual occupation of the land, and the subjection of the soil by labor, to the beneficial use of the person proposing to enter or buy the land from the government. The price at which the land could be bought was fixed by law, as were also the precedent conditions to a purchase. The first act of the settler was the occupancy of the land; the last was the payment of the purchase money, (by the entry of the land at the proper land office). The issuance of the patent followed as a sequence to the regular entry of the land. The title to the land and the right to the title remained in the government until the entry of the land at the proper land office. The settler had possession and the right to possession, and upon compliance with the prerequisites of the law he had the exclusive right to buy of the government at the price fixed by law the entrance money or the minimum price for the land. He was called a pre-emptor; one who buys before, or one

who has by law a first and exclusive right to buy the
of the government. The right of the pre-emptor de
upon the occupation of the land and its continued p
sion, to the time of application to enter it at the p
land office. An abandonment or surrender of possessic
a forfeiture of all right to enter the land. The rig
the settler upon lands is then a possession with a rig
possession, coupled with a right (the precedent condi
being complied with), to enter the land at the mini
government price. The title to the land remains i
government, and no right to a title inures to the pre-en
until he has entered the land. Even after he has occu
the land, made his improvements and filed his declar
of an intention to enter the land, the government can by sp
grant convey the land to another. The pre-emptor h
estate, legal or equitable, in the land, which can be r
nized or enforced in law, except such as grows out of
possession of the land.

The policy of the Federal government with regar
public lands settled and occupied as sites of cities or t
was, in the beginning, the reverse of that governing
public lands open to pre-emption. Such lands were
drawn from entry, and the government held them w
view to public sales to the highest bidder. This latter p
was abandoned in 1844, and since then the policy of
government has been to allow the entry of such lan
the minimum price for the use and benefit of the occu
of the lands within such city or town sites accordi
their respective interests. In other words the policy w
had guided the government with regard to the settle
and entry of agricultural lands, was adopted by it *mu*
mutundis, as to the inhabitants of cities and towns, th
cupancy of the land in both cases being the substa
basis upon which the individual right depends. The n
and quality of the interest which each class has in the
is the same. The government holds the title—the int
of the occupants is only a possession, and the right to
possession, with the right to the one as a pre-emptor,

the other as a member of a community to enter or have entered the land—in other words, to buy it of the government at the minimum price. This limited interest in the land is the creature of the acts of Congress; it is novel and anomalous, and only subject to the ordinary rules of law governing real estate (if at all) in a narrow and subordinate sense. The fee simple which is usually the largest possible estate which a man can have in and which draws to it all of the incidents of such an estate such as possession or the right of possession, and is the predicate of the relations of the landlord and tenant, does not enter into or constitute any part of this statutory interest in land which is created by the acts of Congress. On the contrary the fee is recognized as being in another, and this estate or interest in the land exists in its narrow and meagre entirety, without and independent of it.

To apply to it the rules and analogies which ordinarily govern and guide in determining interests and relations in regard to real estate, would be in contravention of the very nature of the right itself. The title to real estate is now in abeyance. This statutory interest vanishes upon the mere abandonment of the possession of the land. The title to real estate can only be transferred from one person to another by writing in proper form and duly attested. This interest can pass from one to another by the surrender of possession of the land. The conclusion educed from analogies as above announced, is further strengthened and confirmed by the language of the Acts of Congress in conferring this right upon the inhabitants of cities and towns. The entry under authority of the Acts of Congress is "in trust for the several use and benefit of the occupants thereof according to their respective interests." This phraseology points out the class who are the beneficiaries in the trust—"occupants"—and also fixes the time of occupancy, the date of the entry of the land by the corporate authorities or the judge of the County Court which determines the individual *cestie que trusts*.

Those in possession of the land when the entry is made

by the Probate Judge, are the persons for whom the land is held, in trust, and to whom he is to make the deeds. * * * This is the construction and meaning of the Act of Congress—Copeld v. McClelland, 16th Wallace, 334. The Act of Congress of May 23d, 1844, referred to in the citation just made, uses the same phraseology in reference to this subject matter as the Act of Congress of March 2d, 1867, under which the parties in this case claim.

That this is the reasonable and just construction of the Act of Congress, and that the presumption is in favor of the actual occupant at the time of entry of a lot or parcel of ground within the limits of a city or town site, settled or occupied as such upon public lands, and entered under authority of the Act of Congress, March 2, 1867, above referred to, is, in the opinion of the Court, sustained by reason and authority; but out of this springs another question of general interest and necessary to the adjudication of this case, and that is whether the occupancy at the time of entry is conclusive in favor of the right of the individual occupying, to the title to the land, or whether it is only presumptive, and if so, whether the circumstances in this case, repel the presumption in favor of the actual occupant at the time of the entry of the land by the trustee, and show the right to the land in controversy to be in another. The Act of Congress, March 2d, 1867, confers upon the State or Territorial Legislature the execution of the trust, "as to the disposal of the lots in such town," etc., "under such rules and regulations as may be prescribed," etc. This must be done according to the respective interests of the occupants. Does this language "respective interests" apply to the topographical area and measurement of the lots occupied, or is it to be considered in a larger sense as embracing the nature of the occupancy and the quality of interest in the land which the occupant claims as well? The Legislature had construed this language in the larger and more comprehensive sense: By section 3 of the act of the legislature of Utah, entitled "An act prescribing rules and regulations for the execution of the trust aris-

ing under the Act of Congress, March 2d, 1867," it is enacted, "that each and every person, or association, or company of persons, or corporation claiming to be the rightful owner of possession, occupant or occupants, or entitled to the occupancy or possession of such lands, or any lot, block, share or parcel thereof, shall within six months" &c., &c., sign a statement in writing, &c.

These are the persons and those the interests which the Legislature regarded as entitled to claim and assert title to lots or parcels of land in any city or land in the Territory under this Act of Congress. It is manifest that it was the design of the Legislature to extend the benefits of the Act of Congress to two classes of persons—actual occupants and the rightful claimants or owners of possessions—without the occupancy or possession.

This legislation in the opinion of the Court was in harmony with the Act of Congress, and within the authority conferred by the Act of Congress upon the Territorial Legislature, and the construction given by the Legislature to the Act of Congress in this particular is adopted by the Court.

The findings of the law by the Court in the case under consideration are as follows:

First—That under the several Acts of Congress upon the subject, and especially the Act of the 23d day of May, 1844, entitled, "An act for the relief of the inhabitants of towns upon the public lands of the United States under certain circumstances," and the Act of March 2d, 1867, entitled, "An act for the relief of the inhabitants of cities and towns upon the public lands," that the right which the individual inhabitant of the city or town took was a possession of the land with the right to possession and the use with the right as a member of the community to have the land entered by the trustee indicated in said Acts of Congress, at the minimum price in the proper land office of the United States, and the right under such rules and regulations as might be prescribed by the proper Legislative authority to have title made to himself for such lot, or sub-

division as he occupied, or had the rig
sion to at the time of entry of the lar

Second—That this right was a statu
existing by authority of the Acts of
defining and limiting it.

Third—That the basis of the right,
constituent of it, is the actual occupar
time of the entry by the trustee, or
or constructive, or the right to the pc

Fourth—That occupancy at the tim
land by the trustee, presumptively g
occupant of the land, but that this
impeached and overthrown by proof.

Fifth—That possession being of the
that the right may be lost by abandor
the possession, and that it may be tra
a transfer of the possession.

Whether at all, and if so, or how far
may enter into the question of right
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The Appellant, Sarah M. Pratt, wa
the lot in controversy, occupying it a
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Is this right repelled by the proof, a
in the Appellee, Brigham Young? Sa
husband, Orson Pratt, occupied the l
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came into possession. In the latter
or early in 1868, Mrs. Pratt came ba
Lake, and according to the testimony

and Appellee, the Appellee gave her the possession of the lot. There was no qualification of this surrender of possession at the time; no reservation of rent, or any agreement of any kind, showing or tending to show that there was any reservation of the possession, or the right of possession, by the Appellee. No rent was ever paid by, or claimed of the Appellant, and she has had the continuous possession from the 12th of March, 1868, occupying it as a home for herself and her family. There was an effort made to prove that Orson Pratt paid rent for the premises to the Appellee, but in this (even if Appellant would have been bound by it) there is a failure. There is no proof that Orson Pratt ever paid rent for the premises, or ever knew that any was paid, or that any authorized agent of his ever paid any rent for him.

Upon this state of the case it is the opinion of the Court that there is no sufficient proof to repel the presumptive right of Sarah M. Pratt to a title to the lot in controversy as the occupant thereof at the date of the entry of the land by the trustee under the Act of Congress.

In the Supreme Court the case was argued at the June Term, 1876.

Williams & Young, for Appellant.

D. Cooper & H. Pratt, for Respondent.

M. SCHAEFFER, C. J., delivered the opinion of the Court:

This proceeding was originally instituted in the Probate Court of Salt Lake County under the Act of the Legislature of the Territory of Utah, approved February 17, 1869, entitled "An Act prescribing rules and regulations for the execution of the trust arising under an Act of Congress, both parties, Appellant and Respondent, claiming title to the half lot in controversy by virtue of the Act of Congress entitled "An Act for the relief of the inhabitants of cities and towns upon the Public Lands."

In the Probate Court it was adjudged that the Appellant was entitled to said half lot. From this judgment an appeal was taken to the Third District Court of this Territory, by the Respondent, and on the trial in such District Court the judgment of the Probate Court was reversed and for naught declared, and a judgment rendered to the effect that Sarah M. Pratt was justly entitled to said half lot.

Appellant now brings this cause here by appeal from the judgment of the District Court, and assigns for errors:

First. That the Court erred in overruling Respondent's motion to dismiss the appeal. We think the appeal from the Probate Court was properly taken, and there was no error in overruling the motion to dismiss.

The second and main error assigned, is that "this Court erred in its findings and judgment under the evidence," by which we understand the Attorneys of the Appellant to mean that the evidence does not support the findings, and that the judgment is against the law. Section 1,387 of the Revised Statutes of the United States, which is part of the Act of Congress approved March 2d, 1867, provides that "whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the Agricultural Pre-emption Laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof to enter at the proper Land Office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sale thereof, to be conducted under such regulations as may be provided by the Legislative authority of the State or Territory in which the same may be situated." Under this Act of Congress, the lots in question were entered by the Mayor of Salt Lake City. He is, therefore, the trustee who holds the legal title for the *cestui que trust*, *i. e.*, he holds the lot "for the several use and benefit of the occupants thereof, according to their respective interests."

In this particular case two things must concur to give

the right to the title to the lot in controversy, to either of the contestants. First, there must have been a town or city with resident occupants, on the public lands duly incorporated, to secure the title from the National Government. This is conceded, and, therefore, the legal title is in the Mayor, as the representative of such town or city. If there is no proper *cestui que trust* as provided by the aforesaid Act of Congress, then the Mayor holds the title for the benefit of the corporation; but if there be an actual occupant of such lot at the time of the entry by the Mayor, then he, the occupant, becomes the legal *cestui que trust* and the Mayor holds the legal title for his benefit.

There must therefore be, secondly, an actual *bona fide* occupancy by the individual, who is entitled to such benefit, and when there is more than one of such occupants, then the title is held in trust for the use and benefit of such occupants, according to their respective interests. Whilst this Act of Congress confers certain rights and privileges upon the aggregate inhabitants of the town or city thus located upon public lands, it is nevertheless apparent that the primary object was to secure individual rights to the respective inhabitants of the towns and cities who were also the respective occupants of the several lots or parcels of land claimed by them.

The power conferred by this Act of Congress upon the Territorial Legislature is to make regulations for the execution of the trust. It has no power to interfere with, or to modify the rights conferred by the Act of Congress, and if the Territorial Legislature, by its Act approved February 17th, 1869, entitled, "An Act prescribing Rules and Regulations for the execution of the Trust arising under the Act of Congress," undertook to confer rights upon persons, associations, or corporations, other than those mentioned in the Act of Congress, such attempt to confer such rights is simply void. We can readily conceive of a case where an individual was prior to the entry by the Mayor, in the actual *bona fide* occupancy of the lot, and where he was wrongfully ousted by an intruder or trespasser before

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or implied, that she should become or be the tenant of Appellant or any one else, at will or otherwise, even if that were possible under the peculiar circumstances of the case, which we think is not the fact. Whatever interest the Appellant had in the premises on or before March 12th, 1868, vanished upon the abandonment or surrender of the possession to the Respondent, and she being, for the purposes of the proceeding, the head of her family and actually occupying the said half lot as the residence and home of herself and family from the 12th of March, 1868, until long after the entry made by the Mayor of Salt Lake City, she is in our opinion entitled to a deed for the same. The admission or rejection of the evidence which the Court below declined to consider does not affect the status of the case, and if it had been admitted as competent by the District Court, and if the Court had given it all the force which could reasonably be claimed for it, the Appellant would not, in our opinion, be entitled to the half lot in controversy.

The judgment of the Court below must therefore be affirmed.

BOREMAN, J., concurred.

IN THE MATTER OF THE CAIN HEIRS, *Appellants*, v. BRIGHAM YOUNG, *Respondent*.

PARTY ENTITLED TO GOVERNMENT TITLE.—A party claiming deed for Government title, from the Mayor, under the "Townsite" Law of Congress, must show that he is an inhabitant of the town, an occupant of the ground, and has an interest in the property.

OCCUPANCY, HOW BEGUN.—The occupancy referred to must be actual, and cannot be begun by Agent, no one being allowed to take up lots by Agent

NATURE OF THE OCCUPANCY.—The occupancy may be for residence, or for business, or use, but the residence, business, or use, must be the claimants.

RIGHT OF THE OCCUPANT.—A party having made a *bona fide* occupancy can afterwards lease the ground and still retain his rights thereto; and he may sell his claim, *provided* that no contract either for sale or lease conflicts with the requirement that the title shall be made to an inhabitant, who is an occupant and has an interest, will be recognized in deciding to whom the Government title should go.

POSSESSION OF HEIRS.—The possession by the ancestor at his death is the possession by the heirs, and minor heirs cannot give up or surrender possession except by proper suit to which they are parties.

POSSESSORY RIGHTS, HOW DISPOSED OF.—These possessory rights are treated as real estate in the manner of descent and distributions, and cannot be sold by administrators, except to pay debts incurred by the ancestor; but if they be treated merely as personal property, they cannot be sold to pay debts not incurred by the ancestor and not allowed by the Probate Court.

SALE OF ADMINISTRATOR, WHEN VOID.—An order of the Probate Court for the sale of such property to pay for improvements made years after the death of the ancestor, and whilst there was no administration, is void; the Probate Court has no jurisdiction to render it, and no sale thereunder passes any interest or title, and the party going into possession under such order and sale is a trespasser.

WIDOW'S INTEREST IN THE HUSBAND'S ESTATE.—A party buying the widow's interest in such property, can have Government title to the extent of such interest, *provided* that he becomes an occupant; but he cannot claim more than the widow's interest, and can hold only in the nature of a tenant in common with the heirs, and not adverse to them.

POSSESSION OF TRUSTEE.—The possession by one as trustee cannot be set up to support an individual claim of possession.

RIGHT OF TRESPASSER.—A claim based upon a trespass is not "rightful," and cannot be maintained.

HOMESTEAD PROPERTY, HOW DISPOSED OF.—A homestead of a family is not subject to sale by administrators to pay debts, nor can any part of it be given away by the widow, nor otherwise taken from the heirs, except by due process of law in suit to which the heirs are parties.

APPEAL from the Third District Court.

The facts appear in the Opinion.

Baskin & De Wolfe, for Appellants.

Williams & Young, for Respondents.

BOREMAN, J., delivered the opinion of the Court.

The contest in these proceedings is for the Government title to certain lands under the "Town-site" Law of Congress. The Mayor of Salt Lake City holds the title in trust for the persons entitled thereto, under the provisions of the law. The various parties to these proceedings filed their claims with the Probate Court, asking title. The heirs of Joseph Cain, deceased, prayed for title to the whole of the east half of lot 6, block 69, plat "A," Salt Lake City survey. The other parties claimed fractional parts of said half lot. These claims being conflicting, the Probate Court considered all the claims together and subdivided the half lot amongst the parties filing on it. This sub-division not being satisfactory, an appeal was taken to the District Court. In the District Court a finding of facts was had, and judgment and decree accordingly. The Cain heirs, not being satisfied with the action of the District Court, have brought the subject, by appeal, to this Court, a motion for a new trial having been overruled.

The main question involved is as to which of these claimants are "occupants," as contemplated by the "Town-site" Law. This Statute was made for the relief of the "inhabitants" of towns and cities upon the public domain. It was made to secure to those "inhabitants" who were "occupants,"

the legal title, according to their "respective interests." To give one the right to a conveyance of the Government title, it must appear that he is an "inhabitant" of the town, an "occupant" of the ground to which he seeks a title, and have an "interest" in the property. The occupancy must be actual, individual occupancy, not an occupancy begun and held by Agent merely. If a person resided upon a parcel of ground, or carried on his business upon the ground, and claimed the whole of the parcel or lot, he might have title to the whole, unless some part be occupied by another person claiming right to the title. Then the question would arise as to which exercised acts of ownership over the disputed ground first, and to what extent, and if that be settled, then was the claim ever abandoned or given up, and if so, whose possession in good faith attached after the abandonment.

We do not think that the law of Congress ever contemplated that a party should claim title to more lots or parcels than he actually, individually occupied, otherwise a person could gain title to an unlimited amount by not occupying it himself, but by arranging with various agents that they move upon the lots and hold for him, and these agents to lay no claim to title, but let the employer claim all. The employer might thus gain title to the various parcels or lots without ever being an occupant or an inhabitant, and could prove his right by simply showing, not his possession, but possession by other men for him—he never having been individually in possession. Such a proceeding would be at war with the very object of the law, which was made for actual settlers and not for speculators. A man having made a *bona fide* actual, individual occcupancy, either for his residence or his business, or in some way for his own use, he may no doubt afterwards sell his right of possession—his preference or right to Government title, but he must first have been an occupant in good faith himself, and the purchaser must take actual possession also, and become an occupant. There is nothing in the rule we lay down which prohibits contracts, leases, or sales of such

interests, but they can only be made to or with "inhabitants" who can become occupants, if the right of preference in obtaining title is to be affected. Such sales, leases, and other contracts, are not prohibited or discouraged by the law nor by the policy of the law. The Government only says—that if the contract be with one not an "inhabitant," and who does not become an occupant, such contract or sale will not be recognized in ascertaining to whom the title should be granted. A party in possession of any such city or town lot will be presumed to be so in possession in his own right and for his own use and benefit, until the contrary appears. And the possession of the ancestor when dying is the possession of the heir, unless the contrary appears.

These are some of the principles which will control us in the examination of the merits and rights involved in the proceedings at bar.

When Salt Lake City was first settled, the place was laid out, or the laying out dictated, by Brigham Young, Willard Richards, and others, yet Brigham Young claimed to have "exclusive control" in making the settlement. Shortly after the first settlers came and the town was laid out, certain parties, among whom was Willard Richards, were allowed to select portions of the city; each portion composed a number of lots or blocks, all in a body, in order to distribute the lots to those whom they desired to have near them. It appears that lot 6, block 69, was among the lots selected by Willard Richards under this arrangement. He turned the east half of the lot over to Joseph Cain, and marked the boundary between the east and west half; he gave Cain possession of a house situated on the north half of this east half, and he had the public records made to show that this east half was the property of Cain; and there is evidence going to show that Cain bought and paid for the half lot. Cain moved upon the lot and lived there until his death. He exercised acts of ownership over the half lot, and it was assessed in his name and he paid taxes on the same until his death, and being so in

possession, the current of the evidence is that he claimed the whole of the same to the boundaries of the half lot on every side, and that his possession and ownership of possession were recognized by Willard Richards and the public generally. The heirs of Willard Richards claim nothing now in this proceeding, not having appealed, but they have made two deeds for portions of the disputed parts, one to Brigham Young and one to William Jennings, the effect of which will be considered hereafter. At the death of Joseph Cain he was in the undisputed possession of all of said half lot, although Mrs. Ogden was living on the lot, but she claimed no ownership of the possession, and moved off shortly after Cain's death.

The Appellants claim that in the findings of fact by the District Court there has been a failure to find that Brigham Young, William Jennings, Samuel Stringfellow, George Stringfellow, and Nicholas Groesbeck, or either of them, ever have been "inhabitants" of Salt Lake City or of Utah Territory. The law, as we have stated, requires that the persons claiming must, to entitle them to deeds, be "inhabitants." Inhabitancy was an essential fact and should have been found.

The Appellants further claim that there was a failure to find that Young, Jennings, Stringfellows or Groesbeck, was in possesion at the date of the entry. The law requires that the parties, or perhaps those under whom they claim, should have been in possession at the date of the entry by the Mayor. It was therefore an essential fact, and the failure to find thereon was error.

The Appellants, the heirs of Joseph Cain, take exceptions to the findings of fact made by the District Court, and allege that the material findings to which they object as erroneous, are as follows:

1. It is found "that if said Joseph Cain ever occupied or claimed the right of the possession of any portion of the north half of the east half of said lot, after he moved into the new house, his heirs and representatives soon after his decease surrendered and gave up such possession."

2. It is found that portions of the south half of the east half of said lot, formerly in the possession of the heirs of Joseph Cain, "have been sold," and the possession delivered to the persons named in the judgment and decree of the Court with the particular description of the portion which each was in possession of and entitled to.

3. It is found "that the north half of the east half of said lot has been sub-divided, and the occupancy, possession, and right of possession, have been in various persons, and that the persons named in the judgment and decree of the Court are in possession and entitled to the possession of the several particular descriptions of land given in connection with their names."

The first of these points, the alleged surrender of possession of the north half of the east half of said lot, by the heirs of Joseph Cain, after Joseph Cain's death, we consider is well taken, for we are unable to discover facts which would warrant the finding, certainly none so far as the children of Cain are concerned. They have never done anything that would indicate that they gave up or surrendered any rights which they have to such north half. The widow did not control this portion of the ground, although Joseph Cain had possession of it when he died. She said that Brigham Young claimed it, and she did not question his right—for in those days no one questioned what their leaders did, but, as she says, she would have taken the word of the leaders in those days as readily as she would that of "an angel." Such implicit confidence and faith in him were simply abused by Brigham Young, and he used it to take away from this widow and her infant children property to which he did not have the shadow of a right.

The finding, therefore, of a surrender of said north half, we deem was erroneous.

The second of these material findings, to which exception is taken, has reference to a sale, which it alleges took place, of portions of the south half, which had prior thereto been in possession of the heirs of Cain. One would naturally conclude from the reading of this finding that the heirs had

sold such portions as are referred to, or at least were parties to some sale. Nothing of the kind appears, however, from the evidence. The parties referred to as having been the purchasers of parcels of said south half, were Nicholas Groesbeck and the Stringfellow Brothers. Groesbeck's portion is very small, being only sixteen (16) inches fronting on East Temple Street, and running back (west) nine rods. Not a solitary witness was introduced to support Groesbeck's claim, nor any written or oral testimony—and there is an absolute want of any evidence on the point, except an incidental reference thereto in Mrs. Cain's testimony, she saying that she sold a strip of, as she thought, that width to Mr. Groesbeck. Even then there is nothing in the evidence to show where these sixteen inches were, or how long the strip was, or that she ever delivered the possession of it to Mr. Groesbeck, or whether Groesbeck ever was in possession; nor is there anything to show that any interest of the children was intended to be conveyed, nor indeed is there anything to show whether she sold as an individual, or administratrix, or as guardian, although, as it is mentioned in connection with the sale to the Stringfellow Brothers, it might be inferred to have been a sale as administratrix. But upon this inference we could not depend. There is therefore no proof to support Mr. Groesbeck's claim, and it must fall.

The Stringfellow Brothers have allotted to them, on the north of and adjoining the parcel allotted to Groesbeck, a parcel of ground fronting on East Temple (Main) Street, sixteen feet and three inches, running back, west, eight rods, with the road privilege on the west. The road privilege was merely a written consent given by S. W. Richards and Elizabeth Cain, as individuals, and without consideration, and of course was subject to revocation at any time, even if S. W. Richards and Elizabeth Cain had the right to make it. The Stringfellow Brothers claim their parcel of ground (not including the roadway), under a sale and deed from S. W. Richards and Elizabeth Cain, administrators of Joseph Cain, deceased, made in pursuance of an order of the Probate Court. Ad-

ministration on the estate of Joseph Cain, deceased, was taken out more than ten years after his death. Such is the verbal proof, and there is no other kind of proof that any administration was ever taken out. S. W. Richards and Elizabeth Cain, claiming to be administrators, filed their petition in the Probate Court on November 4th, 1869, praying "for an order to sell real estate," upon the ground that the estate was at that date "involved in consequence of loaning money to erect buildings thereon, upon which interest is being paid, and also in consequence of taxes accumulating, while rents have been rapidly declining, by which the obligations and the expenses of the estate have to be maintained." There is no evidence that when administration was taken out, any debts or other obligations of the deceased remained unpaid, but, on the contrary, the administrator, Richards, testifies that no such claims were ever presented to him, and that he believed they were all paid out of the personal effects of the deceased long before application was made to sell the real estate, and that the sale was made to raise money for support of the family, to pay for improvements, taxes, &c., and that all this indebtedness accrued from three to ten years after Cain's death; and Mrs. Cain says that the sale was not made to pay debts incurred by Joseph Cain, deceased. What interest then passed by such sale, and the conveyance thereunder. The Probate Court is an inferior Court, one of limited jurisdiction. It has no powers not given to it by Statute.

Our Territorial Statute (Utah Laws 1852, p. 44, Sec. 16) says that personal and real property may both be sold upon the order of Court; but it does not authorize the real estate to be sold except to pay debts, and then only when the personal property is insufficient to pay the charges against the estate. These facts must appear affirmatively. The parties to this proceeding, and also the administrators, treated these possessory rights as real estate. The Statute likewise treated them as real estate, for the Statute speaks of real estate, and none existed if these rights be not such, for they were the highest interest that an individual could have

to land when the Statute was passed, and it is not to be presumed that the Statute was not meant to apply to them, but only to something that did not then exist.

Whether they are strictly real estate or not as understood at Common Law, we are inclined to hold that the laws of those early dates intended them to be treated as real estate. But whether we deem such possessory rights as real estate or as personal property, we are unable to see how such property could be sold under the law referred to concerning the decedents' estates. If it was personal property it was not claimed to be of a "perishable nature," or likely to "depreciate in value." But it may be said that although this property was not "perishable," or liable to "depreciate," and although no debts, existing against the estate at the death of Joseph Cain, deceased, remained unpaid, yet that year after his death a large indebtedness was incurred against his estate. Who was authorized to incur such indebtedness? There was no administration. The property had descended to the heirs and could not be taken away from them by an administration, unless debts incurred by Joseph Cain in his life time remained unpaid. The guardian might incur debts for the support and education of the children, but this is not a case of that kind. Some unauthorized person, years after Cain's death, puts up improvements on the land of the heirs of Joseph Cain, and it is sought to pay therefor by taking out letters of administration and selling the property under the administration. That cannot be right. And further, the administrators had no authority whatever to pay debts and charge against the estate, even if in existence, until they were proven in manner prescribed by law and allowed by the Court, and the administrator cannot pay for the support of the widow and children, except under the order of Court. No debts were proven up and no allowance for support made. But really all these charges, including the taxes, were against the heirs, if against anyone at all, and the administration had nothing to do with them.

The sale, therefore, under which the Stringfellow Brothers

claim, being unauthorized by law—the Court having no power to make it—the sale and conveyance are null and void, and the parties take nothing by them. They are therefore upon the ground, if at all, wrongfully, and can only be treated as trespassers, and trespassers can have no rights as against the true and rightful claimants.

Next adjoining the "Stringfellow" ground lies that which was allotted to the Cain heirs, about which there is no contest, except, perhaps, as to a small piece on the back part of the lot.

Adjoining on the north the parcel allotted to the Cain heirs, lies the "Ransohoff" property as it is called. It is part of the south half of this east half lot, and was allotted by the District Court to William Jennings, it being No. 51, with extension back. Jennings claims the ground under a chain of quit claim deeds from Elizabeth Cain, through Charles King, Ransohoff, and Brigham Young to himself. The quit claim deed of Mrs Cain purported to convey only "her right of claim, interest and possession." Of course, such a deed conveyed no interest of the minor heirs if they had any. Did they have any?

The Territorial Statute says that if there be "other property" remaining, it shall "descend in equal shares to his children," the widow taking a child's part during her life or widowhood. The interest which her deed therefore purported to convey was only equal to a child's part during her life or widowhood, and at her death or marriage, it became the property of the two children. Under that Statute, therefore, the children had a valid and perfect right to a title for two thirds of said parcel, with the further right to the residue at the death or marriage of their mother. And we can see no reason why such a Statute of descents is not valid. Utah Laws, p. 43, Sec. 24. It in no way affected the "primary disposal of the soil;" it does not seem to be inconsistent with any law of Congress, and it is a proper subject of Territorial legislation.

If, therefore, Jennings was in possession, it was only as co-occupant with the heirs. His interest could only

be that of the widow—one-third interest for the life or widowhood of Mrs. Cain. He cannot by having possession of such an interest thereby obtain a right to oust the two heirs. He only becomes a co-occupant with the heirs; a possession in the nature of a tenancy in common. The Courts are generally inclined to guard the interests of minors, and will not allow them to be deprived of any rights except under proceedings by proper suit to which they are parties. The conveyances set up as the foundation of Jennings' claim, recognize and support the rights of the children. They are a recognition of Joseph Cain's rights, and that is a recognition of theirs. But there is no evidence that Jennings ever went into possession of this property. Then in saying to whom the Government title should go, his claim could not be recognized. If he had gone into possession under Mrs. Cain's title, he would have complied with the requirements of the United States Statute, which is that to be recognized as being entitled to the Government title, the party must be an "occupant," and this he was not at any time. He can therefore have no right to any share in the property. If he has any remedy it is against Mrs. Cain. He shows no right to a preference in the purchase of the Government title.

Let us look, then, at the third point—the exception to findings respecting the north half of this east half lot, together with the strips or parcels claimed by Jennings across the whole west end of the east half lot.

The first allotment to William Jennings was No. 45, according to the plat, including its extension somewhat further west than is indicated by the plat.

In 1861, Brigham Young deeded "all of his right of claim, interest and possession," in and to said parcel of ground to William Jennings. It nowhere appears that Young had any "right of claim," "interest" or "possession" to convey. He, therefore, could convey none. He himself says that whatever possession he might have had was as Trustee-in-Trust for the Church, of which he is the head, and not as an individual. The Church has made no conveyance and

lays no claim to the lot, and files no declaratory statement therefor. The deed, therefore, from Young to Jennings is valueless, although there is testimony to show that Jennings intended to have Young make his title good.

There is evidence that Jennings was at one time "in possession of and exercised ownership" over the Eagle Emporium building, situated on No. 45. But he was not in possession at Cain's death, and there is no evidence that he was in possession at the entry of the "town-site" by the Mayor. The character of his possession is not shown—it not being shown that he lived there or did business in such building. Nor does it appear that he held possession by consent of the heirs. If his possession was not by their consent, legally obtained, by proper action to which they were parties, they being under age, their rights are in no way bound or affected by his possession. It is not claimed that any such suit was ever had.

If, therefore, Jennings went into possession under authority given by Brigham Young in his deed, and depended upon Young's supposed power to compel a good title to the possession from Cain's heirs, and Young has failed to be able to compel such title, Jennings cannot make the heirs bear the consequences, but he must look to Young for his remedy. The heirs are not bound by any arrangement he and Young may have made.

Jennings, therefore, being in possession at one time, was there wrongfully, and as a trespasser, and gained no rights which could be recognized in ascertaining to whom the legal title should be made. This finding and the allotment following to Jennings, were therefore erroneous.

The last parcel allotted to Jennings is fifty-six feet north front, on First South Street. The west twenty-six feet of this north front, running clear across the lot, are upon the west half of lot 6, and not contested, and therefore not to be disturbed by this Court.

The east sixteen feet of the remaining thirty feet of said allotment, is held under no deed, or any other kind of transfer or possession, and if Jennings be in possession,

it was, as in the last instance, as a trespasser, as to the Cain heirs, no authority from said heirs having ever been obtained. The allotment of this sixteen feet front (and running south) to Jennings, was therefore erroneous.

Now respecting the fourteen feet lying between the twenty-six and the sixteen feet referred to, there is some doubt.

Price seems to have been possession in 1866–7 of forty feet north front, running south across the lot. We hear no more of him until in 1869, when he makes a deed to William Jennings of forty feet front and running across the lot, and the fourteen feet in question is embraced therein. In giving his testimony, Price says that he does not know what distance from the east line of the lot his ground was situated, and the great preponderance of testimony is that Price's possession was on the west half of the lot, and not the east half. The simple fact that Price's deed fixes 151 feet as the distance from the east line of the lot, does not prove that the deed from Eddins to him gave the same description, or that Eddins put him in possession of the same; and the evidence shows that Eddins' ground was west of center of the lot, and we cannot say that the statement in Price's deed should override the testimony of numerous witnesses, and the very actions of Dr. Richards himself, especially when Price does not seem to have been in possession for some twelve years before his deed was made.

A deed is also shown in evidence from Willard Richards' heirs to Jennings, covering this fourteen feet. But that deed is subsequent to Jennings' filing, and besides, we think that the evidence clearly shows that the Richards' heirs had no rights or interests in such property or the possession to pass by such conveyance.

The deed, of course, is of no value so far as this fourteen feet are concerned. There is some evidence going to show Jennings' possession, although the evidence is very indefinite as to the precise ground possessed by him. His possession, however, was without authority and wrongful,

and in no way can invalidate the rights of the heirs of Joseph Cain, deceased, when they have given no consent thereto, and it was subsequent to the death of Joseph Cain, deceased.

The remaining portions of said findings objected to, as stated, refer to parcels allotted to Brigham Young by the District Court, and numbered 47 and 49 with extensions back to the west.

Brigham Young testifies that he never lived on any portion of lot 6, now in controversy. Yet he claimed to have had peaceable possession of portions of it, for many years, not in his individual right, but as Trustee-in-Trust for the Church of which he is the head. The Church making no claim, his possession as Trustee—if it ever existed—would affect nothing in the present proceedings. But he really never was in possession as contemplated by the Statute. The fact that he sent Mrs. Ogden down to Joseph Cain with directions to him to measure her off a piece for a house, gave him no rights, as her occupancy was only temporary, and so intended; and he had never been in possession prior thereto. It was evi ently only an exercise of that "exclusive control over the settlement" which he had claimed, but which gave him no right in or to the real estate. It was a permission from Joseph Cain to Mrs. Ogden to use the ground for a time, and not a transfer of his right thereto.

Jennings claims also under a deed from Willard Richards' heirs, made only a few days before the filing of his declaratory statement. He had never had possession under that deed, and all of Willard Richards' right had been transferred to Joseph Cain in his life time. The fact that two women, Mrs. Braddock and Mrs. Franklin, who held the relation of polygamous wives to Willard Richards, residing a short while on the lot after it was transferred to Cain by Richards, does not show that Richards still claimed said lot. Such an inference would be very slight when compared with Richards' own positive acts, showing the contrary. The occupancy by these women was not Richards' occu-

pancy. The law does not recognize the polygamous relation, and that is all that gives color to the idea that their possession was his possession. They laid no claim to the possession themselves, and removed at the request of Cain. Joseph Cain had lived in that house himself before these women were there and used to rent it, and rented it after they removed. There seems nothing in the evidence to warrant the belief that there remained in the heirs of Willard Richards any—even the slightest—claim or right to any part of this half lot.

Brigham Young says in his testimony that he does not own parcel No. 47, but that it belongs to the Co-operative Institution. His deed to Bassett and Roberts shows that he conveyed to them all his interest in that parcel in 1865, and he says himself that it was never deeded back to him; yet he claims it. His claim has no foundation in justice. He was never an occupant of No. 47, or of No. 49 within the meaning of the statute, and can have no right therein. His claim was only such as any one of a thousand men on the street might set up and be able to maintain with as strong evidence as he has done. It is simply a claim—for title—and that is all there is in it. He has shown no right to the title. It was therefore error to allow his claim.

The heirs of Joseph Cain, deceased, had possession of this whole half lot when Joseph Cain died, and they never gave up that possession, and they are not bound to submit, because being under age the control of the lot passed from them without their consent. They had until their majority to enforce their claims.

But there is another reason why none of these claimants, aside from the heirs of Joseph Cain, deceased, can possibly have any rights to any of this half lot. Joseph Cain died leaving that property, the whole half lot, in the possession of his wife and children as a homestead.

The Territorial Statute says: "The homestead occupied by the wife or any portion of the family of the deceased at the time of his death, shall in all cases be held free to the use of wife and family of the deceased, and *shall not*

be liable to any claim or claims against said estate." What authority did the Probate Court have to order the sale of it, even to pay debts if any existed? What right did the widow have to sell any of it, or to give up possession to others as against the heirs? Certainly none. It shall be held "free to the use of the wife and family," and she cannot curtail this right in the heirs.

If she had no authority to sell even to pay debts, she certainly could not give the property away to the detriment of the minor children, which it is claimed that she virtually did do as to the north half. She says that Brigham Young claimed it, and that she submitted to his claim. That does not arise however to the dignity of a gift. It was only yielding to a claim, which she could not oppose or repel.

The Courts cannot recognize that any individual has the right to go upon property which has descended to infant heirs and to hold such property because the heirs cannot drive them off, and then to come into a Court of Equity and claim title based upon his trespass. Such a trampling upon the rights of infant heirs, those who look with strongest claims to the Courts for protection, cannot be tolerated, but the rightful possessor and claimant must be reinstated in his rights and given the legal title.

There seems therefore no valid reason why the heirs of Joseph Cain, deceased, should not have title to the east half lot in question. Therefore the judgment of the Court below is reversed, and it is ordered and adjudged in this Court, that the children and heirs of Joseph Cain, deceased, have the right to title in fee-simple to the undivided two-thirds interest in said half lot, and that the widow has the right to title to one undivided third interest for life or widowhood, with remainder in fee to the children and heirs; and it is ordered that the Mayor convey accordingly.

SCHAEFFER, C. J., concurs.

LIST OF ATTORNEYS

WHO ARE AT PRESENT RESIDING IN UTAH, AND ADMITTED TO

THE SUPREME COURT.

NAME.	RESIDENCE.
Appleby, Wm. P.	Salt Lake City.
Ashbrook, L. V.	Provo.
Barnum, E. M.	Salt Lake City.
Baskin, R. N.	"
Bates, George C.	"
Beatty, James H.	"
Bennett, C. W.	"
Brown, L. A.	Tooele City.
Burmester, Theodore	Salt Lake City.
Burnes, Lewis	"
Carey, William	"
Cooper, David	"
Dana, D. S.	Provo.
Denny, Presley	Beaver.
DeWolfe, Stephen	Salt Lake City.
Dilley, J. B.	"
Gamble, Hamilton	"
Gee, W. W.	"
Gilchrist, C. K.	"
Hagan, Albert	"
Hall, W. C.	"
Harkness, R.	"
Hawley, C. M.	Beaver.
Haydon, Wm.	Salt Lake City.
Hemingray, J. C.	"

Hempstead, C. H.	Salt Lake City.
Hoge, E. D.	"
Howard, Sumner	"
Huey, C. P.	"
Hyndman, Wm.	"
Johnson, E. P.	Corinne.
Jonasson, S. J.	Salt Lake City.
Kimball, J. N.	"
Lewis, S. H.	"
Longstreet, S. P.	"
Marshall, Thos.	"
Maxwell, G. R.	"
McBride, J. R.	"
McCurdy, S. P.	"
McKean, Jas. B.	"
Merritt, S. A.	"
Miner, Aurelius	"
Morgan, C. H.	"
Pratt, Harmel	"
Rawlins, J. L.	"
Richards, F. S.	Ogden.
Robertson, R. H.	Salt Lake City.
Rosborough, J. B.	"
Royle, J. C.	"
Sheeks, Ben	"
Snow, Zera	"
Snow, Zerubbabel	"
Sprague, E. T.	"
Stout, Hosea	"
Strickland, O. F.	"
Sutherland, J. G.	"
Swift, Chas. J.	Beaver.
Tilford, Frank	Salt Lake City.
Whedon, D. P.	"
Williams, P. L.	"
Woods, W. W.	"
Young, Legrande	"

EXTRA ANNOTATION

TO

PRECEDING VOLUME

ANN

EXTRA ANNOTATIONS

—TO—

UTAH REPORTS

VOLUME I

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NOTES

ON THE

UTAH REPORTS.

CASES IN 1 UTAH.

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1 UTAH, 11, PEOPLE v. GREEN.

Status of common law in Utah.

Cited in Deseret Irrig. Co. v. McIntyre, 16 Utah, 398, 52 Pac. 628, holding that common law was in force in territory at time of framing of constitution; Croco v. Oregon Short Line R. Co. 18 Utah, 311, 44 L.R.A. 285, 54 Pac. 985, holding that common law has always been in force in Utah; Hilton v. Thatcher, 31 Utah, 360, 88 Pac. 20, holding that common law has been in force ever since approval of "Organic Act" establishing territorial government.

Number and qualifications of grand jurors.

Cited in notes in 12 A. S. R. 904, on requisite number and concurrence of grand jurors; 27 L.R.A. 852, on number of grand jurors necessary or proper to act; 28 L.R.A. 199, on qualification of grand jurors.

1 UTAH, 17, MURPHY v. CARTER.

What defenses may be set up to slander action.

Cited in Whittaker v. McQueen, 128 Ky. 260, 108 S. W. 236, holding that answer in slander action may deny speaking words in one paragraph and allege truth in another.

Cited in notes in 91 A. S. R. 302, on justification in slander and libel; 48 L.R.A. 201, 202, on right to plead inconsistent defenses.

1 UTAH, 23, EX PARTE ROMANES.

Extradition proceedings.

Cited in notes in 112 A. S. R. 111, on extradition proceedings; 57 A. D. 399, on proceedings for arrest and surrender of fugitives from justice from another state; 46 A. S. R. 415, on arrest and detention of fugitive from justice before demand is made; 26 L.R.A. 33, on right to detain fugitive to await extradition papers; 28 L.R.A. 805, on papers necessary to obtain surrender of fugitives from another state; 57 A.

D. 398, on proceedings for arrest and surrender of fugitives from justice from another state.

Validity of state legislation on extradition.

Cited in Dennison v. Christian, 72 Neb. 703, 117 Am. St. Rep. 817, 101 N. W. 1045, holding state legislation upon subject of extradition, ancillary to and in aid of act of congress, valid.

1 UTAH, 28, BASKIN v. GODBE.

Release of surety.

Cited in Brandt, Suretyship, 3d ed. 722, on giving time for payment of debt as discharging surety.

1 UTAH, 31, CUNNINGHAM v. ROBINSON.

1 UTAH, 33, RICKERS v. SIMCOX.

Right to appropriate articles in possession of prisoner.

Cited in note in 18 L.R.A.(N.S.) 255, on right of officer, in executing criminal process, to take possession of evidentiary articles.

1 UTAH, 35, SAVAGE v. STONE.

1 UTAH, 39, RE WISEMAN.

1 UTAH, 44, RE NOUNNAN.

1 UTAH, 47, RE KENYON.

Stoppage of payment of debts as act of bankruptcy.

Distinguished in Re Hercules Mut. L. Assur. Soc. 4 Legal Gaz. 241, holding fraudulent stoppage of payment of its debts by insurance company not act of bankruptcy.

Nature of notes of life insurance companies.

Cited in Re Hercules Mut. Life Assur. Soc. 6 Ben. 35, Fed. Cas. No. 6,402, holding promissory notes of life insurance company commercial paper.

Manufacturing corporations.

Cited in note in 64 L.R.A. 36, 38, 62, on taxation of manufacturing corporations.

1 UTAH, 55, GODBE v. YOUNG, Reversed in 15 Wall. 562, 21 L. ed. 250.

When interest allowed as legal right.

Cited in Wasatch Min. Co. v. Crescent Min. Co. 7 Utah, 8, 24 Pac. 586, holding interest allowable on debts overdue; Rogers v. Ogden Bldg. & Sav. Asso. 30 Utah, 188, 88 Pac. 754, holding stockholder who sells his stock on maturity to loan association entitled, upon its failure to pay for same, to recover interest thereon from time it was due.

1 UTAH, 63, PERRY v. TAYLOR.

Rate of interest after maturity.

Cited in Sutherland, Dam. 3d ed. 822, on rate of interest stipulated to be paid during period of credit not affecting determination of rate afterwards.

1 UTAH, 68, GODBE v. SALT LAKE CITY.

Power of legislature to confer jurisdiction.

Cited in Ex parte Cox, 44 Fla. 537, 61 L.R.A. 734, 33 So. 509, holding that legislature cannot confer jurisdiction upon courts created by constitution not given it by constitution.

Jurisdiction of supreme court.

Cited in State ex rel. Brett v. Kenner, 21 Okla. 817, 97 Pac. 258, holding supreme court without original jurisdiction to issue writs of injunction in cases where relief prayed for is purely injunctional.

1 UTAH, 81, EX PARTE DUNCAN.

Validity of territorial act relating to officers in conflict with act of Congress.

Cited in People ex rel. Dickson v. Clayton, 4 Utah, 421, 11 Pac. 206, holding territorial statute providing for election of officer by people void where act of congress provides for his appointment by governor.

Mode of electing Superintendent of Schools.

Cited in Williams v. Clayton, 6 Utah, 86, 21 Pac. 398, holding that office of Superintendent of Schools should be filled by appointment of Governor.

Capability of statute being partly valid.

Cited in Territory v. Stokes, 2 N. M. 49; Utah Sav. & T. Co. v. Diamond Coal & Coke Co. 26 Utah, 299, 73 Pac. 524,—holding that statute may be valid in part and void in part.

1 UTAH, 90, SMITH v. FAUST.

Effect of failure to reply to counterclaim.

Cited in Dunham v. Travis, 25 Utah, 65, 69 Pac. 468, holding that judgment should have been granted on equitable counterclaim, set forth in answer, on motion, where no reply filed.

1 UTAH, 92, McGEE v. CONNOR.

Liability of indorser before delivery.

Cited in Sutherland, Dam. 3d ed. 2244, on liability of stranger indorsing before delivery as guarantor.

Disapproved in Kealing v. Vansickle, 74 Ind. 529, 39 Am. Rep. 101, holding liability of accommodation indorser of mercantile paper prima facie that of strict indorsement.

1 UTAH, 100, FIRST NAT. BANK v. KINNER.

Status of common law in territories.

Cited in Arkansas City Bank v. Swift, 57 Kan. 460, 46 Pac. 950, holding presumption that common law prevails in Indian Territory; Thomas v. Union P. R. Co. 1 Utah, 232, holding that common law furnishes measure of personal rights and rule of judicial decision in this Territory.

1 UTAH, 108, EX PARTE DOUGLASS.

Power of municipality to punish acts.

Cited in Hood v. Von Glahn, 88 Ga. 405, 14 S. E. 564, holding that General Assembly might pass local statute for city empowering council to pass all ordinances in relation to keeping open tippling-houses on Sunday.

Cited in notes in 110 A. S. R. 153, on power of municipality to punish acts already covered by statute; 1 L.R.A. (N.S.) 384, on power of municipality to legislate on subjects covered by state laws; 17 L.R.A. (N.S.) 52, on power of municipality to punish act also an offense under state law.

1 UTAH, 112, CAST v. CAST.

Jurisdiction of chancery to dissolve marriage.

Cited in note in 25 L.R.A. 802, on jurisdiction of chancery to decree nullity or dissolution of marriage.

Validity of act conferring chancery jurisdiction on probate courts.

Cited in Re Christiansen, 17 Utah, 412, 41 L.R.A. 504, 70 Am. St. Rep. 794, 53 Pac. 1003, holding act of legislature in so far as it purported to confer general common law and chancery jurisdiction on probate courts, void.

—In divorce cases.

Cited in Reis v. Lawrence, 63 Cal. 129, 49 Am. Rep. 83 (dissenting opinion), on invalidity of statute conferring upon Probate Courts jurisdiction in divorce cases; Irwin v. Irwin, 2 Okla. 180, 37 Pac. 548 (dissenting opinion), on power of legislature to divest probate courts of jurisdiction in divorce actions.

Distinguished in Whitmore v. Hardin, 3 Utah, 121, 1 Pac. 465, holding act of territorial legislature granting to probate court jurisdiction in cases of divorce for statutory causes, valid.

Power of territorial legislature to confer jurisdiction on justice of peace.

Cited in People ex rel. Yearian v. Spiers, 4 Utah, 385, 10 Pac. 609, holding that territorial legislature could confer on justices of the peace no jurisdiction in criminal cases except such as was usually exercised by them at date of passage of organic act.

When alimony allowed.

Cited in Cast v. Cast, 1 Utah, 128, holding that temporary alimony and counsel fees will be allowed on motion in Supreme Court.

1 UTAH, 128, CAST v. CAST.

1 UTAH, 129, HUSSEY v. SMITH, Reversed in 99 U. S. 20, 25 L. ed. 314.

What matters considered on appeal.

Cited in McClelland v. Daniel, 2 Utah, 100 (dissenting opinion), on right of appellate court to consider matters outside of judgment roll when appeal is from judgment and there is no statement.

Who is an occupant.

Cited in Johnson v. Pacific Coast S. S. Co. 2 Alaska, 224, holding that deeds by trustee of town site should be made only to persons in actual and lawful possession of lots conveyed; Singer Mfg. Co. v. Tillman, 3 Ariz. 122, 21 Pac. 818, holding that one who has never been in actual possession of "town lot" cannot be said to be "occupant" thereof; Harris v. Harsch, 29 Or. 562, 46 Pac. 141, holding owner in actual possession both owner and occupant of lot.

Who entitled to conveyance of town lot.

Cited in Aspen v. Aspen Town & Land Co. 10 Colo. 191, 15 Pac. 794, holding claimant of "town lot" not entitled to conveyance without proof of actual occupation; Gill v. Wallis, 11 N. M. 481, 70 Pac. 575, holding occupant at time town site entry made prima facie entitled to deed from town site; Cooke v. Young, 2 Utah, 254, holding actual bona fide occupancy of ground claimed necessary to entitle any one to deed of Mayor for government title; Clawson v. Wallace, 16 Utah, 300, 52 Pac. 9, holding that occupant in possession under town site law may sell his equitable right to lot before patent.

1 UTAH, 135, GOLDING v. JENNINGS.

Jurisdiction of probate court in civil cases.

Cited in Cannon v. Pratt, 99 U. S. 619, 25 L. ed. 446, to point that there could be no appeal from probate court to district court in civil action, because latter court had no jurisdiction; People ex rel. Yearian v. Spiers, 4 Utah, 385, 10 Pac. 609, to point that Probate Court has no jurisdiction in civil cases.

Office of writs of certiorari and review.

Cited in note in 50 L.R.A. 789, on exceptions to rule that certiorari will not lie where there is an appeal.

Distinguished in Ducheneau v. House, 4 Utah, 363, 10 Pac. 427, holding that district court cannot issue certiorari to review proceedings in justice's court where judgment rendered erroneous but within general jurisdiction of justice and when appeal would lie therefrom.

Disapproved in Chapman v. Justices Ct. 29 Nev. 154, 86 Pac. 552, holding that certiorari will lie from supreme court to review judgment by district court on appeal from justice court though it is claimed both

courts did not have jurisdiction; Cereghino v. Third Dist Ct. 8 Utah, 455, 32 Pac. 697, holding appeal proper remedy when justice renders judgment against defendant in cause wherein he has no jurisdiction because case involved title to land; Gilbert v. Police Fire Comrs. 11 Utah, 378, 40 Pac. 264, holding office of statutory writ of review confirmatory of common law jurisdiction on certiorari.

Overruled in Saunders v. Sioux City Nursery, 6 Utah, 431, 24 Pac. 532, holding that writ of certiorari or review will not lie where right of appeal exists.

1 UTAH, 140, NOUNNAN v. ASPINWALL.

Appealable orders.

Cited in Mercer v. Glass, 89 Ky. 199, holding that appeal does not lie from order transferring case from one court to another of same government invested with like jurisdiction.

Cited in note in 60 A. D. 432, on final and interlocutory judgments and decrees.

1 UTAH, 142, LAWRENCE v. HOWARD.

Liability of innkeeper.

Cited in note in 7 Am. Dec. 455, on liability of innkeeper.

—For boarder's goods.

Cited in Haff v. Adams, 6 Ariz. 395, 59 Pac. 111, holding that strict liability of innkeepers does not exist in favor of boarders; Vigeant v. Nelson, 140 Ill. App. 644, holding innkeeper not insurer against loss of boarder's baggage; Taylor v. Downey, 104 Mich. 532, 29 L.R.A. 92, 53 Am. St. Rep. 472, 62 N. W. 716, holding innkeeper not liable to boarder for loss of money in safe if ordinary care and diligence were used in employment of clerk who took it; Meacham v. Galloway, 102 Tenn. 415, 46 L.R.A. 319, 73 Am. St. Rep. 886, 52 S. W. 859, holding proprietor of hotel not liable for loss of boarder's goods unless loss resulted from wrongful or negligent act of himself or servants.

Cited in notes in 99 A. S. R. 584, 601, on liability of innkeepers for injury to, or loss of, guest's property; 28 L.R.A.(N.S.) 497, 499, on duty of innkeeper as to effects of one leaving without intention of returning as guest; 13 Eng. Rul. Cas. 130, on liability of innkeeper for property of guest.

Who are guests at inn.

Cited in notes in 62 A. D. 591; 105 A. S. R. 940,—on who are guests at inn.

1 UTAH, 145, EX PARTE BRIGHT.

1 UTAH, 160, FRIEL v. WOOD.

1 UTAH, 168, NOUNNAN v. TOPONCE.

1 UTAH, 173, HOUTZ v. GISBORN, 2 MOR. MIN. REP. 340.

Effect of adoption of Civil Code.

Cited in Folsom v. McLaughlin, 1 Utah, 178, holding that code governs all pleadings, modes and forms, both at law and equity.

What causes of action may be joined.

Distinguished in Ferguson v. Burt, 2 Utah, 388, holding that cause for specific performance of contract to convey realty cannot be joined with cause to recover money upon alleged agreement.

Nature of mining claims.

Cited in Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Mor. Min. Rep. 610, holding mining claims real property and pass by deed.

Effect of appearance on defective summons.

Cited in Keyser v. Pollock, 20 Utah, 371, 59 Pac. 87, holding general appearance by demurrer and answer waiver of all objections to summons.

1 UTAH, 178, FOLSOM v. McLAUGHLIN.

What causes of action may be united in complaint.

Cited in Ferguson v. Burt, 2 Utah, 388, holding that cause for specific performance of contract to convey realty cannot be joined with one to recover money upon alleged agreement.

1 UTAH, 179, BURNES v. CRANE.

Meaning of "return to state" in statute of limitations.

Cited in Lawson v. Tripp, 34 Utah, 28, 95 Pac. 520, holding "return to state" in statute of limitations equivalent to "come into state."

1 UTAH, 183, SALT LAKE CITY v. REED.

1 UTAH, 184, THOMAS v. UNION P. R. CO.

Right to appeal from order overruling demurrer.

Cited in Smith v. McEvoy, 8 Utah, 58, 29 Pac. 1030, holding that no appeal lies from order overruling demurrer.

1 UTAH, 186, MILNER v. FRIEL.

1 UTAH, 187, MOORE v. WILSON.

1 UTAH, 188, GREENFIELD v. WALLACE.

Effect of pending motion on right to take default.

Cited in Mantle v. Casey, 31 Mont. 408, 78 Pac. 591, holding that special appearance for purpose of moving to quash service of summons did not extend time for general appearance and answering to merits.

1 UTAH, 191, WHITE v. SEELY.

Power to confer jurisdiction by consent.

Cited in Conant v. Deep Creek & C. Valley Irrig. Co. 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188, holding that jurisdiction of subject matter of case cannot be conferred by consent.

1 UTAH, 192, FOSTER v. REICH.

1 UTAH, 192, EX PARTE DIXON.

1 UTAH, 194, SMITH v. RICHARDSON, Later appeals in 1 Utah, 215, and 2 Utah, 424, 1 Mor. Min. Rep. 139.

Sufficiency of venue in affidavits.

Cited in Babcock v. Kuntzsch, 85 Hun, 33, 32 N. Y. Supp. 587, holding that omission of letters "ss" in venue of affidavit did not vitiate same.

1 UTAH, 197, RE FAUST.

1 UTAH, 199, STRICKLAND v. FLAGSTAFF S. M. CO.

1 UTAH, 204, KUHN v. McALLISTER.

1 UTAH, 205, PEOPLE v. MAHON.

Privileged communications.

Cited in Post v. State, 14 Ind. App. 452, 42 N. E. 1120 (dissenting opinion) on competency of physician to testify as to matters learned in his professional capacity.

Cited in note in 66 A. S. R. 237, on attorneys as witnesses.

1 UTAH, 211, WILSON v. JARMAN.

1 UTAH, 213, RE BATES.

1 UTAH, 214, EX PARTE SPRINGER.

Right to bail in capital cases.

Cited in Ex parte Smith, 23 Tex. App. 100, 5 S. W. 99, holding that prisoner will not be admitted to bail where he stands indicted for capital offense.

What will be inquired into on habeas corpus.

Cited in Re McElroy, 10 Kan. App. 348, 58 Pac. 677, holding irregularities in grand jury not subject of inquiry in habeas corpus proceedings; Re Betts, 36 Neb. 282, 54 N. W. 524, holding that legality of grand jury cannot be inquired into upon habeas corpus; People v. Reigel, 120 Mich. 78, 78 N. W. 1017; State ex rel. Dunn v. Noyes, 87 Wis. 340, 27 L.R.A. 776, 41 Am. St. Rep. 45, 58 N. W. 386,—holding that legality of de facto grand jury cannot be inquired into upon habeas corpus proceedings for discharge under indictments by such body.

Right to discharge on habeas corpus.

Cited in note in 100 A. S. R. 36, on prisoner's right to discharge on habeas corpus after commitment and before trial.

1 Utah, 215, CONWAY v. CLINTON.

Waiver of challenge for cause.

Cited in People v. Hopt, 4 Utah, 247, 9 Pac. 407, holding defendant not prejudiced whether challenges properly denied or not where jurors challenged did not sit.

Cited in Abbott's Civ. Tr. 2d ed. 67, on effect of failure to exhaust peremptory challenge on erroneous overruling of objection or challenge.

Qualifications of jurors.

Cited in Abbott's Civ. Tr. 2d ed. 64, on opinion disqualifying juror.

Right of witness to testify as to his belief.

Cited in People v. Hughes, 11 Utah, 100, 39 Pac. 492, holding it error to refuse accused in prosecution for robbery the right to testify as to his belief at time of alleged robbery that money belonged to him.

Inconsistent defenses.

Cited in note in 48 L.R.A. 209, on right to plead inconsistent defenses.

1 UTAH, 226, UNITED STATES v. REYNOLDS.

Bigamy.

Cited in note in 126 A. S. R. 205, 206, on crime of bigamy.

Number of grand jurors.

Cited in notes in 12 A. S. R. 904, on requisite number and concurrence of grand jurors; 27 L.R.A. 846, 852, on number of grand jurors necessary or proper to act.

Disqualification of jurors.

Cited in Abbott's Crim. Tr. 2d ed. 259, on conscientious scruples against law creating offense as disqualification of juror.

Cited in notes in 36 Am. Dec. 532, on bias or opinion as ground for challenge to jurors; 28 L.R.A. 202, on qualification of grand jurors.

1 UTAH, 232, THOMAS v. UNION P. R. CO.

Right of action for death.

Cited in Hutchinson, Car. 3d ed. 1651, on right to sustain action for causing death of human being by negligence.

Cited in notes in 70 A. S. R. 670, on actions for death of human being; 41 L.R.A. 808, 815, on common-law right of action of parent for loss of services of child killed.

Status of common law in territories.

Cited in Arkansas City Bank v. Swift, 57 Kan. 460, 46 Pac. 950, holding presumption that common law prevails in Indian Territory; Maxwell Land Grant Co. v. Dawson, 7 N. M. 133, 34 Pac. 191, holding that extension of jurisprudence of our government over territory ac-

quired by it carries with it, proprio vigore, common law; Croco v. Oregon Short-Line R. Co. 18 Utah, 311, 44 L.R.A. 285, 54 Pac. 985, holding that common law has always been in force in Utah; Deseret Irrig. Co. v. McIntyre, 16 Utah, 398, 52 Pac. 628, holding that common law was in force in territory at time of framing of constitution.

1 UTAH, 235, THOMAS v. UNION P. R. CO.

Meaning of term "liability."

Cited in Suter v. Wenatchee Water Power Co. 35 Wash. 1, 102 Am. St. Rep. 881, 76 Pac. 298, holding term "liability" contractural one.

When action for damages barred.

Cited in Thomas v. Union P. R. Co. 1 Utah, 232, holding action by passenger against carrier to recover damages for injuries resulting by latter's negligence barred if not commenced within four years after cause accrued.

1 UTAH, 237, BACHMAN v. SMITH.

1 UTAH, 238, THACKARA v. REID.

Sufficiency of averments upon information and belief.

Cited in Jónes v. Pearl Min. Co. 20 Colo. 417, 38 Pac. 700, holding that facts not presumptively within knowledge of pleader may be alleged upon information and belief; Carpenter v. Smith, 20 Colo. 39, 36 Pac. 789, holding averments of complaint made on information and belief necessary where verification made by attorney; Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350, holding petition in action to recover taxes brought by county treasurer sufficient when allegations stated "upon information and belief"; Crane Bros. Mfg. Co. v. Reed, 3 Utah, 506, 24 Pac. 1056, holding allegation by attorney of nonresident, on information and belief, of plaintiff's copartnership capacity sufficient.

1 UTAH, 241, HUSSEY v. SMITH, Rehearing denied in 1 Utah, 304, Reversed in 99 U. S. 20, 25 L. ed. 314.

Setting out copy of instrument sued on.

Cited in Abbott's Pleadings, 2d ed. 455, on necessity for setting out copy of instrument sued on or substance.

1 UTAH, 242, LEITHAM v. CUSICK, 7 MOR. MIN. REP. 546.

Sufficiency of allegations to warrant injunction.

Cited in Hale v. Point Pleasant & O. River R. Co. 23 W. Va. 454, holding mere allegation of irreparable injury insufficient to warrant injunction.

Cited in High, Inj. 4th ed. 50, on necessity for positive averments of facts in application for injunction; High, Inj. 4th ed. 1553, on validity of injunction that is broader in terms than prayer of bill.

1 UTAH, 245, SMITH v. RICHARDSON, Later appeal in 2 Utah, 424, 1 Mor. Min. Rep. 139.

1 UTAH, 246, CLAMPITT v. KERR, Affirmed in 95 U. S. 188, 24 L. ed. 493.

Sufficiency of charge to jury.

Cited in People v. Chadwick, 7 Utah, 134, 25 Pac. 737, holding court not bound to use language of counsel where charge fairly covered questions embraced in request to charge; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481, holding exception to "each paragraph of charge" too general.

1 UTAH, 249, POTTER v. HUSSEY.

What causes of action may be joined.

Distinguished in Ferguson v. Burt, 2 Utah, 388, holding that cause of action for specific performance of contract to convey real property cannot be joined with cause to recover money upon alleged agreement.

1 UTAH, 252, ECLIPSE STEAM MFG. CO. v. NICHOLS.

1 UTAH, 260, PEOPLE v. SHAFER.

Separation of jury.

Cited in notes in 43 Am. Dec. 84, 86, on keeping jury together, and consequences of unauthorized separation; 103 A. S. R. 166, on effect of separation of jury.

1 UTAH, 265, UNITED STATES v. WOODMAN.

What will discharge surety on distillers bond.

Cited in Brandt, Suretyship, 3d ed. 829, on sureties on distiller's bond as not discharged because capacity of distillery was declared to be greater than when they became bound.

1 UTAH, 267, CHAMBERLAIN v. WARBURTON.

Right to jury trial.

Cited in Martin v. Warburton, 1 Utah, 271, holding that right of trial by jury cannot be abrogated by legislation or by discretion of court or judge.

— In mandamus cases.

Cited in note in 89 A. D. 732, on law of mandamus.

Distinguished in Nelson v. Steele, 12 Idaho, 762, 88 Pac. 95, holding neither party to writ of mandate entitled to trial by jury.

Nature of proceeding in mandamus.

Cited in Lyman v. Martin, 2 Utah, 136, holding mandamus civil action and subject to same rules of pleading.

1 UTAH, 271, MARTIN v. WARBURTON.

1 UTAH, 273, KUHN v. McALLISTER, Affirmed in 96 U. S. 87, 24 L. ed. 615.

Forms of action under code.

Cited in Nebeker v. Harvey, 21 Utah, 363, 60 Pac. 1029, holding fact that complaint in replevin contains allegation of "wrongful taking" insufficient reason for setting aside verdict for unlawful detention.

"Shares" of stock as subject of conversion.

Cited in Payne v. Elliott, 54 Cal. 339, 35 Am. Rep. 80, 14 Mor. Min. Rep. 515, holding action maintainable for conversion of shares of stock which certificate represents; Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548, holding that trover will lie for conversion of certificate of stock; Keller v. Eureka Brick Mach. Mfg. Co. 43 Mo. App. 84, 11 L.R.A. 472, holding action maintainable against corporation for damages for conversion of shares of stock.

Cited in Cook, Corp. 6th ed. 1584, on right to maintain trover for conversion of shares of stock.

Sufficiency of pleading in trover.

Cited in Cook, Corp. 6th ed. 1594, on necessity that pleading under code for conversion of stock allege facts sufficient to entitle plaintiff to recover.

Defense in action for conversion.

Cited in Cook, Corp. 6th ed. 1030, on insufficiency of defense to action for deceit which alleges original conversion by some one else.

1 UTAH, 277, BROWN v. ATKIN.

Jurisdiction of district judge to hear mandamus at chambers.

Cited in Territory ex rel. Eiseman v. Shearer, 2 Dak. 332, 8 N. W. 135, holding that judge of district court has jurisdiction to issue alternative writ of mandamus, at chambers, returnable before him in vacation; Chamberlain v. Warburton, 1 Utah, 267, to the point that district judge can hear and determine writs of mandamus at chambers; Martin v. Warburton, 1 Utah, 271 (dissenting opinion), on right to jury trials in mandamus cases.

Mandamus to compel issuance of liquor license.

Cited in McLeod v. Scott, 21 Or. 94, 26 Pac. 1061, holding that mandamus will lie to compel county court to issue liquor license to person complying with prerequisites of statute.

1 UTAH, 281, YOURT v. McKEE.

1 UTAH, 283, ZEILE v. MORITZ.

Right to appeal from order overruling demurrer.

Cited in Smith v. McEvoy, 8 Utah, 58, 29 Pac. 1030, holding that no appeal lies from order of district court overruling demurrer.

How errors in pleading reviewable.

Cited in Gregg v. Groesbeck, 11 Utah, 310, 32 L.R.A. 266, 40 Pac.

202, holding errors in pleading reviewable on appeal from judgment upon judgment roll.

Distinction between law and equity under code.

Cited in Kahn v. Old Teleg. Min. Co. 2 Utah, 174, 11 Mor. Min. Rep. 645, holding inherent distinction between law and equity broad as before practice act.

What available as counterclaim.

Cited in Abbott's Pleadings, 2d ed. 848, on unconnected contracts and torts as not subject of set off or counterclaim in equity.

1 UTAH, 287, NEWTON v. BROWN.

Officer authorized to take deposition.

Cited in King v. Green, 7 Cal. App. 473, 94 Pac. 777, holding that person taking deposition must be authorized by law and should be named unless commission directed to officer, authorized by statute, by his official title.

Waiver of error in notice to take depositions.

Cited in Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759, holding fatal error in notice as to name of witness no ground for suppressing deposition, where adverse party appeared and cross-examined.

1 UTAH, 292, ROBERTS v. WILSON, 4 MOR. MIN. REP. 498.

Necessity that record evidence come from proper custodian.

Cited in Coffin v. Kearney County, 114 Fed. 518, holding "stub book" of county incompetent evidence in suit on county warrants to identify some of warrants where it has not been in possession of official custodian.

Location of mining claim.

Cited in note in 7 L.R.A.(N.S.) 884, on location of mining claim.

1 UTAH, 298, SNELL v. CISLER.

How findings reviewed.

Cited in Kahn v. Central Smelting Co. 2 Utah, 371, holding finding required to be brought into record on motion for new trial, where error assigned is that evidence does not support findings.

1 UTAH, 304, HUSSEY v. SMITH.

I UTAH, 305, WINES v. STEVENS.

1 UTAH, 317, ROBBINS v. WOODHULL.

1 UTAH, 319, UNITED STATES v. REYNOLDS, Affirmed in 98 U. S. 145, 25 L. ed. 244.

Number of grand jurors.

Cited in note in 12 A. S. R. 904, on requisite number and concurrence of grand jurors.

Disqualification of jurors.

Cited in Abbott's Crim. Tr. 2d ed. 241, on expression of opinion as to issue to be tried as disqualification of proposed juror; Abbott's Crim. Tr. 2d ed. 230, on complicity of proposed juror in like offense to that charged as disqualification.

Cited in note in 36 Am. Dec. 526, on bias or opinion as ground for challenge to jurors.

Admissibility of former testimony.

Cited in note in 65 A. D. 678, on admission of former testimony of absent witness.

I UTAH, 324, PEOPLE v. WIGGINS, Reversed in 93 U. S. 465, 23 L. ed. 941.

1 UTAH, 328, DAN HARTOG v. TIBBITTS.

Necessity that evidence correspond with complaint.

Cited in Peay v. Salt Lake City, 11 Utah, 331, 40 Pac. 206; Ohlenkamp v. Union P. R. Co. 24 Utah, 232, 67 Pac. 411,—holding that testimony offered must correspond with allegations of complaint.

1 UTAH, 331, OLD TELEG. MIN. CO. v. CENTRAL SMELTING CO. 7 MOR. MIN. REP. 555.

Right to injunction.

Cited in High Inj. 4th ed. 663, 665, on refusal of injunction where title to property is in dispute.

1 UTAH, 333, BOUKOFSKY v. POWERS.

Barred account as consideration for new promise.

Cited in Anthony v. Savage, 2 Utah, 466, holding account barred by statute of limitations sufficient consideration for new promise.

Limitation on new promise.

Cited in Gruenberg v. Buhring, 5 Utah, 414, 16 Pac. 486, holding new promise in writing to pay barred account not barred until four years from date of new promise.

1 Utah, 335, ROBBINS v. CHIPMAN, Affirmed on rehearing in 2 Utah, 347.

1 UTAH, 338, GROESBECK v. BELL.

1 UTAH, 340, SHEPPERD v. SECOND JUDICIAL DIST. CT.

Jurisdiction of supreme court in mandamus and prohibition.

Cited in Maxwell v. Burton, 2 Utah, 595, holding that supreme court has jurisdiction to issue writs of mandamus in cases provided by statute; People ex rel. Yearian v. Spiers, 4 Utah, 385, 10 Pac. 609, holding that supreme court has original jurisdiction to issue writs of prohibition.

Cited in note in 58 L.R.A. 833, 835, 845, on original jurisdiction of court of last resort in mandamus.

Jurisdiction of district court in chancery.

Cited in Bailey v. Stevens, 11 Utah, 175, 39 Pac. 828, holding that district court has chancery power to enjoin issuing of execution and grant new trial where appeal rendered impossible by destruction of records.

1 UTAH, 343, PEOPLE v. TRACY.

1 UTAH, 347, PRATT v. YOUNG, Affirmed in 99 U. S. 619, 25 L. ed. 446.

Who entitled to deed of town lot.

Cited in Johnson v. Pacific Coast S. S. Co. 2 Alaska, 224, holding that deeds by trustee of townsite should be made only to persons in actual and lawful possession of lots conveyed; Singer Mfg. Co. v. Tillman, 3 Ariz. 122, 21 Pac. 818, holding that one who has never been in actual possession of "town lot" cannot be said to be "occupant" thereof; Gill v. Wallis, 11 N. M. 481, 70 Pac. 575, holding occupant at time townsite entry is made prima facie entitled to deed from townsite; Cooke v. Young, 2 Utah, 254, holding actual bona fide personal occupancy of ground claimed necessary to entitle anyone to deed of Mayor for government title.

Right to appeal from probate court in contest under "Town Site Act."

Cited in Gray v. Howe, 2 Utah, 64, holding that appeal lies from judgment of Probate Court, in contest under "Town Site Act," to District Court.

1 UTAH, 361, CAIN v. YOUNG, Reversed in 99 U. S. 610, 25 L. ed. 421.

Party entitled to government title.

Cited in Singer Mfg. Co. v. Tillman, 3 Ariz. 122, 21 Pac. 818, holding that one who has never been in actual possession of "town lot" cannot be said to be "occupant" thereof; Gill v. Wallis, 11 N. M. 481, 70 Pac. 575, holding occupant at time townsite entry is made prima facie entitled to deed from townsite; Cooke v. Young, 2 Utah, 254, holding actual, bona fide personal occupancy of ground claimed necessary to entitle one to deed of Mayor for government title.

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